

INTRODUCTION

I've chosen to discuss this topic because, observing the international labour context, I've noticed that in order to effectively respond to the financial crisis a lot of initiatives have been undertaken to stimulate employers to invest again in the market, hoping that this could be the solution to restore the situation.

These initiatives are very similar to each other – with regard of the ratios behind them – and they have been launched by several Countries, especially those most affected by the crisis.

What has impressed me the most is that these Countries have very different – and sometimes opposite – historical backgrounds and, sometimes, even economic priorities.

For years, then, they had managed the employment relationship and the labour market in general in various ways, approaching to the issues they could have faced, each one on the basis of what was considered the best option according to their expertise.

And these options, as I've already pointed out, were not always of the same rank: some legislations had been more employee-friendly than others, differing according to the strength and the representativeness of the trade unions and from the specific juridical tradition – i.e. whether it safeguards more fundamental human rights or the freedom of business.

After the financial crisis, instead, in conjunction with a more and more intrusive globalization which affects all the spheres of our lives, the most of the Western Countries have adopted a common trend: giving the employer as much as freedoms they can in order to let him/her feel less oppressed by national boundaries, with the hope that he/she could reinvest immediately in the global market and, for what is our concern in this thesis, preserving as much jobs as possible.

In my essay I would focus on the approaches adopted by the EU and those adopted by the US confronting legal and historical background, showing that nowadays the aims behind the adoption of several measures are, for certain degree, very common.

For what concern the EU, I would then consider not only how the internal labor

market has changed after the crisis but also which the future of the Union could be, dealing with the forthcoming projects to create new jobs and reduce unemployment, one of the most catastrophic plague derived from this crisis.

I would then examine how Italy has been reacting to the EU's pressures – especially after the ECB's letter of 2011, in which the EU has asked the Italian government to start an overall reformation period in compliance with the EU's directives – enlightening the shift from the line of reasoning behind the adoption of the *Statuto dei Lavoratori* (Law n. 300/70) and those which have brought to the drafting of the *Jobs Act* (D.lgs n. 85/2015) and have, then, lead this Country from being at the very bottom tail-end of the European scenery to be one of the most influent leader among the flexicurity supporters, i.e. the strategy which more and more Member States seem ready to adopt since – as we would deeply discuss in this paper - the austerity measures which have been carried on since now - Germany being the leader of this trend - have shown a Europe unable to respond to its citizens' real needs but very interested quite exclusively on saving banks and on satisfying the demands of those who are commonly called “*the big fish*” - usually the multinational corporations but not only them.

After having given an excursus of how the European Countries are reacting to this regression period, I would analyze the Country which has originated the crisis itself, generating a global financial collapse without any precedent: the US.

Studying their labor relationship system I have immediately noticed the strong differences in approaches according to which State has been taken into account. We actually could divide these States in two bigger groups since they are perfectly separated by their political views.

On one hand infact we have the Republicans, which in fact aim to weaken the trade unions until their disappearance, giving the employer the most freedom possible, sometimes not taking into account the alleged violations of the employees' rights that could occur following this path.

This is the approach that the EU, with Germany ahead, has tried to follow, at least in the first part of the financial crisis. But, since it hasn't given the expected outcome (on the contrary it has worsened the situation) now its appeal has started to decline under the pressure of the supporters of the flexibility - as I said, Italy ahead in this process.

On the other hand, then, we have Democrats, which try to reach a better balance

between the interests of the two sides involved creating a social dialogue system which has taken steps from how it has worked in the EU for a long time, forcing the employers to sit together with the most representative trade unions in the contractual table in order to guarantee them a stronger position during the negotiations.

Since we approach to a Common Law system, the analysis of the institutions I've introduced above and which I would broadly discuss later on this thesis, would be done through the study of the US Supreme Court cases since there isn't a proper code gathering all the law for a certain legal field together.

In all the Anglo-Saxon system – i.e. those of Common Law – infact, the *Stare Decisis* (“stand by decided matters) is the rule.

It means that, when asked to rule a case, a Court has to rely on past decisions concerning the same matters to provide the judge a guidance on how to decide the case before itself. Consequently, the legal rules which have been applied to solve a prior case with similar facts to those in front of the Court now, should be applied again to solve even this legal issue.

The choice of writing a thesis in Comparative Labor Law regarding these arguments has been influenced by several reasons.

First of all because it cannot be considered an isolated subject and it doesn't deal with just a single topic.

It involves infact, the social, the economic and the political matters which have “pushed” a State to choose a specific legal solution for a specific topic, solution that not necessarily would be adopted by any other State.

And this kind of deep researches could be used also to approach the discovery of universal trends which could influence the labor laws over time, assuming then a practical relevance.¹

It is therefore a very powerful tool of analysis which is able to give a better way of understanding one legal system and/or complex transnational issues which are more and more frequent now with such a globalized economy².

1 Cfr. WEISS M., *The future of Comparative Labour Law as an Academic Disciplin and as a Practical Tool*, CLLPJ, pp 25 ss, 2013

2 SACCO R., *Introduzione al diritto comparato*, Bologna, 1992: “ graduated in law who speak different languages and who has followed comparativism courses have adfirm themselves as employees of sovranational entity (such as UN, CEE and so on), as transnational affairs lawyers, or, with an ongoing frequency, as lawyers working for multinational corporations which have business on the border, or are ruled by the communitarian rules. A new reason

To use the words of Sir Otto Kahn Freund, Professor of Comparative Law at Oxford in the 70's, "One of the virtues of legal comparison, which it shares with legal history, is that allows a scholar to place himself outside the labyrinth of the minutiae in which legal thinking so easily loses its way and to see the great contours of the law and its dominant characteristics"³.

Since the European Union was born, it has always exalted comparativism, especially in the first phase, characterized by the attempts to harmonize the legislative systems of the Member States.

It is important to bear in mind that comparison among juridical systems is possible only whether a functional approach is adopted, i.e. functions and not institutions have to be compared; this could happen only if the analysis takes into account the socioeconomic and political context but also what is the custom of the industrial relationship.⁴

Moreover, in order to effectively protect labor rights nowadays, it is necessary to be comparative in method, transnational in perspective and local in action: this is the reason why I've decided to include the US in my analysis.

As I have already enlightened above, we live in a more and more globalized World – in which the US is one of the undoubted leader in a great number of sectors - so, considering only the labor measures applied within the EU, it's reductive and it shows a limited part of the problem and in general the issue workers have to currently face.

During my researches I've discovered that *globalization* – i.e. "the increase in cross-border transactions in the production and marketing of goods and services that facilitates firm relocation to low labor cost Countries"⁵- is just one of the major challenges for the labor law.

The other changes to deal with are: *flexibilization*, the changing nature of work in which firms no longer seek long-term employees but rather seek flexible employment relationship, giving the employer the opportunity to increase or to

which attracts comparativist has been enlightened: the comparison as the basis for the knowledge of the foreign law, closely linked with the private international law and with the (private) law of the European Community, is what it is needed by the law students who is intended to have, professionally, contacts with the issues not solved in the national learning.

3 KAHN-FREUND O., *Comparative Law as an Academic Subject*, Law Quarterly Review, Vol 82 pp 40, 1996

4 MAGNANI M., *Diritto Sindacale Europeo e Comparato*, Torino, 2015

5 STONE V.W.K., *A New Labor Law for a New World of Work: the Case for a Comparative-Transnational Approach*, Journal of Comparative Labor Law & Policy, 2007

diminish the workforce at his/her will, and the *privatization*, which has to be considered with reference to the rise of neo-liberal ideology, the attack on big government and the dismantling of the social safety net⁶ (the latter is true especially for the US).

These factors have shaped the employment relationship which has seen the corrosion of the model of the open-ended contract of subordinate employment.

This model was dominant in the post-war period because was very functional to an economy that needed a stable workforce.

It directly provided the social and the legal parameters for the sphere of application of labor law and social security.

However, from the 70's this model has become dysfunctional since the need for adaptability, flexibility and competitiveness in the globalized economy, as I have remarked above, provoked a deviation from the standard of the employment contract in terms of length of the relationship (precisely, of the contract), the duration of work, the growth of triangular relationship⁷ (in which, in certain cases, even the State has its role – as we would see in the rescue of Chrysler and GM from bankruptcy in the US).

The result of the combination of all these factors, together with the financial crisis, has been a growing segmentation of the workforce, and a decline in the employees' protection as we have been used to as we are going now to discuss.

6 STONE V.W.K., *A New Labor Law for a New World of Work: the Case for a Comparative-Transnational Approach*, Journal of Comparative Labor Law & Policy, 2007

7 VENEZIANI B., *Liber amicorum: Spunti di diritto del lavoro in dialogo con Bruno Veneziani*, Bari, 2012

CHAPTER I

EUROPE

1. Legal Basis for Social Dialogue

1.1 Treaty on the Functioning of the EU art. 152-154-155

The social dialogue is divided in independent social dialogue – i.e. the dialogue through which the partners implement the Directives basing on their national customs – and voluntary social dialogue⁸.

The main characteristic of the latter is that it begins not as a consequence of the solicitations coming from the Commission, but thanks to the social partners' spontaneous initiative.

The European Commission positively encourages this latter form of negotiations⁹, which it considers a good path to follow to satisfy the needs to support a greater democratic legitimacy of the EU legal order through an appreciation of the instruments of active democracy¹⁰.

Moreover, the voluntary social dialogue could be a useful tool to regulate those sectors in which the jurisdiction of the EU is excluded, or in which the European intervention it's impeded by political and/or practical obstacles.

The legal basis of this technique could be firstly found in the art. 152 TFEU, the subject of which is the role of the social partners and the social dialogue itself.

This article has been modified by the Lisbon Treaty in the 2007, which comes into force in the 2009 and which considers the collective autonomy as one of the fundamental driving force of the European Social Model.

This disposition was already inserted, referred as I-48, in the Treaty which promotes a European Constitution, signed in Rome on October 2004 but never come into force. In the European Constitution this article had a greater

8 ALAIMO A., CARUSO B. *Dialogo Sociale e negoziazione collettiva nell'ordinamento dell'Unione Europea (part I)*, ADL, 2012

9 COM (2004) 557, par. 3.1 e 4.1: the Commission recognizes a “qualitative shift of the nature of the social dialogue towards a greater independency” and it declares to approve “the social partners' will to pursue an autonomous dialogue”. The Commission has based these observations on the assumption that the social dialogue perfectly embodies the subsidiarity principle and it constitutes an important tool of governance, thanks to the proximity of the social partners to the reality of the workplaces

10 COMANDE' D., *Le dinamiche collettive nello spazio giuridico europeo: il paradigma dell'autonomia*, CSDLE Vol. n.76, 2010

importance; it was allocated, infact, in the Title VI of the First Part which was dedicated to the democratic life of the Union. It followed art. I-46 – which prescribed the principle of direct democracy – and art. I-47, which prescribed the principle of active democracy. The location of the art. I-48, promoting the voluntary social dialogue between social partners, immediately after such democratic principles made the commentators perceive it as the expression of another form of democracy, this time with a social nature.

The new collocation of the disposition in the TFEU doesn't reduce the meaning and the importance for the development of the democratic principles of the European Union.

This article is usually read in conjunction with art. 11 of the TEU – i.e. this disposition prescribes that the European Institutions have the duty to speak for the civil society and for the intermediate bodies such as the representative associations, among which those of the workers and those of the employers have to be counted. This choice underlines the will of enhancing social pluralism and social dialogue as tools for horizontal subsidiarity.

We are now going to discuss in the details the article 152 TFEU, starting with its co.1, the text of which as nowadays in force is the following:

“The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.”

The representatives of the collective interests are recognized as the institutional subjects and the article in comment promotes them to the Union level, prescribing to the European Union – i.e. to its institutions and its bodies – a double duty towards the social partners: on one hand, it has a passive duty of recognition of the social partners as institutional bodies at the European level; on the other hand, instead, it has an active duty of promotion not only of the social dialogue, but of the every single activity that the social partners would take on the Union sphere.

As regard of the field of action in which the social partners could operate, this is not limited to the social policy because such a limitation doesn't neither result in the text of the article. The art 152 co. 2 TFEU, infact, prescribes as follow:

“The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue”.

The Tripartite Social Summit is a forum for discussion between the EU

institutions and employers' and workers' representatives which has been constituted after the emanation of the Decision 2003/174/EC – it is prescribed that among the EU institutions the participants to the Summit would be the Council Presidency and the 2 subsequent Presidencies and the Commission; among the social partners instead, 10 workers' representatives and 10 employers' representatives.

According to the art. 2 of this Decision, the task of the Summit “*shall be to ensure that there is a continuous concertation between the Council, the Commission and the social partners. It will enable the social partners at European level to contribute to the various components of the integrated economic and social strategy, including the sustainable development dimension*” .

As a consequence it's the collective autonomy itself which can choose the sphere of action – for example, of economic, health, environmental, educational, financial policies – favored in this by the European Institutions.¹¹

The social partners involved in this Summit, then, collaborate also with the Employment Committee which advises the Commission and in particular national ministers of the Employment and Social Affairs Council.

The Summit meets twice a year and the last meeting took place on the 16th March 2016, one day before the March European Council.

The main theme of this last Summit was “A strong partnership for job creation and inclusive growth” and it focused in particular on three issues which, confirming what it was said above, not necessarily relate to the social dialogue in its strict sense:

- 1) the experiences in implementing the country-specific recommendations
- 2) the impact of the migration and of the refugee crisis on the labour market
- 3) the challenges linked to digitalisation

The participants also discussed the progress and overall results of the new start for social dialogue, an initiative launched on March 2015 aimed at strengthening the European social dialogue.

The result of the Summit is a common agreement on the urgent need to stimulate investment and create more jobs in order to meet the objectives of the Europe 2020 – which we would discuss in the following chapter - and on the need to

11 VILLANI U., *In tema di dialogo sociale e di sussidiarietà nel Trattato di Lisbona*, Bari 2012

pursue reforms to support a long-term recovery. Commissioner Andor underlined in fact that “Investment in human capital is particularly important to support the European economy as a whole and to ensure its competitiveness. This need to be reflected in the implementation of the Europe 2020 Strategy. Clearly the social partners both at the EU and national level must be fully involved in the efforts to address the implementation gap, to pursue reforms and to increase national ownership of the Europe 2020 process”¹²

Back to the analysis of the article, it could be inferred directly from its text that two principles have to be followed in the European context: the diversity of the national systems (which has to be taken into account in the recognition and in the promotion of the social parties' role at the European level) and the autonomy of the social parties.

The first principle is in conjunction with one of a greater range, which characterizes the whole European construction and which implicates the respect of the specific and peculiar values of every single Member States.

This concept can be found also in the art. 4 co.2 TEU which declares that the Union respects the equality of Member States and their “national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”

The respect of the national identity of a Member State has to be considered as one of the fundamental principle which constitutes the core of the European Union as it seems to be confirmed by the Court of Justice in C-208/09, *Ilonka Sayn-Wittegenstein*.¹³

The other principle, the autonomy of the social partner, refers to the horizontal subsidiarity principle which is inherent to the social dialogue and to the collective bargaining.

This principle prescribes that the most appropriate level of intervention (local,

12 EUROPEAN COUNCIL, Tripartite *Social Summit – report of the meeting*, <http://www.consilium.europa.eu/it/press/press-releases/2016/03/16-tripartite-social-summit/>, 2016

13 The Court of Justice was called to pronounce on an Austrian law which commanded the abolition of the aristocratic rights and which implicates a restriction to the free circulation of the European citizens. The Court ruled that those law, considered as an element of national identity of that Member State, could justify such a restrictive measure because “it is not indispensable that the restrictive measure adopted by the authority of a Member State corresponds to a conception common to all the others Member States regarding the way of protection of a fundamental rights or of a legal interest in discussion”

regional, national, European) has to be identify considering the greater efficiency in order to achieve the proposed objectives.

This identification, aiming at the promotion of the occupation and the improvement of the work conditions, in the subsidiarity context, hasn't got only a political meaning, but it gives the Court of Justice the power of control over the validity of the acts of the Union, with their subsequent validation in case of violation of the above principle.

Moreover, the Protocol n.2 give the national Parliament of the Member States the opportunity to check, for a precautionary purpose, the application of the principle of subsidiarity and of those of proportionality. This could lead, in the case of legislative acts, at least to a re-examination of the acts themselves by the European institutions. The national Parliament could, then, oppose to a European initiative which results less suitable to promote an improvement of the occupation and of the work conditions than a national initiative. Considering that sometimes a Government shift to a European level interventions that would be unacceptable from a political and a social point of view at the national one, the Parliamentarian check - which formally deals with the respect of the subsidiarity principle but substantially regards the degree of workers' protection – could be precious.¹⁴

It is obvious, then, that this principle of subsidiarity conjugated at various levels has to start from the bottom, from the institutions which are the closest not only to the citizens but also to the collective subjects which are able to represent the European citizens' interests being the players of the labor market.

For this reason we could say that the art. 152 TFEU opens up the “Union's paddock” to the social parties which have the juridical recognition of the classical labor law forces: association, participation, strike and collective bargaining.

But we have to bear always in mind the protection of the national identity.

The projection of the collective autonomy to a sovranational level cannot justify, infact, the declassification of those collective rights gained after decades of civil riots and trade unions' fights; on the contrary this has to be one of the core for the democratization of the life of the Union.¹⁵

The inclusion of either the fundamental national social rights or of the art. 152

14 VENEZIANI B., *L'art. 152 del Trattato di Lisbona: quale futuro per i social partners?*, Riv. Giur. Lav. e Prev. n.1, 2011, pag 243 - 265

15 TRIGGIANI E., *Solidarietà e dialogo sociale nel Trattato di Lisbona*, Bari 2012

TFEU in the field of the primary legislation could be seen as the structural transnational intervention to sustain collective bargaining, which has to be considered a reliable and uniform source of autonomous transnational regulation for specific themes – as working hour, gender equality, restructuring, information and workers' participation.

The legislative basis of the procedure it has to be observed to carry on a social dialogue in the sense of the art.152 TFEU, can be found in art. 154 and art. 155 TFEU. The first describes the procedure in which a European institution – the Commission - is involved to promote the consultation and in general to supervise the procedure is taking place in the full respect of the applicable laws; the latter instead describes the procedure the social partners have to carry on if they choose to engage contractual relations by their own – in this case, before coming to force the agreement reached by the contractual parties has to be approved by the Council.

Starting from art. 154 TFEU, its text says as follows:

“The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal.

Management and labour shall forward the Commission an opinion or, where appropriate, a recommendation.

On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.”

Even if this article – and the art. 155 as well – talks about “Union level”, it doesn't establish a real European collective bargaining: bargaining infact, is perceived by the European bodies as only a phase of the legislative procedure taking place at a Union level in the social policy field.

The difference between national collective bargaining and that taking place at the

Union level is that while the national one is a tool of autonomous regulation of the social partners within the various national environments, those developed in the Union context is merely a phase of the proceeding which regulate the European institutions, the aim of which is dealing in the best way possible with a vacancy of political representation.

According to art. 154, then, the institutional body in charge of supervising the whole procedure is the Commission – i.e. the European institution which, as set out by art. 17 co. 1 TEU, is the guarantor of the legality within the EU and which has the right to take the initiative for a legislative procedure (it can propose the draft of a disposition, which has then to be discussed and approved by the European Parliament and by the European Council) and as an executive body, it deals also with implementing common policies, managing the Union programs and the balance of the EU.

The article prescribes that, in the case the Commission wants to implement an act regarding some social issues, it has to consult the social partners on the possible orientation an action of the Union has to assume.

This consultation could be taken place either in a preliminary moment – to evaluate the opportunity of an intervention on the chosen topic – or in a following moment – to evaluate the contents of the institutional regulative proposal. For this purpose, according to art. 154 co. 3, the social partners can sent to the Commission opinions and recommendations. That is why social partners has consultative functions every time the Commission takes a legislative action in the social field.

Social partners could have a more effective role. Infact, in art. 154 co. 4, they could ask to proceed autonomously for the regulation of the issue.

In this case, they start a negotiation phase which substitute, for a maximum of 9 months, the institutional legislative procedure and which could lead to an agreement, as described by art. 155 TFEU¹⁶.

The article 155 TFEU, infact, prescribed as follows:

“Should management ad labor so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.

Agreements concluded at Union level shall be implemented either in accordance

16 MAGNANI M., *Diritto sindacale europeo e comparato*, Torino, 2015

with the procedures and practices specific to management and labor and the Member States or in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or a more provision relation to one of the areas for which unanimity is required pursuant to Article 153(2).”

This is the specific provision which describes the social dialogue¹⁷ between the European workers' and employers' trade unions: when this actors reach an agreement on the Union matters, this could be adopted by a decision of the European Council – i.e. a directive.

In order to put into effects this article, the Commission has given advise on the representativeness of the social parties involved in the submission of the agreement specifying that the Council has to implement with its decision only an agreement signed by trade unions with what has been called sufficient cumulative representativeness.¹⁸ This provision means that the exclusion of a smaller trade unions from the procedure is not relevant to the purpose of implementing, through directive, the agreement subscribed to a union level.

According to art. 155 TFEU, this agreement could be reached either “*procedures and practices specific to management and labor and the Member States*” or, within the fields listed in art. 153 TFEU, where the Union has jurisdiction in social matters, and it has to be presented a joint request by both the social parties in order to ask for its implementation at the Union level.

The difference between these two ways of implementing the agreements is self-evident: the first, inspired by the subsidiarity principle, gives to the national social parties the task of putting into effects , following their own collective bargaining systems, the agreements reached at the European level; the latter guarantees the implementation of the understanding in a Union institutional acts and it confers to the collective source that uniform and detached efficiency typical of these acts.

17 This expression is referred to the various levels collective bargaining could assume in the European context. This includes every kind of interactions between social partners and among these and the Commission, through which the social partners themselves cooperate in the definition and to the orientation and the active policy: informal discussion among parties, shared actions (which could lead to institutional participation activities or lobbying) concertative relations, real collective negotiations.

18 For further details read the comment on the COM (1998)322 final, set out in the subparagraph 3 of this paragraph

Obviously, the first methodology has to face the problems coming from the different importance the collective agreement has within the various Member States, difference which is too difficult to harmonize. “Procedures and practices” of the Member States, infact, are so diversified that the choice of this path wouldn't lead to an effective efficiency of the agreement signed at the Union level¹⁹.

Moreover, there is no duty sets out by art. 155 to follow in their national institutions the agreements reached followed the procedure described in the first paragraph of the article itself.

Nevertheless, in the latest years these problems haven't prevented the social parties to enhance this procedure, used especially for the agreements reached at an cross-sector level. This has been caused by the autonomous pushes which has led the social partners to free themselves from the institutional activities of the Commission.

For what concern the second technique, a problem has to be addressed: whether the European Council, verified the representativeness of the signed parties, has to consider the whole agreement, adopt it and implementing it in a directive or it could modify the content.

The most agreed thesis is that the Council cannot modify the text of the agreement, but it can only verify whether this doesn't include clauses in contrast with the Union principles.

The Council has now two options: through the directive implementing the agreement it could give the start to incorporation of the collective agreement or it could restrict itself to make only a formal reference to the text of the agreement.

Only if the Council chooses the first option, the regulation would be formally and substantially determined authoritatively so that variations or terminations of the collective agreement by the social parties are irrelevant²⁰

19 As a matter of example: in the Report on the implementation of the European agreement on teleworking (signed the 16th of July 2002) stipulated by the Committee for the Social dialogue the 28th of June 2006 – which can be found in <http://ec.europa.eu> – are pointed out the different techniques used for the purpose. In this case some Member States had used recommendations coming from the higher levels of the trade unions to the lower levels so that they would take into account the principles expressed in the European agreement; meanwhile other Member States had adopted real collective agreement and in others the implementation had come into force through tripartite activities

20 ROCCELLA M., TREU T., *Diritto del lavoro della Comunità Europea (quinta edizione)*,

To sum up, the social dialogue has many benefits – it allows the most concerned with labor law, management and trade unions, to participate in the legislative process and it is reflexive, allowing them to adapt the law to their particular needs – but it has also some disadvantages.

One problem is that the negotiations could be time-consuming but the most serious one is that the negotiating process will only work if the parties have an incentive to reach an agreement. In the case of collective bargaining, this is provided by the threat of industrial action.

To be fair, anyway, there has never been until now any attempt to treat the social dialogue as a form of large-scale collective bargaining backed by industrial threats and probably such threats wouldn't neither be lawful in some Member States.

All the process of collective bargaining, indeed, rotates around what the Commission might propose and what might be agreed in the regular legislative procedure – i.e. those described in art. 154 TFEU.

The employers, infact, have a strong incentive to enter in the process carried on by art. 155 TFEU only if they are worried that the Commission might propose more radical measures. But the unions only have an incentive to agree if they think they can improve on the Commission's likely proposals. This makes it hard to align the parties' incentives.

Moreover it is clear that, whilst social dialogue could seem to operate as an alternative to the ordinary legislative procedure, its outcomes strongly depend on what could happen via that path. If any agreements is reached at all is, at least in part, a reflection of a political desire of the Commission and the social partners to show that social dialogue is a procedure that can be made to work, despite the prescribed methodology ²¹.

Padova 2009

21 DAVIES A.C.L., *EU Labour Law*, Oxford, 2012

1.2 The Charter of Fundamental Rights of the Union and its art. 28

The Charter of Fundamental Rights of the Union has been announced the 7 December 2000 in Nice from the European Parliament, the European Council and the European Commission. This has been the result of a mixed commission set out explicitly for this purpose, named “Convention”, and composed by members of the three European institutions cited above plus members of the national Parliament of the Member States.

This Charter has a precedent on which rely to take some steps further: the Declaration on Fundamental Rights of the 5th of April 1977, which had been adopted by the same three institutions that later on would have adopted the Charter. The aim behind it was to underline that the respect of the fundamental rights “*as drafted in the national Constitutions of the Member States and in the European Convention for the preservation of the Human Rights and the Fundamental Freedoms*” is one of the core principle of the European Union and to affirm that in the exercise of their powers and following the objectives of the Union, national Constitution would respect those rights.

Referring both to the national Constitutions and to the European Convention, has meant the recognition that the fundamental rights which are included in those documents have to be considered as an integral part of the principles that the European bodies have to follow²².

The Charter declared on 2000 was, then, based upon:

- the EU and the EC Treaties;
- International conventions (such as the European Convention on Human Rights adopted in 1950 and the Charter of the Workers' Fundamental Social Rights adopted in 1989);
- The common constitutional traditions of the Member States;
- Numerous acts of the European Parliament.

It differs from the European Convention of Human Rights because it only protects the civil and political rights, whereas the Charter includes several other rights – i.e. workers' social rights, the protection of data etc.

When the Lisbon Treaty has been adopted, the provisions of the Charter of

22 POCAR F. “*Commentario breve ai trattati della comunità e dell'Unione Europea*”, Assago (MI), 2014

Fundamental Rights were incorporated in the text of this Treaty, as one of its Annex.

This incorporation into the EU primary law has to be read in conjunction with the EU's possibility – as an autonomous body - to take part, with the approval of the Member States, to the European Council and the ECHR.

The Lisbon Treaty leaves open the EU's possibility to be subjected to the ECHR jurisdiction not through the indirect channel of Member States, but at a community level²³.

As already enlightened, the content of the Charter is not limited to the classical distinction of the human rights in civil, political, economics, social and cultural rights but it is referred more to the protected object or to the sector in which this protection has to be find.

The document is composed of 54 articles, divided in 6 chapters according to the fundamental rights protected: dignity, freedom, equality, solidarity, citizenship and justice²⁴.

For what concern the relationship with national laws, the Charter would get the same features as the Treaties' provisions in this context: priority/preeminence, direct effect (which wouldn't applied for all the treaties' provisions), immediate applicability and direct applicability.

In order to assure the effectiveness and the respect of the fundamental rights, infact, the Charter has to have direct effect, because this principle enables individuals to immediately invoke a European provision before a Court – being a national one or the European Court of Justice.

Moreover, in its Communication of 19 October 2010 titled “*Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*”, the Commission committed itself to strengthen the so-called fundamental

23 BARBULESCU I.G., *European citizenship and the charter of fundamental rights of the European Union*, Eurolimes, Vol. 3, 2013, pp 13-30

24 The Charter has several functions. The first of which is to provide a catalogue of rights wide enough to include all the rights which could be involved during the activities of the European institutions. Moreover, it has grouped in a unique text the rights which, even if already drafted, appeared in the Treaties in a strewn order. It provides, then, an organic codification of the matter within the European context, make the protected rights much more visible to the citizens, allowing them to recall those rights with more knowledge of which are the duties of the European institutions. The document could also be inserted in the process of progressive formation of a European Constitution. The Charter is an important element even in the regard of the external relations of the Union with third countries, in particular in the development of cooperation and of humanitarian aid. Every international Treaty concluded by the Union must be compatible not only with the Treaties of the Union itself, but also with this Charter.

rights culture at all stages of the procedure.

The Commission infact, would check that, when elaborating its legislative proposal, all the fundamental rights are respected. Non-legislative measures adopted by the Commission - i.e. the decisions - are also subject to this checks of compatibility, even if there is no need for an evaluation of their impact²⁵.

The adoption of the Charter, anyway, hasn't occur without debate. For what concern the Chapter 4 of the document – the one which interest us the most, because it deals with Solidarity – for example, the mere fact of introducing these rights in the text has been controversial. Some Member States, infact, preferred not to recognize them at the European level because they considered their incorporation as a potential threat to the competitiveness of their economies. On the other hand, the more liberal Member States were also skeptical because they were afraid that this kind of harmonization would undermine the level of their own social systems – hence, their high social standards.

This critics were superseded after the incorporation of the Charter within the Lisbon Treaty because, at that point and without any further doubts, they were regarded as principles. This means that the meaning of the Charter was to strengthen, not lessen, the protection of fundamental rights to better deal with changes in society, social progress and scientific and technological developments by making those rights more visible in the Charter.

Critics were directed also to the way on which the text has been drafted. According to some interpreters, despite its character of indivisibility of rights, the Charter would distinguish rights and principles; the difference being that individual rights have to be compulsorily respected and have direct effect on the national laws.

25 Fundamental Rights “Check-List”:

1. What fundamental rights are affected? 2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)? 3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)? 4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)? 5. Would any limitation of fundamental rights be formulated in a clear and predictable manner? 6. Would any limitation of fundamental rights: - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others? - be proportionate to the desired aim? - preserve the essence of the fundamental rights concerned”

SALOMIA O.M., *The role of the European union charter of fundamental rights in the new European context*, LESIJ N0. XIX, Vol. 2/2012, 2012, pp 180-186

Principles, instead, even if have effects for national or union courts in a normative sense, are left without any enforcement in the same courts. This means that the legislative and the executive powers of the EU and of the Member States have the duty to fulfill them; they don't entitle citizens to rise direct claims for positive action by national or European bodies. This have lead some commentators to see especially the rights listed in Chapter 4 as certain programmatic provisions. But the inability or failure to define rights of the Solidarity Chapter hasn't be seen as if those rights don't possess legal value ²⁶.

According to other critics infact, could be perceived as principles only those formulated in articles 27, 28, 30 and 34 of the Charter, meaning that the most of the provisions included in Chapter 4 contain principles which would relativize those added value that has been declared as characterizing the area of Solidarity²⁷. Anyway, all these theories had been opposed by the majority of the interpreters because they contribute to create an illusory theory of different bindingness that, even if it could have satisfied any worries of Member States and simplify the ratification process, it would have created a theory which would have been useless in a practical sense before the Court of Justice. If the Court of Justice, infact would have accepted the proposed dichotomy between rights and principles declaring the latter less important, the achieved standard of human rights in the European Union would be at stake²⁸.

Since differences among the rights listed in the Charter exist, it could be useful divided them in three generations²⁹:

“A first generation is that of civil rights, which were born in the XVIIIth century and the philosophy of the self determination of the self sufficient individual; they consists of “*liberties from*” and impose upon others, including the government authorities, negative obligations (i.e. not to curb property rights or freedom of speech)...The second generation is that of social rights which consist of powers (“*liberties to*”) and can only be attained through the imposition upon others,

26 PONTTHOREAU M.C, *Le principe de l'indivisibilité des droits. L'apport de la Charte des droits fondamentaux de l'Union européenne à la théorie générale des droits fondamentaux*, *Reveu française de droit administrative*, Vol 19(5):931, 2003

27 RODIERE P., *Droit social de l'Union européenne (3rd edition)*, Paris, 2008

28 LACIAKOVA V., MICHALCIKOVA J., *Rights and principles – is there a need to distinguish then the charter of fundamental rights of the European Union?*, *Cont. Read. in Law and Soc. Just.*, Vol 5(2), 2013, pp 235-243

29 GIANNICHEDA M., *Promoting participation and citizenship*, Background Paper prepared for Workshop 3 of the meeting which took place in Brussels, 24-26 June 1998

including the government authorities, of a certain number of positive obligations...Social rights are a comparatively recent phenomenon compared to civil rights. Not until the twentieth century, and really not until after the Second World War, did constitutions and legislation begin to reflect the idea that workers' or citizens' health, for instance, is a social good and that citizens accordingly have the right to health (attached to workers – or derived from workers' rights – or attached to citizens). The different models of welfare state have had different ways of providing for these rights; however, they generally recognized the principle that the health care, the education, and the welfare of each individual is a good for the entire community and that its members should enjoy a certain basic standard of living: this is the founding principle of social rights...In recent years, a fair number of new rights (*third generation rights*) have emerged, mostly through the drafting of relatively specific Charters. Some, such as the UN Convention on the Rights of Children and Adolescents, are endowed with quite strong statuses. Others are declarations stemming from the work and discussions of social movements and voluntary or community associations (ranging from Charters of rights of patients or homeless persons to Charters of environmental rights)".

As could be inferred from this document, many of the fundamental rights embodied in the Charter we are now discussing depend on specific social policies which are tried to be applied. There would be no point, then, to incorporate those rights into the Treaties without doing the same with the social policies which give effect to these rights.

One of the most fundamental principle on which this Charter has been based upon it's the principle of participation³⁰ of social partners, which prescribes their necessary involvement in the core of the legislative process of social harmonization.

This principle could be found in the article 28 of the Charter, which states that:

“Workers and employers, or their respective organizations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike

30 The term is used by the European Commission:
europa.eu/legislation_summaries/employment_and_social_policy/social_dialogue/index_en.htm

action”.

Prescribing a “liberties to” this article has to be considered as part of the second generation rights and which carries with it the need to adopt determined social policies in order to be effective. For this reason social rights in general, but this article in particular, had been matter of discussion among the scholars. Some of them want to exclude social rights entirely, or at least minimize their content, marginalizing them into a programmatic section, separated from the rest of the Charter, or give them just a declaratory function or impose to them special “horizontal conditions” to prevent the EU from acquiring new and further competences. Other scholars, instead, wanted to include them, maximizing their content, grant them a social status equal to the civil and political ones, make them justiciable or enforceable and not limit them with the fear of extending EU competences.

The outcome of this discussion consists in a mix between the two legal perspective: on one side, the Charter introduce in a single list of fundamental rights not only traditional civil and political rights but also a long list of social and economic rights – among which, as we have already pointed out, we could undoubtedly place art. 28 ; on the other, even if the Charter has been approved by the European Council, it has been limited to a political declaration (i.e. it hasn't been given a formal legal status).

Reading the text, we notice that it refers to “national law and practices”. The ratio behind it, it's to limit the right to collective bargaining because each Member State, of course, has got its own laws and its own practices, which could deeply differ from one another. This has given rise to some problems.

Firstly, the fundamental principles of Community law would be undermined if Charter rights were limited by national laws and practices (this would be even more obvious when the Charter is equated to the Treaties but we would address this problem later on this paragraph discussing about the relationship between art. 28 of the Charter and art. 152 TFEU).

Second, these national standards appear to be less national than international; but this is quite understandable since the values of the Western Countries are pretty much very similar and when the EU has been created, a balance of the standards every single Member States have to reach when protecting its citizens, had been

made³¹.

The Praesidium of the Convention which have drafted the Charter contributes to increase the dispute around this latter problem, stating that:

“This article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers. The right of collective action was recognized by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR...The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States”.

It could immediately be seen the contradiction between requiring respect for the ECHR and the reference to the “national laws and practices”; contradiction which is better evident when the ECHR finds a violation of its rule in a Member State's law (as it has happened to the UK's law found in violation of art. 11³²).

Moreover, in a more and more globalized World it could easily happen that a collective action is carried out in parallel in several Member States, engaging precisely the transnational dimension of collective action in the European single market.

Confining this action to national laws and practices, then, contradicts a fundamental rights of European collective action. It has to be addressed inevitably at EU level³³, not least by the European Court of Justice³⁴.

The influence of the “national law and practices” has been a matter of dispute even among the EU institutions as to the scope of EU competences. On the one hand, the supranational Commission takes an expansive view of the EU's competences; on the other hand, the Council takes a more conservative view in line with Member States concerns about their national sovereignty; the European Court of Justice instead, hold the balance in promoting European integration

31 BERCUSSON B., *European labour law (second edition)*, Cambridge, 2009

32 *Wilson and the National Union of Journalist; Palmer, Wyeth and the National Union of Rail, Maritime and Transport Workers; Doolan and others vs. United Kingdom*, www.internationalhumanrightslexicon.org/hrdoc/docs/echrwilsoncase.doc+&cd=1&hl=it&ct=link&gl=it, 2002

33 See Council Regulation n. 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States

34 See *Eugen Schmidburger, internationale Transporte Planzuge vs. Republic of Austria*, C-112/00 ; see also the *Laval* and the *Viking* cases, which we are going to discuss deeply later on

somewhere in between, as we would see later on this paragraph.

This article, together with article 152 TFEU, is considered one of the legal basis of the social dialogue because, as it could be inferred from the text, not only it states the right to collective bargaining, but also it gives the possibility to negotiate at various level – legitimating decentralized agreements even at the European level.

Referring to the relationship between art. 152 TFEU, then, and art. 28, the Regulation 1176/11/EU on the prevention and correction of macroeconomic imbalances, mentions this mandatory requirement for the EU institutions in relation to the above-said articles. Article 1(3) of this Regulation, infact, prescribes that:

“The application of this Regulation shall fully observe Art. 152 TFEU, and the recommendations issued under this Regulation shall respect national practices and institutions for wage formation. This Regulation takes into account Art. 28 of the Charter of Fundamental Rights of European Union, and accordingly does not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practices”.

Article 6(3) of the same Regulation, then, states that:

“The recommendations of the Council and of the Commission shall fully observe art. 152 TFEU and shall take into account art. 28 of the Charter of Fundamental Rights of the European Union”.

The meaning beyond those provisions is that, even if art. 28 emphasizes the observance of national laws and practices, it doesn't restrict the reference made by Art. 152 to the national level.

Moreover, it could be inferred from the combination of these two provisions, that European social partners are required to use their main prerogatives as recognized by the Treaty – the right to consultation – and by the Charter – their right to negotiate - on economic and budgetary policies insofar as these policies deal deeply with employment and social policies.

It's also implicit then, that the legal system of collective bargaining falls outside the competence of the EU. This being true, even if imposing an obligation to negotiate would disrupt certain domestic laws and national traditions³⁵.

35 BRUUN N., JACOBS A., *The economic and financial crisis and collective labour law in*

As we have seen then, this article – as the Charter in general – doesn't modify the existing powers or tasks of the Union nor it provides other new legislative competences. It only reaffirms that those rights which have been already stated in the Treaties – in our case art. 28 refers to art. 152 - have to be respected by both the social partners and the Member States.

These rights infact, have become part of the primary law according to what has been prescribed by Article 6(1) TFEU³⁶, forming the “rules of Community law” against which the validity of all acts of European Institutions are assessed.

Together with the status of primary law, goes the jurisdiction of the Court of Justice in matters involving these rights. It has to monitor, infact, the compliance with the Charter by the other EU institutions and by the Member States because it has to protect the exercise of the fundamental right to collective bargaining, meaning that it has to interpret a provision with this duty in mind.

Anyway, the task of interpretation doesn't give the Court of Justice the power to regulate collective bargaining, but obliges it to define the substance, the essential elements, of the fundamental right in order to limit any impingement on the part of Member States or the EU institutions.

In this regard, we are now going to discuss what has been called the *Laval Quartet*. This is a group of 4 sentences of the ECJ (Viking, Laval, Albany, Commission vs. Germany) which, discussing the art. 28, have affirmed with strong decision the value of the fundamental social rights subordinating them to the economic freedom of the market.

The first case - in a chronological order - the Court of Justice had to deal with has been the *Albany case*³⁷. The issue brought before the Court arose because it existed a law which prescribed as a mandatory duty to enroll into a supplementary pension fund, which it had been created by a collective agreement. According to the claimant, this would have deprived the factories of the possibility to go to another fund and, moreover, other insurance companies would have been excluded from a relevant share of the market. The question proposed by the deferment judge had been whether the European discipline of the competition

Europe, Oxford, 2014

36 “The Union recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”

37 ECJ, *Albany International BV vs. Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96

would obstacle this law.

The articles the Court of Justice had used to solve the issue are art. 101 and 102 TFEU which forbid the companies to apply the anti-competitive agreements and the abuse of a dominant position.

This sentence has stated that collective agreements does not fall within the field of these two articles of the Treaty, so that they cannot be considered as aimed to distort competition.

The protection of competence has always been perceived, in the European context, as the determinant factor in the process of integration of the various markets in a single market. It has been considered as a value to protect within the legislative and judicial offices, representing a general principle useful to interpret European dispositions and policies.

The Lisbon Treaty, then, prescribing for the first time social rights as fundamental, doesn't have to be considered as a step back in the protection of the competition; it is, rather, a more comprehensive view in comparison to that of the “a very competitive market social economy” which had been the European model for years.

The innovation of the Albany sentence had been the arrival, in legislative terms, of the protection of the interstate competition, which could have a huge effect on the fundamental basis of the labor law. It has been enlightened that the power to regulate the interstate competition of the “federal authority” comprehend those to regulate the economic transitions aimed to utilize the market and all those which would have and impact on it³⁸.

The Court of Justice stated that, infact, even if collective agreements have been signed by trade unions, their objectives of social policy would be strongly compromised if the social partners had to comply with the dispositions of art. 101 and 102 TFEU researching to improve conditions of occupation and work in general. In order to pursue this aim, then, the collective agreements have to be excluded, for their nature and their object, from the field of application of the articles above.

38 The same problem was addressed in the 1890s by the US when the Congress, with the Sherman Act, declared illegal any agreement which restricted the commerce within the different States or with foreign Countries. The issue arose because, together with a disposition which banned any restriction of the competence, it lacked another which supported the collective agreements. The outcome of these discussion had brought to the adoption of the National Labor Relations Act, which we are going to discuss in the second part of the thesis

To rule in this sense, the Court of Justice relied on both art. 153 and subsequent TFEU, which promote social dialogue and art. 155 TFEU, which gives the possibility to social partners to ask to the Council to give effect to their agreements. In this way it could ensure that the fundamental principles of the labor law do no conflict with the protection of the competition.

In the *Laval case*³⁹ the Court of Justice adopted a different approach. The issue brought before the Court was that a Latvian company (Laval) posted some of its employees to one of its offices in Sweden. The trade unions of this Country attempted to negotiate with Laval the application to the posted employees of a wage equivalent to those apply to Swedish employees; wage that was higher than those normally applied to the posted workers in Latvian. For this reason the attempted negotiation failed and the Swedish trade unions, exercising their right to strike, blocked the employees' entrance to the company.

Once consulted the Court, in the incipit of the sentence, stated that even if the Union doesn't have jurisdiction on regulate the strike, this doesn't mean that this collective action could be excluded to the field of action of those dispositions in the Treaty which promote the free performance of services. The strike, then, cannot be exempt to restrictions, because also art. 28 of the Charter of Fundamental Rights affirms that the right to strike is protected in compliance with the Union law. This means that, this action has to be subject to a balance with a fundamental economic freedom as that of the free performance of services.

The restriction to this latter freedom deriving from a strike could be justified only if it is carried on for a legitimate objectives, if reasons of public interests exist and the proportionality principle had been respected.

For the Court then, the strike aimed to obtain a more favorable treatments than those guaranteed from the Directive 96/71/EC (concerning the posting of workers) or the regulation of additional matters other than those listed in the Directive itself, have to be considered illegal.

The reason of this decision has to be found in the Directive above cited, which prescribes that the working conditions applicable to the transferred employees have to be determined by collective agreement declared of general applicability. The problem in this case had been that in the Swedish law the collective

39 ECJ, *Laval un Partneri Ltd vs. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet*, C-341/05

agreements don't have an erga omnes efficiency and, for what concern the minimum wage, Sweden hadn't applied the system described in art. 3 co 8 of the Directive to extend the dispositions of the collective agreements⁴⁰. This means that the collective action, as those in discussion in this specific case, cannot be justified if they aim to make a foreign company apply minimum wage policies in a national context which doesn't have a sufficient precise disposition about this.

The same outcome reached with the Laval case, could be found in the *Viking case*⁴¹. They have in common the motivations and the conclusion – the necessity of balancing the right to strike with one of the fundamental freedoms established by the Treaty; the only difference is with regard to the freedom in discussion: in Viking infact it is the freedom of establishment that have to be counter-balanced.

The issue brought before the Court was that of a Finnish company (Viking) which operated among Finland and Estonia and which in this latter Country had been losing money because of the competition of the Estonian companies. For this reason it chose to move its legal headquarter from Finland to Estonia, following all the necessary procedures of information to the Finnish trade union. The trade union started a collective action in order to force Viking to continue to apply the same contractual dispositions applied under the Finnish law. This strike went on for a long time, involving even international social partners and making impossible for Viking to peacefully work.

For this reason, when Estonia came in the EU one year after, the company brought the case all the way up to the ECJ in order to clarify that the trade unions' action was illegitimate and to force them to not obstacle the rights Viking had pursuant the international law.

The Court of Justice had again stated that, even in the field where the EU doesn't

40 “Collective agreements which have been declared “universally applicable” means collective agreements which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- *collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or*

- *collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory.”*

41 ECJ, *International Transport Workers' Federation, Finnish Seamen's Union vs. Viking Line ABP, OU Viking Line Esti*, C-438/05

have jurisdiction and where, then, the Member States are quite free to regulate that specific matter as they wish, they have to respect the Union law.

Since in the Union law, the restriction of the freedom of establishment, deriving from collective action as those in discussion, could be justified only if the reason concerning a public interest is adequate to realize the pursued legitimate objective and it doesn't go beyond that it's necessary to pursue it. The evaluation of the legitimacy of the collective action in compliance with these two criteria (legitimacy of the pursued objective and its real necessity to pursue it) it's of national judge's jurisdiction.

The last sentence we are now going to discuss is one with which the Court of Justice has tried to clarify how the other three sentences we've discussed above have to be interpreted; this sentence is *Commission vs. Federal Republic of Germany*⁴².

The issue brought in front of the ECJ was that the German law concerning supplementary social services, gave huge powers to the collective bargaining so that a very high number of administrations and municipal entities of big dimensions signed agreements concerning that matter with specific bodies or companies, without establishing a public tender at a European level as required by the Union law.

Germany acted in this way because it thought the principles of the Albany case could be applied also here. The Court, then, had to decide whether the fundamental rights of collective bargaining could exclude administrations and municipal entities from respecting Directives 92/50/ECC and 2004/18/ECC, which deal with the freedom of establishment and of performance of services in the tender sector.

According to the Court, the fact that an agreement could be exempt from the application of the Treaty – as happened in Albany case – doesn't have as an automatic consequence that this agreement is exempt also from the respect of the duties imposed by the above-mentioned Directives, giving that each of those two kind of dispositions imply specific requirements for their application.

The exercise of the fundamental rights of collective bargaining has to be balanced by the duties coming from the TFEU and has to comply with the proportionality

42 ECJ, *Commission vs. Federal Republic of Germany*, C-271/08

principle – as enlightened in Viking and Laval.

Even if Germany has recognized to the collective bargaining a constitutional protection, pursuant art. 28 of the Charter, this right has to be exercised in the respect of Union laws⁴³.

To sum up then, there are some principles that could be inferred from these block of four sentences concerning the interpretation of the right to collective bargaining.

First of all, it is common ground that collective action, namely negotiations and collective agreements may be, in a specific circumstances, one of the main ways trade unions could use to protect their members' interests but, in order to legitimate doing so, it has to be subjected to the test of proportionality.

Moreover, the fact that this right enjoys constitutional protection is insufficient to exclude it from the group of the economic freedoms.

To justify the fact that this right falls within the scope of the Treaty, art. 28 provides that it has to be exercised in accordance with Union law. This means that, compatibility with EU law prevails over national rights, whereas art. 28 itself doesn't explicitly said so.

43 MAGNANI M., op. cit.

1.3 COM (1998) 322

Sectoral Social Dialogue and Representativeness Criteria

This Communication from the Commission has adjusted those drafted in 1993, which listed the criteria a trade union had to have in order to be considered representative for the first time.

In the introduction of this document⁴⁴ it is immediately been enlightened that social partners are different in nature from any other organizations because of their ability to take part in the collective bargaining process.

These social partners then, are divided in employers' representatives on one side, and workers' representatives on the other. In order to reach shared goals and practical commitments an active dialogue (i.e. a negotiation process) has to be carried on among them; the Commission has called it “the *raison d'être*” of the social dialogue.

In order to take part to this process at European level, however, social partners have to have the real support of their national members – who have to give them the mandate to negotiate in the European context.

Subsequently trade unions have the duty to follow them up so that they could take also at the national levels all the possible initiatives to modernize the legal, contractual and institutional framework at all levels of the “inner” (because it's national) dialogue; they could be aware of the latest European ongoing policy developments; it would help European trade unions to maintain the dynamic character of the dialogue, allowing it to continue to develop towards greater co-operation and openness.

It is the Commission the European body appointed to set out the representativeness criteria, then, because Article 118b TFEU states an obligation to promote social dialogue between management and labor.

Anyway, it couldn't be directly involved in the negotiation process. Infact, Article 3(4) of the Agreement on Social Policy stipulates that social partners which are representative at the European level, during the ongoing consultation, have to inform the Commission of their will to start a real negotiation.

We could easily inferred then, as the Commission has prescribed in the

44 COM(1998) 322 final: adapting and promoting the social dialogue at Community level

Communication we are now discussing, that “*the opening of negotiations is totally in the hands of the social partners and the negotiation process is based upon principles of autonomy and mutual recognition of the negotiation parties*”.

This duty of promotion of the Commission is anyway very important for the EU. It helps to improve, infact, the political and logistical conditions, so that dialogue can take place. Moreover, it provides prior and subsequent technical support to the various organizations taking part.

Setting up different structures – among which social partners can choose – for information, consultation and negotiations, the Commission gives them the possibility to actively participate, even at a European context, in a framework in which national members are encouraged to express their views. This happens because the Commission is able to adapt the already existing structures to enable the social partners to develop the perfect solution in the light of the latest developments and the subsequent challenges that they carry on with them.

This Communication differs from that of 1993 because it aims to strengthen the input of the so-called sectoral dialogue in qualitative and quantitative terms because this was seen as a level closer to the involved parties' interests so that a more efficient representativeness would have been granted.

The operating procedure set out in the Communication has been divided in: one high-level plenary meeting each year; a restricted social partner delegation of maximum 15 participants from each side (in special circumstances this number could be raised up to 20 from each); the Commission would provide secretarial services; the meetings would normally be chaired by a delegate of the employers or employees, but a representative of the Commission could have this role if both parties jointly ask it to do so.

This focus on the sectoral level has been supported even by the European Parliament and by the Economic and Social Committee.

In order to get in the sectoral dialogue anyway, the social partners have to meet all the requirements set out in the Article 1 of the Communication, which states that:

“Sectoral Dialogue Committees are hereby established in those sectors where the social partners make a joint request to take part in a dialogue at European level, and where the organizations representing both sides of industry fulfill the following criteria:

- *they shall relate to specific sectors or categories and be organized at European level;*
- *they shall consist of organizations which are themselves an integral recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States;*
- *they shall have adequate structures to ensure their effective participation in the work of the Committees.”*

For what concern the first criterion, it has to be examined the organization's vocation or declared aims and purpose in order to understand whether it is referred to a specific sector or category. But this is not enough because it excludes an investigation of the external appraisal of the organization.

In respect of the Communication of 1993 the term “cross-industry” has been deleted because it is often used as a synonym of “intersectoral”, which could perfectly describe either a centralized level of industrial relations or an organization that extends across different sectors of economic activity. So it gave rise to different interpretations and it wasn't clear when an organization could legitimately claim this status.

With regard of the term “organized at European level”, there still is a problem of multiple meanings.

In a literal sense, it refers to any organization managed by European nationals which has branches in several Member States and in the statutes of which is declared its intention to act at European level. This risk however, is partially eliminated by the second criterion we are going to discuss immediately after.

More fundamentally, examining the history of the various European organizations which act as social partners in the nowadays context, we would see that most of them had originated from one or small number of national organizations – traditionally representing interests, then, which aren't necessarily present in all the other Member States. Therefore, the relative size of the several national branches – being aware of the differences attributable to the size of the countries concerned – could provide an indication of whether that specific organization has to be considered “universal” or “specific to pursue a social purpose”.

As regards to the second criterion, it is relatively explicit but, if read – as it has to be read – in conjunction with the previous criterion it gives rise to some problems. An organization, in fact, while declaring to be organized at European level, could be made up in the reality of national organizations being representative in their countries, but which could represent instead only a limited number of sectors of economic activity.

Moreover, since they represent different cultures as well as the national economic structures in the area, in certain cases they play an important role in parallel to multi-sectoral organizations.

The recognition of the legitimacy of an organization to negotiate collective agreements could be interpreted in several ways. The interpretation, in fact, varies from the organization's ability to effectively mobilize workers, to the threshold reached in the social elections and to the system of mutual recognition set out in each Member States.

As for the third criterion this is pretty much similar to the capacity to negotiate agreements we've discussed above. Both requirements, in fact, can be interpreted in a variety of ways such as: the nature of the organization's internal balance of power, the institutional procedures for taking decisions or deciding on an official position, the process to select representatives and delegates etc.⁴⁵

Since, as we have seen, there are a lot of uncertainties on how to correctly interpret those criteria, especially because of the national differences, the Commission has provided in COM (1998)322 final a list of which social partners are considered representatives at a European level. This list is updated every year by the Commission itself.

One of the consequence of the financial crisis has been the representativeness crisis, which we deeply discuss later on.

This has led the majority of Member States to reform their principles and criteria to measure the representativeness of social partner organizations which have had quite significant effects even at the EU level because of the requirements set out by the article we've discussed above and the link they have created with the criterias set out by the Member States themselves.

45 INSTITUTE DES SCIENCES DU TRAVAIL, *Report on the representativeness of European social partner organisation (part 1)*, Report for the European Commission and the Directorate-General for Employment, Industrial Relations and Social Affairs, 1999

This trend of reformation is not going to cease soon because, even if no direct effect could be demonstrated, European-level discussions and key regulations have been considered in many countries as triggers for the actions and practices of the national social partners. Several topics discussed at European level, in fact, have become the subject of national discussion.

Moreover, the recommendations of the European Council have great impact on the social partners' role and room for action. European agreements and conventions about new employment policies with concrete targets attribute to the Government of the Member States the duty to improve employment and social protection and to mediate in collective bargaining – but the latter is not mandatory⁴⁶.

Only time would tell us whether this new “more nationalistic” approach is the right path to follow in order to go beyond the representativeness crisis, not only with regard to national level, but also and in particular to European level.

⁴⁶ EUROFOUND, *New topics, new tools and innovative practices adopted by the social partners*, Bruxelles, 2016

2. Changes in the Labor Market After the Crisis

2.1 Factors of destabilization of traditional industrial relationship towards a flexicurity approach

In the years before the crisis Brussels – i.e. the EU – had stressed a lot the necessity of harmonization of the legislations of the Member States.

Nowadays instead this incentives are almost gone in favor of a more feasible “horizontal harmonization” which has been lead by comparison and competitions within the national systems.

Anyway, this competition could have different outcomes: it could be tended to the progress – what is trying to be put in action in these latest years of the crisis – or it could determine the weakening of labor conditions and even the social dumping – as it happened in the years immediately following the crisis.

Industrial relations and trade unions are those who are more affected by the consequences of the competition.

The changes in the structure and in the way of action of these macro-players at a European level, has caused a change in the everyday life of the individuals and, even if now this race to the bottom of the social protection seems to be stabilize, its effects are going to last for a very long period, despite all the efforts Member States are endorsing to reform the labor market and the EU's policies in general.

In the rooms of Brussels, infact, there is still a strong and almost equal division between those who support the austerity measures – leaded by Germany and the EU policy since almost the beginning of the Union as we know nowadays – and those who support the new concept of the flexicurity – leaded by Italy, it has seen a growth among its supporters in the latest years.

The “*austerity*” is characterized by a rigid economy with a restriction of consumption and removal of wastefulness – which translating in financial terms means more prudence and reduction of investments allover the World because of the worries of an imminent total collapse of the real economy; the only “reforms” which have been issued in this period are those to save Banks, inserting more and more current assets in order to prevent them from the total bankruptcy but, with a stock market so cautious, this has meant an economic stagnation with persistence

of sacks of recession in the most economic fragile Member States – such as Spain, Greece and Italy. From a social policy point of view, the rigidity has been the key word of this economic strategy: having given all the money coming from the savings of the EU and of the various national treasuries to the Banks – and sometimes to big multinational corporation in order to prevent them to fall justifying these interventions with the need to preserve the occupation – there was not so much left to implement social protection and start a reformation period.

The “*flexicurity*” hasn't much more than a pure economic concept until not so long ago, when some Member States, having understood that the austerity measures weren't going to give rise on the long run to the expected outcome, but only to other sufferings from both an economic and a social point of views, have started a new reformation periods.

As stated in the EU website itself, the flexicurity is “ *an integrated strategy for enhancing, at the same time, flexibility and security in the labour market. It attempts to reconcile employers' need for a flexible workforce with workers' need for security – confidence that they will not face long periods of unemployment* “.

The EU itself has set out the common principle for the national flexicurity strategies. They have to focus on: flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective active labour market policies and modern social security systems.

This is the strategy which has been chose even for the future EU policies, as we would see in details discussing the Europe2020 Strategy.

But even if this policy have already started to give positive validations, there are still oppositions from some EU Member States, afraid that all these freedoms in the markets in a period which is still financially unstable would lead to another – and it would be the definitive one – crisis.

In order to overtake this opposition the supporters of the flexicurity are now stressing all the changes in social legislation in subsequence of the crisis to which the austerity has played a significant role.

We are now going to discuss them to better understand why the flexicurity is the social legislation path that most of the Member States and all the EU institutions are now determined to adopt.

	Partial unemployment	Flexible organisation of working time	Measures to support purchasing power	Measures for those in insecure employment	Vocational training measures
Germany	+		+	+	+
Austria	+	+			+
Belgium	+	+	+		+
Spain	+	+	+	+	+
France	+		+		+
Greece	+				
Hungary	+	+	+		+
Italy	+		+		
Poland	+	+		+	+
U.K.			+		
Sweden	+		+		+

Table n°1

The table above has been drafted in the ETUI (European Economic, Employment and Social Policy) Policy brief⁴⁷ and it represents the crisis measures adopted by 2008/2009.

As we could easily see, there has been a differing perceptions of how the crisis is related to structural trends in the social legislation of the EU Member States.

We could infact divided them in three big groups.

In the first group, as the economist has pointed out, developments in social legislations seem largely unaffected by the crisis. It has been, infact, perceived as resulting from external factors. These countries are: Sweden, Austria and Poland, three very atypical countries according to the EU standards in general.

The second group of countries is that composed by Greece, Hungary and the UK. In these countries the changes in the social legislation are mainly a consequence of a public debt crisis (the second phase of the financial crisis of 2008 as we would see later on this paragraph), which has lead to its extreme consequences an already deep social and political crisis.

The third group is made up by Germany, Spain, France and Italy – those who have

47 LAULOM S., MAZUYER E., TEISSIER C., TRIOMPHE C.E., VIELLE P., *How has the crisis affected social legislation in Europe*, ETUI Policy Biref , Vol 2, 2012

followed in the most strict way the austerity policy - and the main effect they have registered is the reveal of a long standing structural issues relating to the national labor markets: a serious fragmentation of them has been highlighted.

Then, there is a country which doesn't fit in none of the categories described above: Belgium. It has registered, infact, a development in the social legislation area precisely because of the political and institutional crisis. These structural developments then, seem to depend on the redistribution of powers and resources among Federal State and the federated entities. This could be considered a flexicurity policy at its first stage.

Despite these divisions, there have been some common trends which have affected all the Member States. Thy could be divided in two main stages of the social policy's reaction to the crisis.

The first stage has consisted in managing the crisis in employment.

As we have seen in the table, partial unemployment is typical of this period and the measures which have been adopted to face it were mostly focus on flexibility hoping that, giving more freedom to the employers for the organization of its company, would stimulate him/her to grow or at least to not being trespassed by the crisis. In this context, then, the employees' security of their job wasn't taken in too much account. Very few countries infact, adopted measures for workers in fixed-term jobs, who were actually those firstly hit by the crisis.

The main characteristics of these measures was that they all had a temporary nature, meaning that they required just an adjustment of existing agreements, not a project of a large-scale reform.

The initial effects of these actions had been to give a renewed credibility to certain social policy mechanisms and legal provisions which had started to be seen as mere hindrances to the economy – i.e. austerity provisions – and which had been accused to have negative effects on employment.

But the national labor markets had now become very flexible and a year later, in the 2009, Member States had to face a worrying erosion of the employees' social protection. The response to which gave rise to the second stage of the political reactions.

The second stage infact, had been characterized by the public debt crisis – because meanwhile the crisis had hit the national Banks – and this had been used to justify the adoption of protectionist reforms which had been already previously

announced but which had been opposed when there was a secure financial market. Three types of measures were now very common. The first of these are the sweeping reforms to the civil service, which had started to give rise to question on the specific nature of the rules applied to this type of employment. The second of them had challenged the job protection legislation because it had become clear that the employment situation wasn't its direct effect. The last group of measures consisted in the adoption of new relationships between labor law rules, which have lead to a decentralization of the collective bargaining. Company level collective bargaining infact, has gained ground and the normative function of sectoral level collective agreements has become less important - as we would discuss in the next paragraph⁴⁸.

Discussing, now, the practical effect of the crisis - except from Sweden, Austria and Poland – in all the Member States it has been registered a temporary or long-term marginalisation of the social partners as one of the anti-crisis policies. They had been involved, infact, only to give legitimacy to the measures adopted.

In parallel to this governmental weakening of the social partners, as enlightened in the ETUI Policy Brief cited above, the procedures for drafting social legislation, the hierarchy of norms and the criteria applied to trade union in order to be representative have been altered and it has been given to the employers the possibility to opt-out in peius to help them survive the crisis. This alteration has been carried on even in countries where the social partners have shown their ability to get out of the storm; their “reward” for it has been to be allowed to implement the crisis measures already established by the employers and/or the Government.

These opt-out measures, together with the weakening of the criteria for representation, have lead to a diminution of protection of certain categories of workers and have resulted in a loss of autonomy of the workers' representatives at company level. This has facilitated the dismantling of the whole system as well as the social order linked to it.

The EUROFOUND has drafted a table that perfectly describes this specific situation⁴⁹:

48 LAULOM S., MAZUYER E., TEISSIER C., TRIOMPHE C.E., VIELLE P., op. cit.

49 EUROFUND, *New topics, new tools and innovative practices adopted by the social partners*, Bruxelles, 2016

Internal and external drivers	Number of countries where this driver is ranked as important or 'very important'	
	2000–2007	2008–2014
Internal drivers		
Membership losses (trade unions)	16	21
Membership losses (employer organisations)	14	3
Growing diversification of the workforce, members' new needs	15	20
Collective bargaining coverage	10	16
External drivers		
Restructuring, crisis and unemployment	14	26
Labour law reforms	14	20
Changes in social dialogue	8	13
Regulatory change in the collective bargaining system/rules	7	14

Table n° 2

Proceeding with the analysis of these driving forces which have resulted in a constant need for the social partners to adapt and implement changes, the EUROFOUND has gone more in the details dividing those factors and grouping the Member States according to their geopolitical position:

Cluster	Two most important drivers		Driver reported to be the strongest change	Driver reported to have a decreasing weight
	2000–2007	2008–2014		
North	<ul style="list-style-type: none"> Restructuring and unemployment Labour law reforms 	<ul style="list-style-type: none"> Restructuring and unemployment Growing diversification and new needs of members 	<ul style="list-style-type: none"> Changes in social dialogue 	<ul style="list-style-type: none"> Regulatory change in the collective bargaining system
Centre-West	<ul style="list-style-type: none"> Growing diversification and new needs of members Restructuring and unemployment 	<ul style="list-style-type: none"> Growing diversification and new needs of members Restructuring and unemployment 	<ul style="list-style-type: none"> Labour law reforms/ regulatory change in the collective bargaining system 	<ul style="list-style-type: none"> Membership losses (EO)
Anglo-Saxon	<ul style="list-style-type: none"> Growing diversification and new needs of members Labour law reforms 	<ul style="list-style-type: none"> Restructuring and unemployment Growing diversification and new needs of members/ collective bargaining coverage/ labour law reforms 	<ul style="list-style-type: none"> Restructuring and unemployment 	
Centre-East	<ul style="list-style-type: none"> Membership losses (TU) Labour law reforms 	<ul style="list-style-type: none"> Restructuring and unemployment Labour law reforms 	<ul style="list-style-type: none"> Restructuring and unemployment 	<ul style="list-style-type: none"> Membership losses (EO) Membership losses (TU)
South	<ul style="list-style-type: none"> Membership losses (TU) Regulatory change in collective bargaining system 	<ul style="list-style-type: none"> Restructuring and unemployment Regulatory change in collective bargaining system 	<ul style="list-style-type: none"> Restructuring and unemployment/ regulatory change in collective bargaining system 	

Table n°3 ; Note: EO = employer organisation ; TU = trade union

As we could see from this latter table, in most cases “restructuring and unemployment” is one of the two most important drivers leading social partners to

adapt and implementing changes for both study periods and it has been experienced the strongest increase in influence after 2008.

The other drivers is the “membership losses” which could be seen as both the cause and the effect of another very important driver: “growing diversification and new need of members”.

When it comes to drivers that increased the most, in term of change, the Nordic countries as well as the Centre-West countries differ from others. Here, infact, there is not restructuring, but rather regulatory change and changes in social dialogue institutions and practices which have influenced a lot those countries.

Starting with the analysis of the membership losses we could immediately say that it is one of the biggest effect of the crisis which have lead to a change in the traditional conception of the industrial relation, even at the European level,

This, as we could see in Table 2, hasn't equally affect both sides of the industry in the same way⁵⁰ .

Together with the changes in the representativeness criteria, the other driver force responsible for these losses – which in some circumstances could be seen, in alternative, as its consequence – is the growing diversification of the workforce and new needs of members. Two factors, according to the researchers of the EUROFOUND, have to be mostly addressed for this:

- the effects of structural changes in the economy (i.e. ongoing and accelerating shift towards the service and knowledge economy);
- a growth in non-traditional forms of work and a growing segmentation within the labor markets.

There has been, infact, a huge increase in the share of workers on more flexible contracts and non-traditional forms of employment⁵¹.

The diversification not only has resulted in organizational and recruitment challenges, then, but also has forced the trade unions, as well as employers' organizations, to face different new demands and expectations by their members.

These challenges, as enlightened by the EUROFOUND, “are linked to economic

50 For employers' organizations only in a few countries this losses has been registered, while the situation seems to have improved since 2008. In contrast , very few trade unions do not report a declining membership destiny as among the most important organisational challenges and a reason to adjust.

51 As a matter of example: agency work, casual work, freelancing and dependent self-employment or mobile workers.

and social changes in society that, in general, have resulted in a stronger diversification, polarization and also individualisation of employment conditions and the respective expectations and demands of workers, as well as companies.”

In the report another useful table has been drafted. It shows the major responses by social partners to organisational and membership challenges:

Table 5: Major responses by social partners to organisational and membership challenges

Challenges and drivers	Major responses
Membership decline	<ul style="list-style-type: none"> • Mergers and stronger cooperation (shared services) • Establishing new sections/organisations to reach groups with weak membership rates • Attracting new group of members by organising and recruitment campaigns (TU), change in organisational principles (TU: self-employed) or establish specific services (EO) • Explore new incentives to become or remain a member • Restoring legitimacy and image among the public (alliances against corruption, ethical codes, political neutrality)
Growing diversification and new needs of members	<ul style="list-style-type: none"> • Systematic and professional recruitment campaigns targeting specific groups or companies (TU) • Setting up of tailored sections for specific groups of members (young people, migrants, solo self-employed) • Tailoring existing and exploration of new services (legal advice, counselling) • Providing social and financial support to specific groups of members (such as the unemployed, low-paid workers, students) • Reduced fees and possibility to non-payment in situations of unemployment • Other added-value material (for example, unemployment insurance, support for healthcare, discount rates) • Opening organisations for dependent self-employed workers (TU) or setting up specific support and services (EO) • Target group-specific activities of recruitment, campaigning and organising • Strengthening social dialogue and collective bargaining practices in sectors so far not covered (TU: ICT, agency work)

Table n°4

As we could see from the table, the most radical way to address the organizational challenges is the merger but trade unions are also experimenting the internal reorganization and new forms of cooperation between social partner organizations. Those measures cannot be addressed only to the membership decline, they are linked, infact, also to aspects related to the growing diversification of members.

Other causes of it are: the decreased financial resources due to the crisis and the need for a general greater efficiency (in membership recruitment, in providing services to members and in establishing departments for new groups).

The trade unions need also to restore legitimacy – that, subsequent the changes in representativeness criteria, they have lost, especially at a company level (where it's now more needed as we would see in the next chapter) – and trust – in most of

the countries in fact, trade unions are seen nowadays as conservative and backward-looking, total inefficient in carrying on public debates and campaigns. A change in their inner social values, then, is required. The right path to address the employees' needs nowadays, is an increasing of individualisation and a decreasing in collective orientation among social partners – i.e. meaning that the company level bargaining have to be improve in order to be more competitive and, being much more prepared on this level, opposing the employers' demands in the best way possible, without feeling “lost”.

The other fundamental drivers enlightened by Table n°3 are the restructuring and unemployment. They differ from the membership losses because this is a pure “internal driver”, meanwhile those are the most important “external driver” which have lead the Member States to put pressure upon the social partners to:

- adjust as organizations (as we discussed above);
- take on board new topics for policy, bargaining and social dialogue;
- explore new tools and instruments in regard to organizing, lobbying and shaping policies.⁵²

The Nordic countries, in fact, have reported to the EUROFOUND that the structural changes in the economy and the labor market have increased the pressure on wages and working conditions. But not only these countries have experienced a decrease in wage and a shift towards precarious work; also Italy and Spain have experienced a changing status due to an inflow of migrants and mobile workers which have contributed to reduce wages thanks to the social dumping and have redesigned a lot of workforce profiles, making some of the peculiar subordinate positions disappear.

Some have seen the reasons for the growing of unemployment and/or of the increasing of precarious work, in the adoption of the temporary employment contract. But this couldn't be considered a priori a negative outcome of the labor market.

If temporary contracts, in fact, were used as a cheap tool for screening new workers and/or as the first step towards a more stable job, then any increase in the adoption of this kind of agreement could be lead to a significant difference in the labor market and on the productivity growth.

52 EUROFOUND, op. cit.

The problem is that, only one-third of temporary workers move to a more stable job within two years; one-fourth of them becomes unemployed one year later and a large part remains steadily in temporary jobs.

Therefore, the increase of these agreements have to be considered as a problem having a long-run negative effects:⁵³dampening labor productivity growth, not only GDP growth could be restrained – generating the so called *growthless job creation* – but also the initial growth in employment could be re-absorbed.

The original aim of these contracts, instead, was to increase the level of the employment, removing the disincentive to hire the austerity had caused with its permanent contracts and layoff restrictions, but as the researchers have made crystal clear, this is not the trend nowadays.

There is a need of an ulterior reformatory intervention in which the main challenge would be to find a labor market regulation able to eliminate the disincentive to hire and at the same time to motivate firms and workers towards more stable and productive job relationships.⁵⁴

Even to address this need, in the 2011 the Regulation on the prevention and correction of macroeconomic imbalances⁵⁵ has been released. It was necessary, infact, to reduce the imbalances in the distribution of income and foreign trade to better deal with social dumping, another of the principal cause of the European crisis – in certain cases it has been the effect but it has strongly influenced all the subsequent social strategies anyway.

The key concept behind this Regulation was that the countries which register a current account surplus thanks to wage moderation or labor market deregulation – the positive effect of the austerity measures on the short-term that we've already seen – and that are appointed as being partly responsible for the indebtedness of those with a current account deficit, have to significantly increase their wages and thus labor costs in order to restore a fair competition. The whole package of law, then, has been based upon: “correction of wages policies” and “deregulation of labor markets, product and service markets”.

The outcome this Regulation wants to achieve is clear: create a permanent

53 LISI D., *The impact of temporary employment and employment protection on labor productivity: evidence from an industry-level panel of EU countries*, J Lab. Mark. Res, Vol 46, 2013, pag 119 – 144

54 Italy is going in this sense thanks to the “*contratto a tutele crescenti*” disciplined in Matteo Renzi's Jobs Act. We would discuss this topic in a specific paragraph.

55 Regulation (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances

competition state in and through the legal form and implementing - in authoritarian fashion if necessary - “stable prices, sound and sustainable finances and monetary conditions”.

There is a serious risk of violation of the fundamental values of the EU, anyway.

According to the document, infact, the European Commission has the power to create a paper which is divided in macroeconomic indicators, to establish the objectives of European economies and to evaluate the economic performance of the Member States without preserving the right of co-determination of the European Parliament – i.e. without preserving the balance between the European institutions. The executive, then, has an almost unlimited decision powers to directly push through dominant interests.

This means that, if the European Commission, after the above said examinations, stated that a Member State has an excessive balance, the Council can adopt a recommendation asking for taking corrective action. The Member State, then, has to present a corrective action plan in which exact structural reforms and timetable for their implementation must be included. If the Council agree with the sufficiency of this plan, it shall endorse it with another recommendation.

Moreover, for the first time in the EU policy, sanctions for not implementing European “guidelines” have gone beyond the traditional “naming and shaming” system adopting until now; a relative impotent fine could be addressed to the Member State.⁵⁶

We can conclude the analysis of this regulation, therefore, stating that, even if it has made some step further toward social protection, it has to be still included among the austerity measures because it contains some provisions which substantially interfere with formal freedoms in order to achieve a better balanced economic governance.⁵⁷

Anyway, credit has to be given to Regulation 1176/2011 because it has opened the way to the idea of a necessary re-thinking of the wage policy – either the national or the European ones. But doing so, it's not so easy because this policy is a complex combination of market mechanisms and public authorities' regulation. The latter are usually supplemented by the industrial relation process. This

56 BRUUN N, LORCHER K., SCHOMAN I., *The economic and financial crisis and collective labour law in Europe*, Oxford, 2014

57 The Regulation doesn't explicitly said so, anyway. In its wording, infact, it says that it need only to demand that “competitiveness” be enhanced in the area of the wage policy

process has an inherent collective dimension since it involves representatives that stand for collective interests and it produces common economic and normative rules.

This type of industrial relation, anyway, is in contrast with the market mechanisms which support a more decentralized collective bargaining because – as we already pointed out and as we would see in details on the next paragraph – focusing more on the local conditions, it increases adaptability and differentiation, both of them very useful for an enterprise in order to be competitive on the market.

Nevertheless, centralization and coordination, together with a responsible attitude of the confederated trade unions (but we've seen that in the latest years this structure is in a deep crisis), give the possibility to control wage developments in a more organized way and it could better manage possible local tensions which could arise during the negotiation on wages.

To compose the dispute on which type of process has to be adopted, in the latest years state-intervention has become more insistent in this matter. In the private sector this has meant the introduction of additional requirements for granting the extension of collective agreements, stricter rules on collective agreements which are applied even after the expiration date and a change in the hierarchy of collective agreement with the company-level agreement prevailing over sectoral ones in certain cases⁵⁸.

It should be noted, however, that a certain degree of correlation between collective wage increases and productive developments could be found – i.e. taking into account just state-intervention and collective bargaining doesn't suffice when drafting a reform of the wage policy.

Before the crisis collective wage increases were systematically below productivity developments in real terms, according to the datas. With the crisis, anyway, a whole new phase has been started: real collective wage growth has been recorded as sensible higher than gains in productivity per hour worked. This has been a general trend, it hasn't been in any particular way linked to industrial relation systems.

In other words, the crisis has induced a general slowdown in real wage growth and the gap between wages and productivity have derived mostly from a contraction

58 PEDERSINI R., *The evolution of the crisis – developments in wage bargaining systems*, <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7739>, 2015

in output; this has been the result, according to the economists, of an unexpected low inflation which hadn't be taken into account in bargaining⁵⁹.

We have to bear in mind, anyway, that collective wage and actual compensation gained by the employees are two separate things. Normally infact, individual compensation is higher than collective wage because it includes allowances, overtime, performances ecc. but this is the compensation which could be more affected by the upward and downward swings of the economic cycles.

For this reason, the financial crisis of the 2008 having brought to a slowdown of real compensation developments, have caused a large reduction in employment – low skilled and low productivity jobs in the first place.

For this reduction of jobs, anyway, it's not responsible only the markets and the social dumping. As we have seen, the wage policy is made up also by public authorities' regulations – i.e. in a broader sense national policy in general.

On this regard, then, it would be useful to expose Mosley's theory⁶⁰ which aims at identifying four domestic variables that could deeply influence conditions for labor. According to her “the effects of export competition likely depend on the ideological orientation of the government and on the strengthen of the organized labor movement”.

The first of the four variables she has identifies is the political competition and coalitions. She has proved that the chances of improved workers' conditions are sensibly greater in situations where there is a competitive political framework and where left parties are in power. In places where right parties have the power, according to the datas, a worse labor conditions have been recorded.

The second variable is the political constraints: “the existence of a higher degree of political constraints operationalized as veto player and including the size of legislative coalitions; the ideological distance among coalition members; the ideological similarity between the executive and legislative branches; the political authority of subnational units; and the number of legislative chamber can render changes in existing law less likely”.

The third variable is the economic and political strength of workers' representatives which she has linked with better labor outcomes. Again, datas

59 PEDERSINI R., op. cit.

60 She is a famous economist and she has elaborated this theory some months after the “explosion” of the financial crisis

have proved that where there is a left governments the link between unions and political parties in general, improve rights and conditions of work, with the State playing a role of mediator among the forces rising from the globalization.

The fourth and final Mosley's variable is labor market conditions and the structure of the economy, involving the relationship between unemployment and the power that employees have to in order to promote requests to government and employers. Tight labor markets lead to greater levels of union recruitment meaning that both government and employers would be more likely to accept the employees' demands.

As we could infer from this theory, which is very welcomed by the most of the economists, the austerity measures and the crisis of the trade unions are factors which greatly hamper the improvement of the employees' conditions and, together with that, the total recovery of the socio-economic European and national fields.

It's important to notice, anyway, that the invoked adjustments in the labor markets can work through channels other than real wages – i.e. migration, changes in labor force participation and part time agreements ecc.

In the presence of these variables, real wages would react less than would in their absence.

The situation is even more complicated by the existence of relatively extensive grey economy in some Member States. This could influence infact, the behavior of wages, create distortion of the official wage figures and it could represent an alternative labor market adjustment channel⁶¹.

All these economic theories and implications have to be acknowledge by national legislator when called to draft a new reforms to face the crisis, and this is real for all the legislative fields, not only in the labor context.

And as said at the beginning of this paragraph, Governments of more and more Member States, taking into consideration all of these factors and datas, are now moving from austerity measures towards the adoption of the flexicurity system (we could define it a system because it involves all the aspects of a welfare state).

One of the main features, for what interests our analysis, of this new approach – that it has adopted half because of some positive aspects of it and half to react to trad unions' crisis that we've already discuss - is the shift from centralized to

61 RUSINOVA D., LIPATOV V., HENZ F.F., *How flexible are real wages in EU countries? A panel investigation*, Jour. of Macroecon., Vol 43, 2015, pag 140 – 154

decentralized bargaining, which we are now going to present in the following paragraph.

2.2. Decentralization of Collective Bargaining and its different structures throughout the EU

As we have already underlined in the above paragraph, the austerity measures adopted by Member States so that they could have satisfied the severe obligations imposed by the EU, have inevitably affected what could be addressed as one of the core of the social democracy: the collective bargaining system.

This in fact, has been modified because the austerity policy has always seen bargaining outcomes as having negative impact on the society, so that it has modified the structure and level of collective agreements.

The first effect of these measures is connected to the direct link this policy has established as one of its key objectives between unit wage costs and competitiveness – as we have already discussed: the flexibility of wages already prescribed by the collective agreements has been increasingly improve.

As a consequence, there has been a shift of the economic decision-making from the national to the European level; a decrease of the national discretion over social policy choices which has lead to a review of the degree of centralization of wage setting arrangements and of the indexation mechanisms and to a net separation between the public sector wage settlements (generally higher and more law-regulated than the others) and those of the private sector, in order not to mine competitiveness.

The second effect is the shift from a multi-employer (i.e. centralized) collective bargaining system, to a company-level procedures.

The third effect, then - directly connected with the previous one - has derived from the tightening of rules on the extension of the application of the sectoral agreements and from the increase in the requirements a trade union has to meet in order to be allowed to negotiate. These measures in fact, have lead to a pressures toward decentralization.

Furthermore, the tripartite social pacts have been weakened from the fear the financial system has been in serious and deep danger. This has also contribute to reinforce the government role in preparing emergency programs to save companies from bankruptcy, although without the involvement of the social

partners⁶². For this reason the framework within the social dialogue has to move in Europe is strongly underlined by the International Monetary Fund (IMF) and the International Labour Organization (ILO), which operate as an institutional tool “to avoid an explosion of social unrest”⁶³.

This state-intervention is characterized, in general by severe cuts in already agreed levels of pay and pay-related benefits (especially in the public sector, in which the government has a consolidated role) and other restrictions of the principle of free and voluntary negotiation that, as we have seen, it's not only a fundamental right in all the Member States, but it is also among the European ones.

Focusing in the public sector then, we have to underline that during the financial crisis in some Member States the intervention has strongly hit this sector, not only with the above-mentioned cuts (which have occurred in every single economic field), but also by freezing the collective bargaining for years⁶⁴.

What has surprised the most, anyway, has been the non-reaction of the Committee of Experts (CEACR). Its traditional approach for more than 30 years has always been that the collective agreements must be respected. But, after the crisis, it has stated that limitations on the future collective agreements - particularly those in relation to wages imposed by authorities in order to achieve economic stabilization or necessary structural adjustment policies – are admissible if they have been subject to prior consultations with the representatives of both sides and meet all the subsequent requirements:

- applied as an exceptional measure;
- limited to the necessary extent;
- not exceeding a reasonable period;
- accompanied by safeguards to protect the standard of living of the workers effectively concerned⁶⁵

62 This has been the case also with the Italian Ilva, which has been saved by the government thanks to its mediation in stipulating Regional pacts and to its insertion of liquidity in its account to help the company restoring its debts, as we would discuss later on this chapter

63 IMF/ILO, *The Challenges of Growth, Employment and Social Cohesion*, www.osloconference2010.org/discussionpaper.pdf, 2010

64 Italy is one perfect examples. The collective bargaining in the public sector has been frozen for 7 years. Anyway the Prime Minister, Matteo Renzi, has declared in July 2016 that there are current assets ready to be put at the disposal of the free collective bargaining in the public sector

65 ILO, *Collective Bargaining in the public service. A way forward*, Conference 102nd session,

Another guideline the CECAR has always suggested is that a mechanism which involves the representatives of the highest level of the State, on one side, and those of the most representative confederations of workers and employers, on the other, should be immediately established when there is a crisis so that their economic and social impact could be addressed in a united approach. The need for this mechanism, the CECAR concludes, is urgent in the case of strict recovery measures because trade unions and employers' organizations would face difficulties and problems on such a scale that it is not possible to solve the situations reaching a framework agreement at the European level, each solution is different according to the specific Member State.

Another principle the austerity policy has targeted is the principle of favorability and in some countries it has also succeeded in partially abolish it. This principle means that an industry-level agreement cannot be exceeded by local or individual agreements , although it might be possible – and this is the cornerstone of this principle – to agree on more favorable terms and conditions for the employees at a lower levels.

The effect of the attacks to the principle this policy has carried on is that of a radical decentralization of collective bargaining in Member States where company agreements had general priority over the sectoral ones thanks to the favorability principle (i.e. they had some more favorable clauses so they could have exceeded the sectoral-level ones); by attacking it, the Member States have been obliged to formally give more importance to the company-level bargaining and this has caused another step towards the affirmation of the decentralized system and sometimes a worsen of the employees' conditions because there is no need now to prescribe better conditions in order to outdo the industry-level agreements so that the employer could have more freedom of organization.

Moreover, another traditional feature – common to the most of the Member State – that the austerity measure has limited is the so-called “after-effect” of the collective agreements. This principle states that the terms and conditions settled in the collective agreements have to be applied also after its expiration until the new agreement has entered into force. The purpose of this rule is both to avoid disputes during the negotiation period of the new agreement and to protect the standards of

pay and the working conditions already applied because included in the previous collective agreement.

During a financial crisis such that of the 2008 anyway, this procedure has been seen as an obstacle to wage decreases which had been considered necessary to recover from the crisis. That's why this principle has been one of the first targets of the austerity policy, contributing to an ulterior detriment of the social protection.

Another important measure which has been limited by the EU policy in this period is that of the existing extension-mechanism (i.e. *erga omnes*) which extends the effect of collective agreements to non-organized employers (and employees) in a specific sector in order to achieve the full coverage of a determined collective agreement. In many cases it has been used also as a tool for setting a minimum wage, reducing the subsequent need of other mechanisms to address this latter issue.

Introducing restrictions to this system, the coverage and – broadly – the impact of collective bargaining can seriously be affected.

Moreover, even if within the ILO system there is no detailed Convention that addresses the issue of the extension, during its Conventions the ILO has defined the general principles regarding the freedom of association and the framework in which collective bargaining has to operate and it collects these guidelines in Article 5 of the ILO Collective Agreements Recommendation (1951)⁶⁶. In this article even the conditions to extend the contract have been included.

66 (1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

(2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions:

- (a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;
- (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;
- (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

The crisis, anyway, hasn't been the only driver who has led collective bargaining from centralization to decentralization. The economic downturn and the fiscal consolidation subsequent to it, in fact, could have accelerated a change which predates the crisis.

The proof of this is in the analysis which some economists made in the 90s.

More than analysis they were legal-economic theories, in which the expertise started to face the issue of the decentralization of the collective bargaining.

Some of them stated that, theoretically speaking, this could have led to an increase of wage dispersion because “firm- and individual-specific characteristics are more likely to enter the wage contracts, while under centralized bargaining egalitarian union preferences are easier to accomplish. Obviously changes in wage dispersion may have important direct welfare implications through increased income inequality, but there may also be more indirect consequences. A movement away from a standard wage rate applying to all workers means that wages are more in accordance with individual productivity and local conditions, which tend to reduce misallocation, inefficiencies, and unemployment in the labor market”⁶⁷.

In accordance with this theory another, then, has been affirmed according to which centralized bargaining tends to sustain those companies which are in expansion and to obstruct those which are facing difficulties; decentralized bargaining instead gives the possibility to these latter companies to remain functioning by reducing wages.

Moreover, when individuals are in doubt about their position in the income distribution, unions may improve welfare by reducing wage structure.

It is clear anyway that the connection between bargaining level and wage dispersion, is very important for welfare. So a first move, according to these economists, has to be to understand the extent to which decentralization increases wage dispersion.⁶⁸ Cross-country evidence suggests that centralized bargaining leads to a less wage dispersion but no unanimous conclusions have been reached yet by those studies based on cross-sectional data.

After having described how the EU strict policies adopted after the crisis have contributed to this huge change in the industrial relations scheme – and how the

67 DAHL C.M., LE MAIRE D., MUNCH J.R., *Wage dispersion and decentralization of wage bargaining*, Journal of Labor Economics, Vol 31, 2013, pag 501-533

68 MOENE K.O., WALLERSTEIN M., *Pay inequality*, Journal of Labor Economics, Vol 15, 1997, pag 403-430

ILO has tried to marginalize these effects, not very much succeeding in this attempt – and after having shown what had been the almost very similar – and probably neither so far from the truth - outcome of the legal-economic theories elaborated before this century, now it is the time to go more in the specific of our analysis of the agreements structure and contents and of how it has changed all around the EU.

First thing to say, collective bargaining is a not so old system which regulates the industrial relations at all levels. It made its first appearance in Europe in the 19th century, when employees began to “unionized” forcing employers – especially through strikes at first – to improve their working conditions. Since once reached they ended the strikes, the first collective agreements were called “peace treaties” but, due to the still very active Industrial Revolution – and the subsequent enormous influence and unilateral powers the employers have -, their spread was slow.

Only after the First World War, infact, they were recognized as a proper source of law, on which more and more employees relied to understand the real contents of their employment relationship.

This development arrived at its maximum in the 70s in most of the EU, when around 80-90% of the workforce was covered by a collective agreement.

Nevertheless, with the economic crisis on the 80s and the improvement of the neo-liberalism, this development stopped and in some cases has even backed out.⁶⁹

From that period, infact, decentralization of labour law standard setting has started to develop as the new form to regulate the industrial relations, especially in the Northern Member States even tough with different degrees.

We have Denmark, on one side, that has perfectly developed a decentralized model which set the labour standard at a company-level in a very well-functioning way; Austria, Belgium and the Netherlands, on the other, where decentralization is very far away to have a stable place in the social dialogue.

In Germany, instead, the process has been slightly different than Denmark but it has now reached the same outcome. Here, infact, having adopted for almost

69 The sharpest decline could be found in the UK, where the Conservative government pushed for a decollectivisation and a subsequent individualization of employment relations. As a result the coverage rate nowadays in the UK is below the 40%

fifteen years a system of collective agreed opening clauses, the basic structure of the collective bargaining itself has been radically modified; nowadays infact, a process of decentralization has been started.

For what concern the Southern Member States – such as Italy, Spain, Portugal and Greece - instead, the process has gone in another direction. They infact have safeguarded their high level of centralization with an high employees' coverage, at least until few years ago.

They are now facing, infact, a dismantling of the existing wage-setting agreements and a decentralization of labor relations, which have affect those countries more than the North because they haven't experienced nothing similar before the crisis has started – but of course, even in these countries the basis for this change had been already there, leading the membership losses; the crisis has just accelerated the process⁷⁰.

One of the most debated “feature” of this kind of agreement has always been its nature.

The collective agreement, infact, it's an hybrid legal concept which has arisen in practice. It is useful to quote an Italian judge which tried to described as easier as possible this unusual mix stating that “the collective agreement has the body of a contract and the soul of a law”.

In almost all the Member States it has been tried to give a binding force to collective agreements via Acts of Parliament because they are considered the best way of setting standards on the labor market and they prevails over other sources of working conditions, since they are applied to everyone without exceptions – if nothing has said within the text of the Act on this regard – and consequently they facilitate awareness and enforcement of the norms stated in the Act.

But that of the industrial relations is a broad panorama, going from sector-level to company-level. This has force social partners to fit this method of reaching standard settings in this complex scheme; in general this has lead to leave at the Acts of Parliament the possibility only to settle the minimum standards required – and sometimes even this could be a too broad field because some companies or sectors couldn't comply with this minimum requirements, since their specific characteristics.

70 BRUUN N., LORCHER K., SCHOMANN I., *The economic and financial crisis and collective labour law in Europe*, Oxford, 2014

This problem could be addressed in several ways. One could be to insert some exceptions in the statute; another could be allowing the derogation in peius of the statutory norms by lower source. This means that the norm contained in the Act of Parliament doesn't have to be considered mandatory, it assumes a dispositive nature.

The problem connected to this new dispositive nature of the norm is that there are higher chances its content would be deeply modified in the employment contracts because the individual employee is always the weaker part.

A solution to this problem has been found anyway using a legal technique: the derogation in peius to the statutory norms could be allowed if it is agreed within a collective agreement. This is because that agreement is a real balance of forces and being general forbidden a so-called yellow union – a union directly influenced by the employer – it could be easily assumed that if a trade union agreed to derogate in peius to a certain statutory norms, this means that it is strongly convinced of its convenience and that there are sufficient guarantees that the loss of the advantages prescribed in the norm would be compensated in a certain way.

However even this agreed derogatory clauses are risky: they could set up the local representatives of the employees against the national trade unions, but this risk is smaller if the negotiations are carried on in a single-channel system of workers' representatives (negotiating power belongs only to the unions) than inside a dualist system (work councils besides trade unions).

These solutions are usually adopted in the Northern Member States: they use opening clause (in Germany, as we have seen) or by completely erasing certain items (such as, for example, wage increases) being sure that there wouldn't be any abuse of the freedom left at a decentralized level. Sometimes this is guaranteed by conflict resolution procedures but there isn't a common path adopted by all the Member States. For instance we could see that in Germany in order to deviate from statutory norms, privileging a more flexible approach, there should be a strong legalized and formal system in the background. In Denmark, instead, a more informal way has been preferred – i.e. it has been enabled a decentralization system through a very unitary method of bargaining: single-channel workers' representation and no rival trade unions⁷¹.

71 The biggest exceptions to this legislative enforcement method have been Italy and UK.

For what concerns Italy, as we would see in a dedicated paragraph, this statement has been

Anyway, we don't have to reach the conclusion that the statutory labor law is weakened because of the introduction of this process of derogation. This technique infact, was not originally intended to be used like is being used nowadays. When it was conceived the idea on the background was that all the parties have equal strength at the collective bargaining level but this is not so often the case. In the recent years infact, membership losses and the rise of the yellow union has weaken trade unions and the labor law in general⁷².

Focusing now on the parties of the collective agreement, traditionally trade unions are considered to be the workers' representatives and they claim this domain for themselves not allowing other clubs (such as works council or staff associations) to enter into an agreement with the employer.

Some Member States have highly concentrated and consolidated trade union systems, with just a few different confederations and unions, meanwhile in other countries they are more divided. Moreover, some trade unions focus only on collective bargaining, other instead have a broader function – i.e. involvement in the public policy-making and being the State counselors in matters involving economic and social policy issues.

In some Member States anyway, it has been given the possibility to conclude an agreement even to other entities. The most evident example is the the important distinction between single-channel and dual-channel systems for workplace representation.

The first prescribes that workplace representatives are elected and/or delegated by trade unions, giving them the right to represent all employees.

The dual-channel systems instead, give the possibility at the representatives to be totally independent from trade unions because the employees' interests could be represented also by the work councils – in most of the countries where this system is adopted, however, the work council is somewhat linked to the union⁷³.

quite modified with the adoption of art. 8 l. n° 148/2011.

For what concern the UK, instead, collective agreement has traditionally been seen as a “gentlemen's agreement”, meaning that it's not enforceable through the courts. The Conservative government tried to do so but when it had been replaced by the Labor government it returned the old tradition of not legally enforceability of the contracts unless the parties have explicitly agreed so, but this doesn't happen very much.

72 Recently it has been given the possibility to opt out of statutory rules also to employees' representative bodies – which are far weaker than the trade unions – increasing the risk of abuse from the employer's side.

73 For instance the work councilors could be trade union members and/or trade union support and supplement the activities undertaken by the works council.

This latter form of representation has been strengthened also at the European level with the adoption of the Directive 2002/14/EC on information and consultation of employees. This has increased the legal rights relating to workplace representation at EU level ensuring that work councils would benefit from a minimum level of rights in all Member States. With the crisis anyway, even their organizational strength has started to fall and new actors have emerged in several Member States⁷⁴.

In such a diversified context, where a European harmonization of the actors allowed to bargain is impossible, either statutory law or case law of each Member State has to provide a definition of the notions of "trade unions" and "employers' associations" so that it could be easily understood which body could enter into contract and which is forbidden to do so⁷⁵.

The legal technique which has been adopted the most by the Member States in order to set the requirements which define whether an organization is allowed to bargaining is that of "representativeness".

In many EU countries the law requires that in order to be representative, trade unions have to have legal personality but there are notable exceptions to this rule. In countries such as Belgium, Germany and Italy for instance, trade unions are reluctant to have their legal personality conferred because they are afraid of a too-deep control by the state.

One of the common factors which is often utilized to understand whether the trade union is representative or not it's the trade union density. This is the proportion of all the employees who are members of a certain trade union⁷⁶.

As we have already seen in this paragraph and in the previous one, this density has heavily declined since the 80s, especially in the private sector.

Another factor which determines the membership levels reached by a trade union is its presence and visibility at workplace – and consequently their

74 For instance, in Greece a new legal framework has granted "associations of persons" the right to sign company-level agreements; similar extension of these competences to non-union actors have been registered even in France, Portugal, Romania and Hungary

75 The Netherlands is the most flexible Member States in this regard. It doesn't required in fact almost no conditions to meet in order to be allowed to bargain. The only requirement is that an organization has had the full legal capacity for two years. There is a negative consequence of this approach anyway: in the country in fact, occasionally yellow unions are admitted to the collective bargaining process.

76 This is based on a net trade union membership – i.e. total trade union membership minus members who do not belong to the active, dependent and employed labor force (retired workers, self-employed, students and unemployed)

representativeness - because it is thanks to their presence in the company that the trade unions could recruit members.

Since the temporary employment relationship fixed-term workers and part-timers are less unionized – and, as we have already registered, after crisis these have been the normality of the work-life – it has contributed to the drastically membership losses we are attending nowadays.

For what concern employer's organizations, instead, their density consists of the proportion of employees employed by firms that are members of employers' organizations. Even their density is fall after the crisis – especially because of the massive lay-offs which have followed in the majority of the cases – but their crisis isn't so huge and worrisome as that of the trade unions since the employers would always be the strongest parties in the agreement, so their interests would be protected in a way or in another.⁷⁷

Once we have clarified on which basis a certain body could take part to the agreement procedures, we are now going to address some other legal issues – in some way connected to the social partners of the collective agreement - which arise subsequently.

The first one concerns whether there is an obligation to negotiate for the trade unions and the employers' association and whether they can legally enforce admission to collective bargaining.

Whereas there is no duty to reach an agreement in any of the EU Member States, in some of them it has been settled an obligation to negotiate⁷⁸ – even if a violation of it doesn't entail the application of sanctions as strict as those applied in the US, as we would see in the second chapter of this thesis.

Another legal problem is the timeframe within which a contract should be considered to have effect. In most Member States this is freely determined by the contracting parties. In many of them infact, the law prescribes only the maximum period which couldn't be exceeded.

Moreover, in all Member States the collective agreement could be terminated before its expiration date by mutually consent. If a party wants to unilaterally

77 BECHTER B., BRANDL B., *Developments in European industrial relations*, York, 2013

78 Luxembourg has been the first European country to introduce a “duty to negotiate” in its Collective Agreements Act, dated 1965. It prescribes that employers must start a negotiation process with the representative trade unions within 6 months after the expiration date of the previous collective agreement.

withdraw it, it is required a minimum period of notice to the other parties⁷⁹.

For what concern the effects of the agreement, a rule applied in all Member States prescribes that they terminate when the contract expires, unless otherwise provided by the parties. After the expiration date, in fact, its clauses may continue to regulate the individual contracts until their replacement by either a new collective agreement or by a new individual agreement negotiated directly between employer and employee.

Describing now, the subject matter of collective agreements all of them – disregarding to the level – in all Member States, are divided in two parts:

- normative provisions: the part which must be respected by the parties to individual contract of employment (i.e. wages, holidays, periods of notice and supplementary social security)
- obligatory provisions: the part which govern the relationship between the parties that have concluded the collective agreement (i.e. information and consultation, compliance provisions, clauses on renegotiations, peace obligation clauses, dispute mechanisms etc)

Generally speaking, in all Member States parties are free to determine the content of the agreement they have negotiated but they are required to respect mandatory legal provisions concerning the public order. If a collective agreement violates the fundamental rights which there are stated in those provisions, the content of the agreement would be declared null by the courts⁸⁰.

Besides the violation of the provisions concerning the public order, a collective agreement could be brought before a court only contesting its normative set of provisions, because the judges cannot interfere with the pure working organization. And even when called to judge the normative provisions, they could only put in place an investigation about the compliance of those provisions with

79 Peculiar it's the case of a transfer of enterprise. According to the dedicated EU Directive the transferee has to continue to apply the terms and conditions agreed in collective agreement which has bounded the transferor until its expiration, unless the transferee applies another collective agreement of the same level of the transferor's one. In this case those adopted by the transferor is replaced by those adopted by the transferee.

80 In ECJ, *Commission vs. Germany*, C-271/08, the ECJ has prohibited a clause in a national collective agreement which violates EU law, even if in its earlier sentences it has always stated that the contents of the collective agreements are immune from EU competition law as far as they can be considered as “measures to improve conditions of work and employment”

the minimum standards set by the specific Member States law or, if so requested by parties and if so allowed by law, the judge can investigate the contract through an equitative judgment.

Moreover, in most Member States, in the case of a withdrawal of the collective agreement, it is given to the parties the possibility to resort to mediation, conciliation and arbitration. The competence for these procedures could be either of the institutes and procedures – if so provided by law - or of the social partners themselves. However, arbitration is not mandatory in any of the Member States. Scholars are strongly against this latter legal method to restore the situation, infact, because they sustain it is contrary to the fundamental right to free collective bargaining⁸¹.

As we've already enlightened at the opening of this paragraph, decentralization is a phenomenon that, even tough already present before, has been incremented with the crisis.

Besides the strong opposition of the austerity policy discussed above, its drivers are several and all are related to the economic changes Europe has faced in the latest years.

First of all, the growth in the international economic integration due to globalization has deeply reduced the capacity of national-level agreement to protect wages from competition – this has meant the erosion of one of the core advantages employees have from the centralized bargaining and subsequently the increase of the social dumping even within Member States.

Another economic driver has been the diversification in the product market: the sector-level agreements infact don't address anymore all the problems an individual company could face because they cannot comprehend all the market conditions of a certain territory. From this statement we could also infer that the economic actors – obviously the employer in the first place – now need to have the possibility to readjust the agreement in a very short period to face the more and more volatile market conditions deriving from the global market development. But this is impossible to do if the procedures of the centralized collective agreement have to be respected, they are perceived from the employers as time-consuming.

81 JACOBS A., *Labour and the law in Europe*, Nijmegen, 2011

This centralization vs. decentralization issue is directly linked to the difference between multi-employer bargaining and single-employer bargaining, difference which results from the different level of centralization of such systems.

For what concern the multi-employer bargaining, infact, this is typical of the centralized bargaining because trade unions negotiate with employers' organizations in order to reach an agreement that would cover all the employees and all the employers of a certain sector⁸².

The single-employer bargaining, instead, is typical of the decentralized bargaining because it is carried out between trade unions and a single employer – as also the name suggests. The pushes for the adoption of this kind of procedure are coming firstly from the employers side. They infact, weren't satisfied with the already existence possibility of derogation in peius that we have already discussed above. They wanted to have much more freedom at a company-level in order to, according to the employers' organizations, survive the crisis⁸³.

But is this shift towards decentralization compatible with international law?

To respond to this question we have to refer to ILO's Collective Agreements Recommendation 1951 (n°91). This document defines the principle of binding effect of collective agreements and their primacy over individual employment contract, the only exception being in the case that in the latter is contained provisions which are more favorable to the employees than those prescribed by the collective agreement.

Relying on this Recommendation either the Freedom of Association Committee (FAC) or the Committee of Experts on the Application of Conventions and Recommendations (CECAR)⁸⁴ have strongly opposed the legislature of some Member States which gives precedence to individual rights in employment matters.

Nevertheless, according to the CECAR, the interference of higher-level

82 Multi-employer bargaining is a necessary condition for a centralized bargaining but it's not sufficient. Sometimes, infact, could happen that the group of social partners involved doesn't correspond to a specific sector.

83 Not all employers are in favor of the decentralization. Smaller firms infact, may prefer centralization bargaining to be sure that the peace in the labor market is assured and to save bargaining costs – that, for a small company, could be very high to sustain. They don't have the organizational back up to institutionalize a company-level bargaining procedure, as instead the bigger firms normally have.

84 ILO-FAC, *Digest of decisions and principles on the freedom of association committee of the governing body of the ILO*, Geneva, 2006

organizations in the bargaining process held by those of a lower-level is incompatible with the autonomy that must be enjoyed by the parties, at each bargaining level.

The ILO has also addressed the agreements negotiated by works collectives or works council. The CECAR, infact, has stated that it cannot be accepted that in some Member States these agreements are far more numerous than those signed with the trade unions. These agreements are possible – still according to the ILO's Committees – only when there is no representative trade union at that specific level of negotiation.

With regard to the austerity measures which have pushed for the decentralization, the FAC has stated that “it is a general rule that the public authorities should not exercise their financial competences in such a way that the effect of collective agreements is prevented or limited, as this is not compatible with the freedom of collective bargaining”. And also that “restrictions on collective bargaining should be exceptional. They can only be taken if necessary and for a limited, reasonable period. In addition they have to be accompanied by sufficient protective measures in order to protect the existing standards of living of the workers in the sectors concerned”.

This body has also enlightened that the procedures which systematically make the decentralized agreement prevail in order to negotiate less favorable conditions than those settled by the centralized collective agreement, destabilize the negotiation systems and also trade unions and employers' organization. This means that these procedures weaken the freedom of association and the right to collective bargaining, violating what has been settled by ILO Conventions n° 87 and n° 98 on this regard.

All these conclusions, then, are agreed by the European Committee of Social Rights (ECSR).

Moreover, it has to be noted that there is any proof that decentralization guarantees the resolution of the labor market problems. The mere fact that all the European countries – that till recently had adopted a centralized bargaining scheme – are dealing with the economic problems connected to the financial crisis cannot be the evidence on which rely to state that the more the setting of essential working conditions is decentralized, the more the employment situation would improve.

Nevertheless, in a context ruled by individualism, market forces and liberal conceptions, this decentralization process could be a good thing if well-organized. After having analyzed all the aspects of the collective bargaining and all the changes – with their relative effects – it has faced during years, it is possible to affirm that there are some indisputable prerequisites that have to be met in order to adopt this “new” bargaining model:

- a strong trade union workplace representation and high-union coverage in small firms to guarantee that the employees' interests are really protected;
- provisions to not allow the abusive exploitation of multiple unionism and a dual model of workers' representational company-level – if the representativeness criteria aren't met or the work councils are out of control, the company-level collective bargaining is a highway to erode the trade unions position and the sector-level bargaining;
- organization of the process either by law – which has to respect the suggestions of the most representative social partners at the sectoral level – or by these partners themselves – the choice between the two methods depends on the collective labor law of a specific Member State.

If one or more of these conditions aren't met the adoption of the decentralization process could lead to several problems⁸⁵.

To sum up, then, decentralization is not per se a threat to the employees' protection but it could become so if social partners and the national governments don't regulate it paying close attention to well-balance all the forces involved in the procedure.

85 BRUUN N., LORCHER K., SCHOMANN I., *The economic and financial crisis and collective labour law in Europe*, Oxford, 2014

2.3 EUROPE 2020 An agenda for New Skills and Jobs a European contribution towards Full Employment

The EUROPE 2020 Strategy was drafted by the Commission having the economic and financial crisis in the background, especially its devastating effects on European economy – sharp economy contraction and an incredible rise in unemployment rates.

According to the Commission, in order to successfully exit from the crisis a modification of the public policies, adopted both at national and European level, is required. This modification has to take into account the changed circumstances in order to be able to lead the EU towards a sustainable and high growth path.

To achieve these goals, the EU institutions have to act collectively and give a coherent political response which is desperately needed to come out of this crisis.

Due to this economic instability infact, some of the progress reached in the last decades thanks to the implementation of the Lisbon Strategy have been deleted and the EU has regressed from an economic and social point of view, falling in a risky lower growth path.

Moreover, some of the persistent structural weaknesses of the European economy have been underlined and at the same time the already present long-term challenges of the EU – i.e. globalization, population ageing and pressure on natural resources – have become more pressing.

The EU2020 Strategy renews the Lisbon Strategy which hadn't succeed in reaching its goals and which was based on a partnership for growth and job creation – relying on a mix of the commitments of Member States to improve their national level on this regard by using the Community instruments at their best, contributing to implement also the EU level.

The outcomes have to be reached, infact, on those policy areas where – exactly as the Lisbon Strategy – a collaboration between EU and Member States exists. In this way the best results could be reached.

Since one of the problem that has emerged from the crisis is the citizens' concern about the policy coherence and effectiveness, in order to avoid it, in this Strategy 4 objectives have been underlined so that, focusing on just them, dispersion of capitals/resources and political control could be avoided.

One of the way to implement those objectives suggested by the EU2020 itself, is

basing the Strategy on what it has been proposed to be the two governance pillars of this new approach: thematic priorities and country reports.

For what concern thematic priorities, these consist in a combination of actions either at EU or national level aimed at implementing the EU2020 strategy.

As for the actions that have to be taken at the EU level, the priority of the Commission is to identify those necessary to: settle a credible exit strategy from the crisis, start an effective reformatory period of the financial sector, ensure budgetary stabilization necessary for long-term growth and strengthen the coordination among EU institutions so that, working together in an harmonized way, they could ensure to EU citizens more incisiveness as for their actions.

For what concern the actions that have to be taken at national level, instead, there should be a translation of the objectives listed in the EU2020 in order to adapt them to the specific national needs.

In this regard the European Council would have a control function: it has to check the compliance of the action taken by the several Member States with those taken at the EU level and monitor their progress towards an even more effective implementation of it. For this reason the Member State is required to provide a national simplified reform program to the Council itself.

Then there are the Country Reports - which are different from the national simplified reform programs discussed above. Those are documents which a Member State has to fulfill defining their specific national strategy to exit the crisis so that, having to respect what has been written down there, they could better applied the strategy itself. In this Report infact, they have to address issues like: how they want to restore macroeconomic stability, the identification of their criticality and provide the strategy to get back their economy onto a sustainable growth and a well-restored financial path.

In order to be able to fill the Report the Member State has to carry on a deep evaluation of the main macroeconomic challenges that it would have to face not overlooking the indirect effects their future actions would have on the other Member States and the different policies with which they have to necessary “dialogue”⁸⁶.

Even if each Member State has different needs and consequently the strategies

86 BONGARDT A., TORRES F., *The competitiveness rationale, sustainable growth and the need for enhanced economic coordination*, Intereconomics, Vol 3, 2010, pag 136 – 140

they would adopt are different, there are some common obstacles that they all have to face, such as:

- criticalities for the realization of cross-border activity
- insufficiently interconnected networks
- irregular enforcement of single market rules
- legal complexity due to 27 different sets of rules ruling the same kind of transactions

Moreover the access to the market for the small companies has to be implemented, specifically it has to be:

- simplified company law (i.e. bankruptcy procedures, requirement for fulfilling private company statute etc...)
- allowed entrepreneurs men to easily restart after failed businesses

All of these obstacles are faced by the Strategy which is based on five targets and it's aimed to restore the Europe's economic, social and environmental weaknesses – some of which were present even before the crisis but that the financial instability has exacerbated. The core of this project is the “investing in knowledge, a low-carbon economy, high employment productivity and social cohesion”⁸⁷ in order to ensure that the EU would exit the crisis without losing its unique social market economy.

Moreover, according to the introduction of the COM(2010) 682 final – better known as Europe 2020 Strategy - “EU employment and skills policies that help shape the transition to a green, smart and innovative economy must be a matter of priority” because the crisis has caused the employment to slow down to 69% and the employment rate to increase up to 10% so the rate the Commission has stated that has to be reached in the 2020 by the EU is to 75%, meaning that the average growth per year as to be slightly above the 1% .

To meet these requirements the Commission set out 4 key priorities that each Member State has to adopt:

- “Better functioning labour markets” because “structural, chronically high unemployment rates represent an unacceptable loss of human capital” so the “flexicutiry policies are the best instrument to modernize labour markets: they must be revisited and adapted to the post-crisis context, in

⁸⁷ EUROPEAN COMMISSION, *Q&A: Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth*, Brussels, 2014

order to accelerate the pace of reform, reduce labour market segmentation, support gender equality and make transitions pay”

- “A more skilled workforce” which has to contribute and address technological change through new patterns of work organization. Leading actions in order to reach this objective have to be considered the “Investment in education and training systems, anticipation of skills needs, matching and guidance services” because they “are the fundamentals to raise productivity, competitiveness, economic growth and ultimately employment”. The EU in fact want to reduce the school drop-outs to 10% or less and increase completion of tertiary or equivalent education to at least 40% within the 2020. It is there declared also that “the potential of intra-EU mobility and of third-country migrant inflows is not fully utilised and insufficiently targeted to meet labour market needs, despite the substantial contribution of migrants to employment and growth.”
- “Better job quality and working conditions” it cannot be trade-off between quality and quantity of employment: “high levels of job quality in the EU are associated with equally high labour productivity and employment participation. Working conditions and workers’ physical and mental health need to be taken into account to address the demands of today’s working careers”
- “Stronger policies to promote job creation and demand for labour” even if the Commission is well-awarded that this “ is not enough to ensure that people remain active and acquire the right skills to get a job: the recovery must be based on job-creating growth. The right conditions to create more jobs must be put in place, including in companies operating with high skills and R&D intensive business models. Selective reductions of non-wage labour costs, or well-targeted employment subsidies, can be an incentive for employers to recruit the long-term unemployed and other workers drifting from the labour market. Policies to exploit key sources of job creation and to promote entrepreneurship and self-employment are also essential to increase employment rates.”⁸⁸

As already said, the Member States have a duty to achieve these objectives using

88 All the words in the brackets are those used by the Commission in COM (2010) 682 final

all the instruments – even the European ones – that they think could be useful for this purpose but they have to respect the fundamental principles set out in the Treaty and those of subsidiarity.

The Agenda – as the Commission has called the EU2020 Strategy – describes also what could be the EU contribution within this process of reformation and it does so listing the key actions which could be and should taken at the European level.

Before describing in details what should be done, anyway, the Commission dedicates a paragraph to the flexicurity policy.

It has been adopted in December 2007 – it explains - because it was necessary to modernize labor markets and to promote work through a new and different approach, coming from a mix of flexibility and security⁸⁹. This has been seen by the Council, as the best way to increase adaptability, employment and social cohesion even within the Member States, not only for with regard of their inner social relations.

In the Agenda the Commission declares that the evidences and the datas collected show that this policy – where adopted – has helped to better resist to the crisis.

Infact, it is stated in the COM (2010) 682 final, that “by increasing internal flexibility, Member States countered the fall in the growth of employment in 2008-09 by 0.7 percentage points on average on an annual basis. They helped companies avoid the loss of firm-specific human capital and re-hiring costs, and contributed to mitigate hardship for workers.”

In addition, some Member States have improved unemployment insurance systems; there has been an increase of active labor market measures (such as business start-up incentives, training and work experience programs); particular groups as young, temporary workers and migrants – among the hardest hit by the crisis – have been better helped by the public employment services through more targeted job-search assistance.

In order to be complete as much as possible, anyway, after having describes the advantages correlated with the adoption of the flexicurity in a period of recession such those followed the 2008, the Commission has also pointed out what this policy has highlighted to be an imminent need to exit this period but that it still lacks in the most of the Member States: “to pursue labour market reforms, without

89 EUROPEAN COUNCIL, *Towards common principles of flexicurity* (doc.16201/07), Brussels, 2007

reducing the scope for consensus and trust between social partners — a key prerequisite for successful flexicurity policies” since the policies adopted to reduce segmentation have shown to be insufficient.

For this reason, even if the EU common principles for flexicurity – which we have already listed in the section 2.1. and which we are now going to discuss in details - are well balanced and comprehensive, they have to be strengthened to be sure that nowadays Member States would focus on the most cost-effective reforms while providing better flexibility and security. This latter objective could be achieved by establishing a new balance within those principles, by better coordinating Member States' policies and by deeper involving social partners and other relevant stakeholders.

The core of the Agenda is the key policies priorities needed, according to the Commission, to reinforce flexicurity. These are several for each of the 4 principles⁹⁰:

“Flexible and reliable contractual agreements:

- *Focusing on the reduction of segmentation in the labour market*

Different avenues can be pursued in line with the national context such as the decentralization of collective bargaining or the revision of existing contractual arrangements. While in some cases greater contractual variety may be needed to answer territorial and sectoral specificities, in highly segmented labour markets, one possible avenue for discussion could be to extend the use of open-ended contractual arrangements, with a sufficiently long probation period and a gradual increase of protection rights, access to training, life-long learning and career guidance for all employees. This would aim at reducing the existing divisions between those holding temporary and permanent contracts;

- *Putting greater weight on internal flexibility in times of economic downturn.*

While both internal and external flexibility are important over the business cycle, internal flexibility can help employers adjust labour input to a temporary fall in demand while preserving jobs which are viable in the longer term. Forms of internal flexibility include the adjustment of work organisation or working time (e.g. short-time working arrangements). Flexibility also allows men and women to

⁹⁰ I've preferred to directly quoted the document, especially in this part, because it's written in such a plan way it doesn't need any further explanations.

combine work and care commitments, enhancing in particular the contribution of women to the formal economy and to growth, through paid work outside the home. Notwithstanding the importance of internal flexibility, external flexibility remains essential in case of necessary structural adjustment in order to allow an efficient reallocation of resources.

Comprehensive life long learning:

– *Improving access to lifelong learning*

More flexible learning pathways can facilitate transitions between the phases of work and learning, including through modularisation of learning programs. These pathways should also allow for the validation of non-formal and informal learning and be based on learning outcomes, as well as the integration of learning and career guidance systems;

- *Adopting targeted approaches for the more vulnerable workers* particularly the low skilled, unemployed, younger and older workers, disabled people, people with mental disorders, or minority groups such as migrants and the gipsy. Public Employment Services should provide career guidance and well-targeted and adapted training and work experience programs. Specific priority should also be given to i) the skills upgrading of older workers who are particularly vulnerable to economic restructuring, ii) re-skilling of parents returning to work after a period taking care of family dependents and iii) re-skilling of blue collar workers with a view to a transition towards green-collar jobs⁹¹;
- *Enhancing stakeholders' involvement and social dialogue on the implementation of lifelong learning.*

Partnerships at regional and local levels between public services, education and training providers and employers, can effectively identify training needs, improve the relevance of education and training, and facilitate individuals' access to further

91 In a paragraph dedicated, subsequent in the document, the Commission recognized that the crisis has underlined this need to gain skills because, having accelerated the economic restructuring, those workers who lack the skills required by expanding sectors are the first incurred in massive lay-offs. Moreover, the market trend nowadays emphasizes the importance of acquiring skills. According to the statistics in fact, those jobs which require highly qualified people are expected to increase up to 16 million until the 2020 in the EU, while those requiring low-skilled workers would decrease to 12 million.

education and training. Social partners' dialogue is particularly important on effective cost sharing arrangements, on the provision of learning in the workplace, and on the promotion of cooperation between public sector organisations and business;

- *Establishing effective incentives and cost sharing arrangements*

This in order to enhance public and private investment in the continuing training of the workforce, and increase workers' participation in lifelong learning⁹².

Active labor market policies (ALMP):

- *Adapting the mix of ALMPs and their institutional setting to reduce the risk of long-term unemployment.*

Member States have made significant progress in this component of Flexicurity: thanks in part to the European Employment Strategy, ALMPs are far better and stronger than they were a decade ago. However, there is scope for improvement on several aspects: individual job counselling, job search assistance, measures to improve skills and employability. Cost-effectiveness of ALMPs and the conditionality of unemployment benefits with the participation in ALMPs are also two areas requiring further attention. These labour supply measures may not suffice if the pace of job creation is subdued: they should then be complemented by labour demand measures, such as cost-effective targeted hiring subsidies. To minimise the burden on public finances, these subsidies should focus on net job creation and 'hard-to-place' workers, such as those with low skills and little experience.

Modern social security systems:

- *Reforming unemployment benefit systems to make their level and coverage easier to adjust over the business cycle (i.e. offer more resources in bad times and fewer in good times).*

This would enhance the role of benefits as automatic stabilisers, by promoting income insurance and stabilisation needs over job search incentives during downturns, and the reverse in upturns⁹³;

92 Measures could include: tax allowance schemes, education voucher programs targeted at specific groups, and learning accounts or other schemes through which workers can accumulate both time and funding

93 As labour markets recover, Member States should consider rolling back the temporary extensions of benefits and duration of unemployment insurance introduced during the recession, to avoid negative effects on re-employment incentives

– *Improving benefits coverage for those most at risk of unemployment*

For instance: fixed-term workers, young people in their first jobs and the self-employed. This can be achieved, where necessary, through extending unemployment benefit systems coverage, and reinforcing other social security entitlements;

– *Reviewing the pension system to ensure adequate and sustainable pensions for those with gaps in pension-saving contributions*

Pension reforms should go along with policies to support labour market transitions of older people, particularly from unemployment back to work.”

There are two other paragraphs that, according to the author, deserve an in-depth focus because of the importance they have assumed after the latest events – i.e. the migrants crisis and the Brexit.

The first of these is named “*Reaping the potential of migration*” and it addresses those who are already legally residing within the EU. According to the Commission these people have to be better integrated and barriers such as discrimination or the non-recognition of skills and qualifications, have to be quickly removed because they increment the already very high risk of unemployment and social exclusion that migrants have to deal with.

The EU body suggests that the “brain waste” of highly educated migrants – which in the Member States are usually employed in low-skilled or low-quality jobs – could be avoided through a better monitoring and anticipation of skills needs as well as recognizing their skills and qualifications, even if obtained outside the EU. Of course, the principle of Community preference and of the right of Member States to determine the volumes of admission of these workers are respected but, again the Commission states, a mapping of their skills profile would be useful to determine how the legal frameworks of both the EU and the Member States regarding the admission schemes for migrant workers could help reduce the skills wastes that nowadays occur.

The second paragraph that I would like to better discuss is titled “*Reviewing EU legislation and promoting soft instruments*” and deals with the necessary adaptation of the so-called *acquis communautaire*. This French definition stands for the body of those rights, juridical duties and political objectives which are common and binding throughout the EU and that a State has to accept without any hesitation in order to join the Union. This *acquis* ensure the respect of minimum

standards across the EU with regard social and economic aspects.

What the Commission has stated in the Agenda is that this set of rules anyway has to be adapted in order “to clarify the implementation or interpretation of rules, and make them easier to understand and apply by citizens and businesses; to respond to the emergence of new risks for human health and safety in the workplace”.

In additions, it states that the EU primary legislation is not sufficient to address these problems; “soft” instruments could shape consensus and incentive action at national or company level, they could help to create a smarter legal framework, to settle a long-term strategic approach to improve the way national authorities and social partners implement legislation at national level and to update the concept and indicators of quality of work. According to the Commission, these “soft” instruments could be “comparative analysis, policy coordination, exchange of good practice, benchmarking, implementing guides, frameworks of action, codes of conduct and recommendations” and so on.

In addition to that, when asked whether what has been settled in the Agenda is binding for the Member States, the Commission replies that the targets “are politically binding and have been agreed by EU leaders. National governments have a major role in making the strategy a success. Two of the targets – on reducing greenhouse gas emissions and on the use of renewable energy – are legally binding”⁹⁴.

In November 2014, the Commission and the Council have jointly drafted another document – the COM(2014) 906 final - which reports the results of the analysis of the labor markets and from which it could be inferred that, even if the implementation of the EU2020 Strategy has already started to give some positive signs, there is still much left to do.

First of all the employment and social situation, it is still cause of concern. There is a high but relatively stable rate of unemployment – around 24.6 million people within the EU – but divergences across Member States remain high.

On the contrary, as regard of the implementation of education and training, Member States have introduced measures aimed at improving skills supply and supporting adult learning and the first positive results start to be seen.

In addition to this, the analysis on which the document is based upon, state that

94 EUROPEAN COMMISSION, *Q&A: Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth*, Brussels, 2014

the employment rate is likely to slightly improve in the future. Over the medium-term infact, there would be a further jobs growth; technological progress would create more jobs in the ICT sector; ageing would increase the demand for health workers and consequently for health-related services; the greening of the economy could lead to an increase in green jobs.

On the contrary in several Member States labor market matching has worsened, the segmentation continues to be substantial and the training of low-skilled workers hasn't been implemented yet.

Addressing the Europe 2020 Strategy, scholars have referred to it as the “third half” of the Lisbon Strategy. This name derives from the troubled history this latter model have had and which could be divided in two periods.

The first period had started in the 2000 and the document became the prevalent economic imaginary. Anyway, even if it had been planned to last for 10 years, the Lisbon Strategy had to be revisited and re-launched because of a growing disappointment with its implementation results. This had been the start of the second period, in the 2010 and it was renamed Europe 2020. So when the Lisbon Strategy process had failed at some point, the reasons for this failure hadn't been recognized but the EU had preferred to go back since the drafting and, having variated something of it, re-launched it. That's why according to the scholars, the EU2020 is nothing more – cynically speaking - than the “third half” of the Lisbon Strategy⁹⁵.

Nevertheless, there are differences among the two strategies.

First of all, the meaning of the European model and of its necessity has been better explained. Infact, it has been clarified that this model aims, as we have seen during our analysis, to modernize social and environmental practices in order to improve growth trying to adapt to the new economic realities and to address all the consequently various challenges.

Moreover, when interpellated on this regard, the Commission had justify this continuity with the Lisbon Strategy declaring that it had helped the EU during the economic and financial crisis because without it – i.e. the flexicurity policy that had been already settled down there – its effects could have been even worse.

95 MAKAROVIC M., SUSTERSIC J., RONCEVIC B., *Is Europe 2020 set to fail? The cultural political economy of the EU grand strategies*, European planning studies, www.dx.doi.org/10.1080/09654313.2013.782387 , 2013

To sum up, EU 2020 doesn't innovate too much what had been already settled out in the Lisbon Strategy for what concern the instruments it utilizes; it only tries to strengthen itself on the supervision of pre-existing frameworks.

Its main innovation, anyway, consists in a stronger recognition of the interdependencies existing between national budgetary policies and national reform reports on one side, and the attempt to increase pressure on bad performers, on the other⁹⁶.

Even if it has been criticized by several scholars, the majority of them recognized that the EU2020 is a credible strategy for the future of the EU and has the advantages that it presents clear actions, clear target and a well-detailed strategy to monitor the implementation of it by the Member States.

Moreover, the European Council on October 2012, have adopted the Employment Guidelines⁹⁷ which contains stable policy guidance to Member States to help them to address employment and social challenges against the economic tendencies of the latest period in order to reach the EU2020 objectives.

In addition, the European Social Fund supports the Strategy and it has taken actions itself to fight unemployment, focusing especially on youth. It has infact, offered traineeships and apprenticeships for re-skilling and up-skilling them and it has supported education actions to fight poverty and social exclusion and it has promoted the administrative capacity building.

Furthermore, the most of the Member States continue the process of modernization of employment protection – even if we have gone beyond the first half of the Strategy – in order to promote employment dynamism and combat segmentation. Some of them have implemented wage-setting mechanisms to realigne wage developments to productivity; others have particularly focused on minimum wages to support households' disposable income.

For what concern the Youth Guarantee – a program inserted in the EU2020 and which aims to help the youth to enter in the labor markets since the unemployment rate for them is even higher than the average – the reform of public employment services has continued to improve service standards and

96 BONGARDT A., TORRES F., *The competitiveness rationale, sustainable growth and the need for enhanced economic coordination*, Intereconomics, Vol 3, 2010, pag 136 – 140

97 EUROPEAN COUNCIL, *Guidelines for the employment policies of the Member States*, Brussels, 2012

coordination throughout regional levels⁹⁸.

Member States seem to finally have understood, differently from the Lisbon Strategy period, that the social protection system can:

- effectively activate and enable those who can participate in the labor market;
- protect those excluded from the labor market and/or unable to participate in it;
- prepare individuals for potential risks in their lifecycles investing in human capital⁹⁹.

These results, then, make the EU institutions, the majority of the scholars, the national governments, the markets and – hopefully – the EU's citizens feel very positive on the EU2020 Strategy and on the reaching of its final outcome.

Probably all the objectives settled in there wouldn't be achieved within the year 2020 but the path has been definitely drawn.

98 Italy is one of the Member States which has achieved the most results in implementing this specific program, called “Garanzia Giovani”, in the Jobs Act.

99 EUROPEAN COMMISSION, COM(2014) 906 final, Brussels, 2014

3. *Future of the Labor Market*

3.1. *TTIP Agreement and its possible damages*

This acronym stands for Transatlantic Trade and Investment Partnership. The whole idea behind it – those of an ambitious transatlantic agreement – is not new at all. It has been formulated for the first time 20 years ago but a real negotiation process hadn't been started before because there was concern with regard to its possible political impact on the multilateral trading system.

This hadn't been the only critic: some argued that this kind of agreement would have been too small because transatlantic tariffs on one side, and trade barriers on the other, are not so consequential. The first in fact are just a “small” part of the latter.

On the other hand instead, some other critics argued that this deal would have been too big for what concern the content. It would have to deal with so many issues that, while trying to make a balance of interests on each of them, it would have for sure face the opposition of some of these interest groups.

Even if all these worries could be true in part, nowadays time has changed in the economy market and the appetite for liberalization of the market forces inside the WTO (World Trade Organization) are growing more and more, driven by the globalization process.

This is true especially for some of the latest “created” trade policy areas that are important to both the EU and the US, such as competition frameworks, intellectual property protection and market access for financial services.

As stated by former European Commissioner for Trade Peter Mandelson:

“If GATT (i.e. General Agreement for Tariff and Trade) had been a club of self-described liberalisers, the WTO had become a club of guardians of the global trade rule book. For members who see global trade liberalization as a work in progress, the WTO can be a frustrating place to be, moving as it seems to do at the speed of the slowest of its members.”

Moreover, being true that the area that would be covered by this agreement is very huge, even if the tariffs there negotiated would be low, their small reduction could be even more important than possible bigger tariff cuts in smaller markets.

In addition, supporters of the TTIP have argued that even if this would be a very broad negotiation with regard to its content, it would generate an harmonization on issues of several trade aspects and this could help to create more jobs and the push for an economic growth would be much greater than an exclusive focus on trade alone¹⁰⁰.

Plus, they added, the advantage of the settlement of better regulatory process procedures should not be underestimated – i.e. it would be possible to agree identical standards for regulatory consultation, impact assessments and so on¹⁰¹.

Agreeing with these statements, nations all over the World are taking part in two of the largest negotiation process attempting to improve their own economies.

Besides the TTIP, which tries to regulate trade between EU and US, there is the TPP (Trans-Pacific Partnership) which has been already signed and it disciplines trade relations among the US and 11 Asia-Pacific countries – Japan is among the signatory parties.

The aim of both of these agreements is to liberalize trade by lowering tariffs – which would be shifted from already low rates to no-tariffs barriers at all - and other trade barriers which exist nowadays between the negotiating parties.

In this way the participating states hope to increase trade and investment – consequently the workers' and consumers' protection, the economy and the environment would be increased - because the absence of tariffs would be balanced by increasing the role of rules and regulations.

Despite one of the characteristics of these agreements is their secrecy – which for the TPP was respected for all the period during which the negotiation process was on-going – the European Commission, even in response of the strong criticism expressed by very important figures – as we would discuss later -, has started an intensive campaign aiming at informing the public of the latest developments in the negotiations¹⁰².

As we have already outlined, TTIP is not the first transatlantic agreement. It has been launched in the 2013 but already in the early 90s, the European Community

100 This being especially true, according to the supporters of this agreement, in trade areas like automotive and pharmaceuticals, where regulation is science-based so that the desired outcome is the same in each country.

101 HAMILTON D., BLOCKMANS S., *The geostrategic implications of the TTIP*, CEPS-CTR Project “TTIP in the balance”, Paper n°5, 2015

102 It has also created a website for this purpose:
<http://www.europarl.europa.eu/news/it/top-stories/20150202TST18313/TTIP-un'opportunit%C3%A0-per-tutti>

and the US opened a transatlantic dialogue signing a *Transatlantic Declaration*. In 1995, then, a lobby of businesses men called Transatlantic Businesses Dialogue (TABD), operating on both the EU and the US, has been created and it has been coordinated by public authorities.

Relationship with the US kept on going and has given rise to the Transatlantic Economic Partnership and subsequently to the Transatlantic Economic Council. The aim of these latter two initiatives was to organize advisory meetings on economic matters for both the EU Commission and the US Government. The outcome of these meeting on 2011 is resulted in the creation of a group of high level experts whose recommended in 2013 to lunch a negotiation process to regulate a comprehensive free trade agreement – i.e. this was the rise of the TTIP. This agreement is included among the mega-regional ones. These are hybrids, being a mix of the trade liberalization model and the cooperative bilateral regulation in specific sectors.

Infact, they not only aim to further reduce tariffs (with regard to the TTIP, the target that has to be reached it's zero) and other border measures that obstacle trade; they also contain ambitious arrangements for regulatory cooperation in order to face trade barriers created subsequently of different regulatory measures and approaches for products and services; they regulate global supply chains, e-commerce, competition, policy, transparency, anti-corruption measures; they improve protection for investment and intellectual property¹⁰³.

The format of this negotiation consists of a one week-long cycle, taking place once in Brussels and once in Washington and held by the representatives of both parties.

For the EU, the European Commission is in charge: the activities are led by the Directorate General (DG) for Trade, the leadership belongs to the Chief Negotiator, who is supported by a team of experts and other parts of the Commission. The completion of the activities is up to nine other Directorates General in conjunction with the Secretariat General.

For the US, instead, the Office of the United States Trade Representative (USTR) is in charge, together with stakeholders, representatives of the US Congress and

103 BULL R.T., MAHBOUBI N.A., STEWART R.B., WIENER J.B., *New approaches to international regulatory cooperation: the challenge of TTIP, TPP and Mega-Regional trade agreements*, Law and contemporary problems, Vol 78, 2015, pag 1-29

high level experts.

If an agreement is reached, then, the 28 EU governments have to approve or reject the agreement negotiated in the EU Council of Ministers.

When every single Member State has approved it, the European Parliament would be interpellated for recommendations. Please note that the EU Member States have different judicial systems which impose different way of approving or ratifying the document.

On the US side, instead, the reached agreement would have to be submitted for ratification to both houses of the US Congress: the Senate and the House of Representatives.

Despite this last phase of official vote, negotiation meetings are carried on following a certain number of formal phases which have to be respected at every round.

Firstly, position papers are exchanged. In these papers each party sums up its aims and desires with regard to each aspect that have to be discussed. If it is the case, at this point, initial offers could be already made.

After that, anyway, the real negotiation would start and new proposals are made and can be accepted or rejected or partially agreed or partially denied.

When both sides agree on a matter, a consolidated text is prepared and the issues which have to be further negotiated are expressed in the text between brackets.

This means that, the agreement couldn't be considered negotiated as a whole until each text containing a certain topic is not finalized.

It's important to bear in mind, anyway, that TTIP would not necessarily be concluded with a real final document: it is, infact a process which seeks to reach what could be defined a "living agreement". This would consist of always new consultative mechanisms involving regulatory and non-tariff issues, mechanisms which could develop the response to changes in trade, technology or other areas.

From this it could be inferred that TTIP instead of being limited in another trade agreement, it's a new-generation negotiation path which aims to help the US and the European economies to better face the intensified global competition¹⁰⁴.

But we would later see that not to settle a specified and transparent discipline would be a great risk, especially for those not directly involved in the negotiations

104 GUTU I., *The TPP and TTIP trade agreements: the international negotiation process*, CES Working Papers, Vol 8, 2014, pag 81-92

– being them citizens or institutions.

Focusing now on TTIP content, the draft of the future agreement contains 24 chapters addressing every field of interest. The working groups are divided following the same framework; that's why there are 24 joint EU-US working groups.

Moreover, these 24 chapters are divided in 3 major part: market access, regulatory cooperation and rules – this latter suggests principles and modes of cooperation that have to be mutually respected by both parties.

The Market Access part includes trade in goods and customs duties, services, public procurement and rules of origin.

The Regulatory Cooperation part deals with regulatory coherence, technical barriers to trade, food safety, animal and plant health, information and communication technology, pharmaceuticals.

The Rules part regulates very sensitive areas such as sustainable development, customs and trade facilitation, small and medium sized enterprises, investment protection and investor-state dispute settlement, competition (this list is not exhaustive).

The second and the third parts are those made public by the European Commission in 2015 because they are those which cause much concerns.

If every TTIP country agrees with those provisions, infact, there is an high risk of increasing misinterpretation of the settled rules by corporations and third parties because of the not so complete clearness and/or transparency of the rules.

Another concern deals with the possibility for companies to relocate their money through different countries taking advantage of the strength of their legal position in relation to the government, giving rise to money laundry phenomenon.

In order to highlight the TTIP benefits, its supporters are now stressing the positive international effects hoping that they would make the public opinion go beyond their fears for what concern gray areas – on which no certain datas could be collected in advance – that we have addressed right above.

One of the main focus of the TTIP supporters is that nowadays developing countries don't share neither the fundamental principles nor the basic structures that characterized TTIP agreement nor an open rules-based commerce in general, and they have little interest in new-market opening initiatives. This could result in an implementation of national discriminatory trade, regulatory and investment

practices.

According to the TTIP supporters, this agreement could indeed represent a new form of transatlantic collaboration which would result in a strengthening of multilateral rules and in an improvement of international norms.

This would be possible because of the size and the scope of the US and the EU economies. They could become the model for future global rules, reducing the risk of imposition of stricter, protectionist requirements for either products or services which could have been made by other new actors that are now emerging on the economic scene¹⁰⁵, contributing to restore in part the past European and American primacy in the WTO and other multilateral bodies – primacy which has been lessened after the affirmation of new economic giants such as India and China.

But this is only one of the drivers which has led the US and the EU to enter in this agreement. There are others which have been equally important and which have had a decisive role in the decision of the parties.

First of all, liberalizing trade and investment would lead to mutual economic benefits: more competitive markets, lower prices, broader diffusion of innovations, improvement of consumer welfare and so on.

Another driver has been the strengthening in the capacity of every TTIP state to protect their citizens because an intergovernmental cooperation is needed in order to solve growing regulatory issues coming from a global economic integration; so that, if the domestic regulators would cede or share authority with other countries of their same economic area, this would rise the economic importance – i.e. the possibility to impose conditions - of the block itself, helping each country to carry out their missions.

After having introduced what the TTIP is about and how the negotiation process works, we are going to address now the object of my thesis , the labor-related part. In this regard there are similarities and differences on the approach of the two signatories parties.

105 The TTIP supporters claim that in many cases, the standards being negotiated are intended to be more rigorous than comparable rules found in the WTO. They add that agreement on such issues as intellectual property, discriminatory industrial policies or state-owned enterprises could strengthen the normative set of rules of the multilateral system by creating common standards for a possible multilateral – i.e. global - liberalisation under the WTO.

Starting with the EU, it considers that comprehensive provisions on labor rights¹⁰⁶ which have a certain relevance on trade have to be included in the TTIP, integrating them in a context which highlights the contribution of the agreement to sustainable development. It is convinced in fact that the TTIP is a unique opportunity to realize an ambitious and innovative coverage of the labor provisions.

For this reason in its initial position papers concerning this matter, the EU has identified the following topics as “key building blocks” aiming to build on the EU and US commitment to high levels of labor protection, contributing to a global social progress – topics which have been reiterated in the Communication on the Commission regarding the TTIP in 2015:

“ 1. Multilateral labor standards, agreements, and frameworks:

- The **Decent Work Agenda of the International Labour Organisation** (ILO): set its four pillars - 1) promoting employment, 2) social protection, 3) promoting social dialogue, 4) fundamental principles and rights at work - as the overall objective and framework;
- **ILO core labor standards:** respect of all the ILO core labor standards (i.e. freedom of association and right to collective bargaining; forced or compulsory labor; child labor; non-discrimination in respect of employment and occupation), including with regard to their effective implementation in law and practice; and support to ongoing efforts towards ratification of fundamental ILO Conventions. Commitments to the core labor standards could be detailed in dedicated “**thematic core labor standards articles**”, which, for each standard, would (1) recall relevant international instruments (2) list key principles to which the Parties are committed, (3) define specific commitments on actions to achieve those principles;
- **Other ILO labor standards:** protect working conditions in additional areas (e.g. health and safety at work), including by

¹⁰⁶ Every time it refers to labor rights, the EU has the ILO Decent Work Agenda in mind, including social protection

implementing relevant ratified ILO Conventions.

2. Domestic law

- **Right to regulate:** recognize and protect each Party's right to set its own levels of labor protection, consistently with internationally recognized standards and agreements;
- **High levels of protection:** work towards continuous improvements of domestic labor policies and laws to ensure continued high level of protection;
- **Upholding levels of protection:** prevent a race to the bottom, by ensuring domestic labor laws are not relaxed as a means to attract trade or investment.

3. Cross-cutting issues

- **Corporate Social Responsibility (CSR):** in addition to the respect of labor law, promote the uptake of CSR, including – but not only - on labor matters in accordance with internationally recognized principles and guidelines (i.e instruments of the United Nations, the ILO, the Organization for Economic Cooperation and Development - OECD), to foster the contribution of trade and investment to sustainable development.

4. Cooperation

- **Joint activities through bilateral and multilateral channels, as well as in third countries:** identification of priority areas for joint work to strengthen governance for trade and labor issues and labor protection worldwide.¹⁰⁷

Moreover the EU wants to be deeply involved – at least as deep as possible – civil society in the TTIP because it firmly believes that this could help to realize a strong implementation of the TTIP provisions.

In order to allow the civil society to actively join the TTIP dialogue, the EU stresses these elements:

“- the use of domestic mechanisms by each Party to request and receive inputs from representatives of its domestic civil society (“domestic advisory groups”), providing for a balanced representation of

107EUROPEAN COMMISSION, *Roundtable on labor rights and civil society participation in TTIP*, Issue Paper, Brussels, 2014

economic, social, and environmental interests, following the three-pillar concept of sustainable development.

EU domestic advisory groups work independently from the public

administration, i.e. they call their own meetings, elect their chair, draw their agenda, invite EU officials for dialogue sessions, formally transmit their views to the administration. The administration can ask for their advice on a specific topic as well, thereby creating a two-way interaction process;

- the establishment of a dedicated platform for joint dialogue (“civil society forum”) with a balanced representation of economic, social, and environmental interests of both civil society, to allow for exchanges both among stakeholders and between them and the Parties.

This platform meets yearly, and members of all domestic advisory groups are an integral part of it, ensuring information flows between the work done by civil society on a continuous basis at domestic level and the joint discussions;

- both at domestic and at joint level, there is no limitation on civil society’s inputs, either in terms of which provisions of the chapter they can refer to or concerning their nature. Civil society can advise the Parties on any issue related to the implementation labor-related provisions;
- while it plays an important role, civil society cannot bear responsibility for the implementation of the provisions. Governments remain liable for their commitments and have the primary responsibility to ensure they are met – a task which can be strongly supported by civil society’s active participation in the implementation¹⁰⁸”

With regard of the US position paper, there it shares the same EU's hope that the labor provisions settled in the TTIP would become a model worldwide.

In the document the US stresses the need for an international commitment and the wish to arrange common procedures for consultations and cooperation in order to equally promote the respect of the labor rights.

It states then workers in the TTIP countries should have the same protection levels granted in the US – indirectly it criticizes the diversity which nowadays exists on

108 EUROPEAN COMMISSION, see note n°107

this regard within the EU Member States.

Moreover, since the service sector is fundamental for the US – four out of five US jobs are in this area – it tries to obtain an improved market access in the EU and to refer to every operation concerning any designated monopolies and state-owned enterprises as appropriate¹⁰⁹.

In addition the US would like to ensure that US suppliers of goods and services would receive the same favorable treatment which the EU provides for its domestic – and in certain cases even some other foreign – suppliers without being, then, subordinate to quality checks.

For what concern the investment dispute settlements, instead, both the EU and the US agree in ensuring that government maintain the discretion to regulate in the public interest¹¹⁰.

As we have stated at the beginning of this paragraph, there are some similarities between the EU and US provisions concerning labor rights and this could be seen not only comparing their position papers filled for the TTIP agreement; it could be seen also in the other trade agreements they have signed over the years.

The similarities regarding their content resulting from the comparison of these agreements are: the reference to the ILO Declaration 1998, to Corporate Social Responsibility (i.e. annex to the labor chapter of the US agreement with Peru 2009, all recent EU trade agreements), involvement of civil society in the negotiation phase, implementation, monitoring and dispute settlements (i.e. promotion of labor standards through bilateral and multilateral channels, interministerial meetings, independent expert panels and inter-governmental dispute settlement, reference to ILO supervisory mechanism as indirect source).

Despite all these similarities, in the recent EU trade agreements labor provisions have been deeper developed because the EU has made reference to a broad concept of labor – encompassed the ILO Decent Work Agenda - which isn't limited to the promotion of the fundamental and basic labor rights.

Moreover, the US hasn't ratified neither the ILO Decent Work Agenda nor the eight Fundamental Conventions – which have been signed by all the EU Member

109 With regard to the privatization of public services which the EU has asked for, the US Chief Negotiator, Dan Mullaney, responding to the public debate and to stakeholders' concern on this regard, confirmed that the US “do not include such provisions in its trade agreements and will not do so in the future”

110 EMPLOYMENT AND SOCIAL AFFAIR COMMISSION, *The Transatlantic Trade and Investment Partnership (TTIP) and Labour*, Briefing, 2015

States, instead. The US has implemented only two of them (namely the Abolition of Forced Labor Convention and the Worst Forms of Child Labor Convention) and a third of these had been submitted to the Senate for consent in 1998 but it has never been discussed.

The reasons behind this failure in ratification is based on one ground rule set by the US President's Committee: the US will not ratify any ILO convention “unless or until U.S. law and practice, at both the federal and state levels, is in full conformity with its provisions”. And the legal review process is in all cases complex and long-lasting. There are evidence that prove that for five of the Fundamental Conventions full compliance has not yet been achieved¹¹¹.

Labour aspects in trade and investment agreements		
	EU approach	US approach
Content	ILO Declaration of 1998 on Fundamental Principles and Rights at work Reference to Corporate Social Responsibility	
	ILO Fundamental Conventions, sometimes with recommendation to ratify (e.g. – EU-Korea) ILO Declaration 2008 - Decent Work Agenda (CETA)	Internationally recognised worker rights (e.g. working hours, safety and health at work, minimum wages)
Promotion	Promotion through cooperation	
Implementation mechanism	Monitoring by the Parties (inter-ministerial meetings) Mechanisms of dispute settlement via independent expert panels and government consultations ILO supervisory mechanism as indirect source	
	Political pressure, in principle no sanctions Mandatory establishment of advisory bodies and dialogue between civil societies of both parties	Potential sanctions Third parties can file a complaint including investors' and civil society submissions

Table n°1 ; Source: ILO researches

111 Among these unratified Conventions, there are also those on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87) and the Right to Organise and Collective Bargaining Convention, 1949 (No.98).

More in detail:

Labour aspects in US and EU trade agreements		
	US approach	EU approach
Content	labour chapter	chapter on trade and sustainable development
	principles of 1998 ILO Declaration Corporate Social Responsibility	
	-national labour law (including acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health)	ILO core conventions (including sustained efforts towards ratification) Decent Work
Promotion	issues for cooperation	
Non-derogation clause	obligation not to lower domestic labour law for increased trade or investment	

Table n°2

Source: ILO researches

Labour aspects in US and EU trade agreements		
	US approach	EU approach
Dispute settlement	cooperative labour consultations	
	commercial dispute settlement system with financial or trade sanctions	panel of experts without sanction possibility
Implementation mechanisms	Labour Affairs Council	Committee on Trade and Sustainable Development
	domestic labour advisory committee (optional)	domestic advisory committee on sustainable development (obligation)
	- open meeting civil society with Labour Affairs Council	- transnational advisory committee on sustainable development

Table n°3

Source: ILO researches

As could be inferred by the table n°1, the US is still committed in a way to the internationally recognized workers' rights. In the US Trade Act, in fact, similar aspects are covered - namely the right of association; the right to organize and bargain collectively; the prohibition of using any form of forced or compulsory

labor; a minimum age to employ children; the settle of acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Furthermore, enforcement is stricter. There are, infact, severe economic sanctions in case of non-implementation of certain labor standards – even if they are rarely applied they are heavier than any sanction prescribed by the EU.

However, the ILO Fundamental Conventions are different for what concerns their nature from the US Trade Act. Being international treaties, a regular supervision procedure is ensured.

If labor provisions rely only on the ILO Declaration – as it is the case for the US – this would create legal uncertainty and they would be inconsistent with the ILO supervisory machine, as recently stated by the ILO itself, creating difficulties when a dispute arises on the compliance of the party adopting such “incomplete” labor provisions¹¹².

Tables n°2 and n°3 instead, better represents the still very huge – in certain area - difference in workers' protection.

The US infact, as we would see in-depth in the dedicated chapter of my thesis, privileges a more national approach; where for national, being the US a Federation of States, it means that every single US State could choose a different level and method of protection with a very “soft” influence of the Federation's minimum requirements – i.e. it could give just guidelines but every State could choose whether to follow or not.

This is a very risky approach, then, because in the Republicans States (which are almost the half of the US States) a workers' protection system could be barely provide and, after the crisis and the subsequent adoption by those States of the Right-to-Work laws – as we would see in the following chapter – the employees' situation is even worsen.

The danger is that, doing a balance between the Republicans approach on one side and the Democrats – which even if provide more protection than the Republican States, they still adopt weaker provision than those adopted in all the EU – on the other, the US negotiation platform would be a downward of the EU labor standards adopted till now.

The transposition of these approaches within the TTIP agreement has started in

112 EMPLOYMENT AND SOCIAL AFFAIR COMMISSION, see n° 110

November 2011, when a High Level Working Group on Jobs and Growth prepared the launch of official negotiations. The final report of this working group has been released on February 2013 and it prescribed that the future agreement “should establish new trade rules that are globally relevant”, as was already required by the position papers of both parties.

Among those rules for sure it has to be included, according to the report, high level of liberalization of services and improved access to government procurement at all levels.

Moreover it has to be taken into account the EU approaches on sustainable development on one side and the US general approach adopted in the environment and labor chapters of every trade agreement it has entered into – and this is one of the most opposed provision since, as we have already outlined and we would see in details later, the US has a very weaker workers' protection than those required in the EU.

On June 2013, then, the Council of the European Union – pursuing art. 207 and 218 TFEU – gave its authorization to the Commission to lead the negotiations and it also gave some directives that has to be followed during the whole negotiation process, aiming at defining the scope and the core of values and general principles that have to be respected in order for the EU to sign the agreement.

According to those directives: the TTIP has to regulate trade in goods and in services, investment protection and public procurement and it has to take into account the particular challenges small and medium companies have to face.

Plus, it has to define: market access, regulatory issues and Non-Tariff Barriers and rules (as we have already seen this has ended to be the macro division of the arguments dealt with in the TTIP).

Moreover, according to the Council, the principles of the EU's external action – i.e. human rights, fundamental freedoms, the commitment of the Parties to sustainable development and “the contribution of international trade to sustainable development in its economic, social and environmental dimensions, including economic development, full and productive employment and decent work for all”- should represent the background of the negotiations.

Even if in all the rounds of negotiation that have been carried on progresses have been made, a lot of issue still require negotiations because of the differences of the two approaches, increasing by the strong oppositions this agreement is facing –

especially on the EU side, since it is seen as a race-to-the-bottom.

Furthermore, as we have already pointed out discussing the several phases of the negotiation and in compliance with art. 207 TFEU¹¹³, the European Parliament has to be involved in the process too.

On May 2013, then, after being informed on the progresses already done the European Parliament declared that it “*considers that it is crucial for the EU and the US to realize the untapped potential of a truly integrated transatlantic market, in order to maximize the creation of decent jobs and stimulate ... growth*”¹¹⁴. Agreeing with the directives that the Council gave, at the same time it warned the negotiators “*not to rush into a deal that does not deliver tangible and substantive benefits to our businesses, workers and citizens*”.

On July 2015, then, the European Parliament which has updated its recommendations and under the section “regarding the rules” of its resolution on TTIP, dealing with the labor provisions, it stated that:

- “ - to ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO's Decent Work Agenda and the core international environmental agreements;
 - provisions must be aimed at further improving levels of protection of labor and environmental standards; an ambitious trade and sustainable development chapter must also include rules on corporate social responsibility based on OECD Guidelines for Multinational Enterprises and clearly structured dialogue with civil society;
- to ensure that labor and environmental standards are not limited to the trade and sustainable development chapter but are equally included in other areas of the agreement, such as investment, trade in services, regulatory cooperation and public procurement;
- to ensure that labor and environmental standards are made enforceable, by

113 Art. 207 TFEU : “*The Commission shall regularly report to the special committee appointed by the Council to support the Commission and to the EP on the progress of the negotiations*”

114 EUROPEAN PARLIAMENT, *EU trade and investment agreements with the US*, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0227&language=EN&ring=B72013-0187> , Brussels, 2013

- building on the good experience of existing FTAs (i.e. Free Trade Agreements) by the EU and US and national legislation;
- to ensure that the implementation of and compliance with labor provisions is subjected to an effective monitoring process, involving social partners and civil society representatives and to the general dispute settlement which applies to the whole agreement;
 - to ensure, in full respect of national legislation, that employees of transatlantic companies, registered under EU member state law, have access to information and consultation in line with the European works council directive;
 - to ensure that the economic, employment, social, and environmental impact of TTIP is also examined by means of a thorough and objective ex-ante trade sustainability impact assessment in full respect of the EU Directive on SIA (Sustainability Impact Assessment), with clear and structured involvement of all relevant stakeholders, including civil society, asks the Commission to conduct comparative in-depth impact studies for each Member State and an evaluation of the competitiveness of EU sectors and their counterparts in the US with the aim to make projections on job losses and gains in the sectors affected in each Member State, whereby the adjustment costs could be partly taken up by EU and Member State funding.”¹¹⁵

Having read the latest recommendations of the EU Parliament to the Commission and having noticed that they are not so much dissimilar to those given at the beginning of the negotiation and to the general principles already settled by the EU Council, we could infer that not so much has been achieved under the labor topic and/or the positions of both the signatory parties are probably still too far from each other so that reaching a well-balanced agreement on this matter would be very difficult.

This very optimistic approach adopted by the EU institutions is based on a study carried out by the CEPR (Center for Economic Policy Research), the outcome of which is that the TTIP agreement would lead to a growth of 0.5 % GDP (Euro

115 EUROPEAN PARLIAMENT, *Recommendations to the European Commission on the negotiations for the TTIP*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN>, Brussels, 2015

120 billion) and the US by Euro 95 billion (or 0.4 % of GDP).

Sectors which are likely to benefit most from TTIP include metal products (+12 % exports), processed foods (+9 %), chemicals (+9 %), other manufacturing goods (+6 %), other transport equipment (+6 %), and especially motor vehicles (+40 %). Effects on agriculture, forestry and fisheries are expected to be close to zero (+0.06 %).

However, for a number of sub-sectors, limited negative impact is probable, and a small number of jobs will move between sectors (7 jobs in every 1000 over 10 years).

On the other hand, according to this study, wages may rise by 0.5 % for both skilled and less-skilled workers.

In addition, the European Commission suggests that the study rather underestimates the gains. According to its own calculations, in fact, several hundred thousand or even million new jobs dependent on exports may be created¹¹⁶.

Furthermore, it has been predicted that even if a jobs or income loss could be faced at the first stage of the TTIP adoption, this could be compensated by flanking measures to be adopted both at the domestic level and, in order to compensate differential intra-EU effects, at the EU level. The outcome of this re-balance could be a reinforcement of the Globalization Adjustment Fund for the creation of more automatic stabilizers at the EU level. Moreover, a social safeguard mechanism could be considered to respond to unforeseen negative social consequences.

In addition, according to the Directorate General for Internal Policy since there is still little evidence about the effectiveness of labor provisions – and also to address the always stronger critics to the TTIP – the EU could consider to apply a precautionary approach to the impact of the agreement for what concern labor conditions utilizing various instruments prescribed by the agreement itself to ensure positive social effects. This instruments could also reinforce the position of trade unions helping them to face their loss of bargaining power – which we have already dealt with - because of trade liberalization. In-depth and systematic

116 CENTRE FOR ECONOMIC AND POLICY RESEARCH (CEPR), *Reducing transatlantic barriers to trade and investment: an economic assessment*, http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf, London, 2013

monitoring are recommended anyway¹¹⁷.

As for what concern the trade unions' positions, they too have submitted their position papers. ETUC (European Trade Union Confederation) and its American counterpart AFL/CIO provided a joint statement in occasion of the TTIP round of negotiations in 2014 declaring that labor provisions in the TTIP have to “ensure sustainable development by requiring parties to protect fundamental labor rights and the environment by including recourse to dispute settlement and trade sanctions if necessary. Labor rights must be enshrined in the body of the agreement, be applicable to all levels of government, and be subject to dispute settlement and trade sanctions equivalent to other issues covered by the agreement. The parties should commit to the ratification and the full and effective implementation of the eight core conventions of the ILO and of core international environmental agreements. The provisions should envision labor and environmental standards that continue to rise, aiming in particular toward implementation by all parties of all up-to-date ILO Conventions. Moreover, the dispute settlement mechanism must not undermine, weaken or create conflict with existing interpretations of ILO Conventions and Recommendations”.

On the other hand Businesses Europe (there is no American counterpart for it) stated that “the sustainability chapter should encourage effective domestic implementation at central and sub-central level of ILO Conventions and Environmental Agreements that have been ratified by the US or individual Member States. Parties should be free to define policies and measures adjusted to labor and environmental standards they deem appropriate ... calls for an effective enforcement of all TTIP provisions, including those in the sustainability area, and supports soft pressure, consultation, transparency and publicity”

In these two positions we could see the never-ending different interests – difference highlighted by the crisis - protected by the social partners: trade unions on one side, asking for more insurance of compliance with ILO Conventions and in general for a continuous updating and increasing of the labor standards and employers' organization on the other, asking for much more freedom of decision, supporting a much more US-friendly approach.

117 DIRECTORATE GENERAL FOR INTERNAL POLICY, *TTIP and labor standard*, Policy Department: Economic and Scientific Policy, Brussels, 2016

The strengthening of the liberalization which would result from the application of the TTIP agreement (and which is strongly asked also by the EU employers' organization) unavoidably creates – at least in the short-term according to the Directorate General – “winners and losers” within countries and there is also the risk that it would generate dynamics that might lead to lower levels of labor protection respect than those which could have been achieved without the liberalization process (in the case of the EU, if it would have “limited” to the application of the EU2020 Strategy for example).

The dynamics which could start could be:

- Cost Channel: increasing the competitive pressure on countries and firms could lead them to re-apply social dumping mechanisms in order to improve their (short-term) cost competitiveness;
- Bargaining Power Channel: the free movement of goods, services and capital but not so much of employees, could result in an increase in the employers' and investors' bargaining power in contrast with a strong decrease of those of workers and governments, leading to wage decreases, job insecurity and lower labor standards;
- Social Chill: this could more be a consequence of the previous two.

The increased attractiveness of social dumping and the weaker position of unions, in fact, could lead to more implicit lowering of labor standards by hampering progress in social protection.¹¹⁸

Anyway, according to Directorate General, this race-to-the-bottom could be prevented if the negotiators would strictly followed all the guidelines which have been given by the EU institutions and the EU social partners because, if they do so, the outcome the TTIP would achieve could be the very positive one predicted by the CEPR researches that we have seen and others conducted by Ecorys, CEPII and Bertelsmann Stiftung – all predicting the same positive outcome of those conducted by the CEPRS.

Problems start to rise, anyway, when we take a closer look to these researches.

The European Commission has always referred to all of them as “independent reports” but this is very questionable. In the cover page of most of these studies the Commission itself is addressed as the client for whom the study has been

118 DIRECTORATE GENERAL FOR INTERNAL POLICY, see note n°117

produced so that the suspect that this could have influenced the results is more than legitimate.

Besides this doubt about their independence, all the studies adopt the same economic model, the assumptions of which have already showed their limits as tools to assess trade reforms during the liberalization process carried on in 80s and 90s.

As J. Capaldo have declared in his research which is one of the most reliable according to the anti-TTIP movement: “The main problem with this model is its assumption on the process leading to a new macroeconomic equilibrium after trade is liberalized. Typically, as tariffs or trade costs are cut and all sectors become exposed to stronger international competition, these models assume that the more competitive sectors of the economy will absorb all the resources, including labor, released by the shrinking sectors (those that lose business to international competitors). However, for this to happen, the competitive sectors must expand enough to actually need all those resources.

Moreover, these resources are assumed to lack sector-specific features, so they can be re-employed in a different sector. Under these assumptions, an assembly-line employee of an automobile factory can instantly take up a new job at a software company as long as her salary is low enough. Supposedly, this process is driven by speedy price changes that allow an appropriate decrease of labor costs and, consequently, the necessary expansion of the competitive sectors.

In practice, however, this “full employment” mechanism has rarely operated. In many cases, less competitive sectors have contracted quickly while more competitive ones have expanded slowly or insufficiently, leaving large numbers of workers unemployed. One need only look at the experience of Europe in the last decade to see that full employment does not re-establish itself even if job seekers are willing to work informally and at relatively low pay.¹¹⁹”

In order to conduct his researches, then, Capaldo adopted the more trustworthy United Nations Global Policy Model simulating the impact of TTIP on the global economy in a context of protracted austerity and low growth, focusing on the EU and the US. The outcome he observed is very different and, according to all the

119 CAPALDO J., *The transatlantic trade and investment partnership: European disintegration, unemployment and instability*, Global Development and Environment Institute Working Paper n°14-03, Medford, 2014

numerous critics of this agreement, much more likely to be achieved than the results of the positive researches we quoted above.

Starting with the employment, the problem on the ultra positive predictions of the creation of millions of jobs both in the US and in the EU relies on the fact that those researches had used too old datas.

Having used datas up to 2010, they sustain that in countries where there is more labor and labor income protection an higher unemployment rate is suffered so any cost reductions which could be introduced by the TTIP would lead to positive employment results.

Recent data anyway, and this is not just a Capaldo's statement – even the EU itself has recognized so – have proved that, not only these countries, but also those where these protections where lower have experienced higher and persistent unemployment.

Moreover, due to the reduction of net exports and of the overall economic activity – which we are going to address later in this paragraph – together with a tendency toward specialization in higher-value added, lower-employment-intensity products - which would lead to export and output gains in a few sectors while adversely affecting many others – the predicted job loss would be of 600,000 jobs by 2025, most of which would be in the Northern Europe, France and Germany – ironically, the countries which have best survived the crisis.

This number is higher than those reached between 2010 and 2011 – the most difficult period related to the crisis.

Subsequent to this massive job loss there would be a further acceleration on the reduction of incomes – reduction which is one of the main cause of the EU's current stagnation.

This decrease of total income, would weaken consumption and residential investment and it would strengthen and increase social tensions.

What Capaldo has called the “flipside of this decrease” consists in an increase of the share of profits and rents in total income, meaning that proportionally there would be a transfer of income from labor to capital¹²⁰.

Furthermore, the loss of employment and labor income would increase pressure

120 The largest reductions will take place in France (with 8% of GDP transferred from labor to profit income), Germany and Northern Europe (4%), contributing to push a negative trend that has continued at least since the beginning of this century.

on social security systems but this has been recorded just in the EU; meanwhile in the US – which is very lacking on this side – there would be a great increase in this field because it would have to respect those minimum standards required by the EU, standards which are higher anyway than those nowadays applied.

Analyzing the net exports, the UN Model gave evidence that “trade expansion among TTIP countries will cause a net export loss for all EU economies.

Losses would be a drag on aggregate demand for all EU economies¹²¹.

On the other hand, US net exports would be higher by slightly more than one percent”.

A probable explanation of this substantial difference is that “in the EU’s stagnating economy, domestic demand for lower-value added manufactures – in which the EU is relatively uncompetitive – will crowd out higher-value added ones.”

On the other hand there would be an “increase of net exports in almost every other region of the world except Europe, suggesting that higher demand for low-value added product will lead to higher net imports from Asian and African economies. Alternatively or additionally, TTIP could facilitate EU imports of manufactures assembled in the US with parts made in China and other regions.”

Furthermore, since net exports are a core component of the GDP, their decrease would directly lower the national income of the EU Member States¹²² in contrast with those of the US that, recording an improvement of the net exports consequently would increase its GDP.

What implicitly results from this, it is also that the predict gains for non-TTIP countries – one of the fundamental benefit of the TTIP according to its supporters – would remain just a wish because those prediction rely on multiple unrealistic assumptions and on methods that have proven inadequate to assess the effects of trade reforms.

Another strong criticized aspect of the TTIP is its proposal for a regulatory cooperation, this would give the possibility to the two signatory parties to take decisions on how to regulate very hot issues – such as regulating toxic chemical,

121 Northern European Economies would suffer the largest decreases (2.07% of GDP by 2025) followed by France (1.9%), Germany (1.14%)

122 Northern European Economies would suffer the largest GDP reduction (0.50%) followed by France (0.48%) and Germany (0.29%). GDP would increase slightly in the US (0.36%) while GDP increases in non-TTIP countries would be positive but negligible (approximately 0.1%)

unhealthy food, banks, data privacy and so on – in which the EU adopts much more severe rules and asks for much more monitoring mechanisms than what is applied in the US.

This process then, would be carried on outside the regular decision-making procedure of both of the parties excluding national parliaments and local bodies – elected by the population – from the decision and consequently limiting the public debate.

This means that any valid idea for regulation in a certain sector which take into account the public interest, could be stopped before any further discussion in an institutional office.

On the other hand instead, ideas which favor powerful company – i.e. lobbies – interests could be made accessible to public opinion and any national institution only after they are already agreed – and so, adopted – by business lobby groups, the EU and US authorities, and a restricted group of unaccountable officials without any room for change.

To sum up, this regulatory cooperation method could severely undermine democratic control of new laws¹²³.

Another system which really worries the critics is the ISDS mechanism (Investor-State Dispute Settlement) because as it is disciplined it could legitimate multinationals and investor to sue an EU Member States if this adopts a new environmental or health legislation that in some way adversely affects their businesses prospects¹²⁴.

There are three main area of concern regarding this mechanism of disputes resolution.

Firstly, Member States would fear to introduce new effective legislation which could have positive social and environmental impacts because these could go against the interest of the companies – especially the American ones because they are not used to be bound by rules – and be sued by them.

A second reason of concern is the cost of this disputes resolution system for a Member States. At the end of this procedure infact, very high fine could be imposed since they have to be in line with “potential” profit loss. This means that

123 CORPORATE EUROPE OBSERVATORY, *TTIP: Covert attack on democracy and regulation*, Brussels 2014

124 As it is already happened when the Philip Morris sued – and won against – the Uruguay and the Australia because they adopted very sever restrictions on the consume of tobacco

the fine could be easily equal to a large proportion of the GDP of a Member States.

Thirdly it is very difficult to understand why this “independent” dispute mechanism is needed since within the EU commercial and single market laws are already provide a myriad of courts which could judge on those matters, the European Court of Justice included.

Lacking any other reasonable explanation, it really seems that the ISDS has been established with the only purpose of preserving the multinationals and investors interest against any too stricted – according to the companies – national law¹²⁵.

Among the critics there are also numerous members of the EU institutions – in all of them –, of the others EU bodies (for instance, official research centers) and among the social partners – within the ETUC there are some campaign groups that completely rejected the TTIP, even if the current line of the European Trade Union is to be open to this proposal.

The Campaign Coordinator of the Corporate Europe Observatory, referring to the European Commission predictions about all the positive effects that would follow the TTIP, stated that “It's really propaganda. Unfortunately, those figures are being taken quite seriously. It's tempting to believe it when you hear that a trade agreement will miraculously create all these new jobs and all this income, but the reality is there aren't a lot of facts to back up this statement”.

The Executive Director of a very influential NGO at the European level declared that:

“In their own impact assessment the European Commission said absolutely clearly that they recognize there will be ‘prolonged and substantial dislocation’ of jobs under TTIP. So people are going to lose their jobs in one sector, even if there may not be jobs in another sector. Even if there may be gains for the big corporations, free trade agreements of this sort have always brought massive job losses”.

The ETUC – better, those among the ETUC representatives who are against this agreement – expressed concerns even with regard of those which could be addressed as labor rights violations, according to the EU standards, referring to

125 EURACTIVE, *TTIP puts the EU's environmental and social policies on the line*, <http://www.euractiv.com/section/trade-society/opinion/ttip-puts-the-eu-s-environmental-and-social-policies-on-the-line/>, 2014

the US “custom” of giving very little room for the employees to exercise their right to organize and negotiate collectively.

Moreover 24 out of 51 US States adopt the Right-to-Work law – which we are going to analyze in detail in a dedicated paragraph – which provide very low labor standards with cheaper labor costs, no minimum wage (so that people receive far less than what is the wage for the same job in the EU), no guaranteed social benefits such as pensions – they have to enter into a trust in order to have it granted – or healthcare and so on.

In addition, TTIP would give the possibility to European companies to relocate themselves through investments and to establish their plants in one of those States, so that they don't have to respect the EU labor standards anymore. And this, of course, would be valid everywhere – even in the sections still present in the EU – producing a race-to-the-bottom.

These US labor rights violations is indirectly confirmed by the fact that the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) agrees with the ETUC that the goals of the TTIP should include full employment, decent work, and rising standards of living for all, and should not allow deregulation – meaning that even the American workers representatives are well aware of the weak protection they could offer to American employees. We would see in the US-dedicated chapter why the trade unions don't have so much power to better influence the bargaining process, granting more rights to the employees.

Taking a deep look to this agreement, to its content, its negotiation procedures and its actor, anyway, the settlement of high standard labor provisions seems to have no chance¹²⁶.

Offering benefits such as lower standards and reduction of barriers to business make us infer that it is really drafted only for this purpose - neither to the national government, as we have seen addressing the ISDS problem – and that if it would be signed this would mean nothing good for workers.

126 SPEAK C., *What does the TTIP really mean for workers?*, <http://www.equaltimes.org/what-does-the-tip-really-mean-for?lang=en#.V6XZO9MgXIV>, 2013

There are other strategies the EU could adopt to get out of its stagnation period and reconquer its role of economic primacy, without necessarily having to take any step further – meaning having to give up some of its fundamental values – in the trade relationship with the US, or at least not concerning all other issues that aren't strictly trade-related.

We are now going to describe two of these strategies that are already applied in some Member States and which are giving some positive feedbacks for real.

3.2 Flexicurity and Voluntary Occupational Welfare (VOW)

a better path to follow

In the previous chapter we have addressed the TTIP, an agreement which the EU would like to sign because – according to the official documents – it would help the economic recovery but there are too many risks involved and the possibility that they would be realized if this agreement would be signed, is too real.

Anyway, a solution to help the EU to get out of the stagnation period which has started after the first shock caused by the crisis, is strongly needed.

According to the author, whom opinion is supported by empirical datas and the practical examples of several Member States – among which Italy is currently one of the leader as we would see in the next paragraph – the flexicurity policy, embodied in the Europe 2020 Strategy, in conjunction with an increase of the voluntary occupational welfare (VOW) – which would help on one hand the employer to reduce its labor cost because the real wage would be decreased, meanwhile on the other hand the employee's deprivation of his income would be compensated with other benefits which are going to address his or his family's essential needs.

Starting with flexicurity we have already discussed about its origins and we have already listed the common principles that according to the EU have to be respected by the Member States which are going to adopt this new policy path.

The focus now would be on COM(2007) 359 final, the Communication with which the Commission has firstly suggested the implementation of this new approach. In there all the references are to the Lisbon Strategy, but we have already explained that there is not so much difference, for what concern the contents, between it and the EU2020 so all what has been stated in this paper is still valid, probably now more than before.

According to the document the aim of this approach is to ensure a high level of employment security¹²⁷ to the EU citizens.

127 “The possibility to easily find a job at every stage of active life and have a good prospect for career development in a quickly changing economic environment.”

In addition, it looks forward to give the possibility to both employers and employees of fully enjoy all the opportunities coming from the globalization, pursuing the perfect balance of flexibility and security.

Flexibility is defined in the Communication as an ensemble of “successful moves” (i.e. transitions) collected during one's lifetime. It is not limited, infact, in giving more freedom to the employers to recruit or dismiss neither it implied that the open-ended contracts, the traditional form of contract until the crisis, are now old fashioned. It stands for, instead, “upward mobility” - an ongoing progress of employees into better jobs. Of course, it provides also more flexibility in the organization of work so that the company, on one side, would quickly and effectively address the new productive needs and skills and the worker, on the other, would better combine the working time with its private life.

Security, instead, is providing people skills that give them the possibility to face and progress in their working lives so that they would be always able to find new employment because they wouldn't have just sectorial skills. Moreover, to facilitate transition it seek to provide adequate unemployment benefits and training opportunities for all.

Since the policy measures adopted by the Member States are still too fragmented to effectively address the broader problems the labor market is now facing – these policies infact, according to the Commission, try to increase either flexibility for enterprise or security for worker resulting in neutralizing or contradicting each other – the document asks for a stronger effort by the Member States.

In asking this to the Member States, the Commission cited the OECD guidelines which broadly characterize flexicurity and which it had drafted after having observed the outcome their implementation has reached in the first Member States to apply them. Among these guidelines there are:

- high participation in lifelong learning;
- high spending on labor market policies (both passive and active);
- generous unemployment benefit systems balancing rights and duties;
- broad coverage of social security systems;
- high trade union coverage.

These are only guidelines and each Member States has to decide whether apply them and if so, whether apply only some or all of them. The choice would be different from one Member State to another, according to their different needs.

In order to convince the Member States to adopt this policy, the OECD stressed the socio-economic results reached by those States which have already implement it: “high employment rate, low unemployment rates and low relative poverty rates compared to the EU average”.

Of course, it added, this policy has to be complemented by other social policies to help the underprivileged and those who cannot be comprised in the labor market.

The Commission deals also with social dialogue and it states that the “active involvement of social partners is key to ensure that flexibility delivers benefits for all.” For the same reason, on the other hand, all the relevant stakeholders general involved in this have to be responsible for change.

Their support for the core objective of the EU2020 Strategy is essential because a “partnership approach” is the best way to develop flexicurity¹²⁸. In those Member States where dialogue between social partners and between them and public authorities is well-functioning – and based on mutual trust – infact, integrated flexicurity policies are more likely to be achieved.

It is up to the social partners, anyway, to decide how taking part at the dialogue on the development of flexicurity policies. Public authorities of the Member States, on their side, have to work with them with the aim of including their approaches and suggestions within the National Reform Programs.

As we have already stated above, each Member States varies from the other for its socio-economic, cultural and institutional background so the specific combination of actions necessary to implement flexicurity policies in the best way possible, differ very much.

To help the Member States, anyway, the EU has developed a number of “typical” combinations and sequences of the policy components of flexicurity which have been identified studying the best practices from throughout the EU itself. These are called *flexicurity pathways*.

128 As we have already seen, this has been reiterated also within Communication which established the EU2020 Strategy.

The essential aim of these pathways is to help reaching the EU2020 through mutual learning and benchmarking.

According to these pathways, the biggest division is among those countries where it has already been adopted a system of generous unemployment benefits and those where these benefits are less developed.

For what concern the first group, by applying the right-and-duty principle a more cost effective system could be reached.

For the other group, authorities could take into account to shift public resources to increase flexicurity policies and to distribute the additional costs among different sources – i.e. increased taxation or social contributions¹²⁹.

Talking about social contributions, we are now going to address the voluntary occupational welfare (VOW). This is the set of benefits and services provided to the employees from the social partners or directly from the employer.

The ProWelfare (Providing Welfare through Social Dialogue) is a research which compares the VOW of eight different Member States¹³⁰, focusing on three social policy areas – i.e. healthcare, conciliation of private and working life, lifelong learning – and on three productive sectors – i.e. manufacturing, service sector, public administration.

The aim of this research is to:

- monitor the VOW development trends in those Member States;
- analyze the interaction between VOW and industrial relations;
- analyze the interaction between VOW and national welfare systems;
- analyze the reasons which have pushed the social partners to introduce the VOW.

The research has started from the different voluntary private contribution of each Member States which goes from a maximum of 17.5% (UK) and a minimum of 0.2% (Poland); the average being 6.7%, then.

129 For an insight on all the possible pathways see Annex I of COM(2007) 359 final or WILTHAGEN T., *Rapporteur of the flexicurity expert group*, Brussels, 2007

130 Namely: Austria, Belgium, Germany, UK, Italy, Poland, Spain and Sweden

Basing on these datas it's possible to identify a connection between a national model of welfare and the importance of the voluntary private contribution. According to the results of this research the liberal model is that characterized by the highest amount of total contribution (i.e. private and public) with the Southern States – Italy and Spain – being in the middle of the rating, but they are growing more and more. We would see what has been happening in Italy on this regard in the next paragraph.

As for the figures adopted in the observed Member States to effectively implement the VOW, the most common are: complementary health insurance, supplement to the income if an illness occurs, agreement on flexibility or reduction of the working time and the institution of training courses.

Usually these kind of benefits are applied at the sector or the company level (only Sweden disciplines them at national level). This is infact a completion to the public welfare.

In the majority of the Member States there is a bilateral coordination, with the social partners cooperating for the introduction and the administration of the benefits and the services.

In all the Member States examined the VOW, independently of which model has been applied, has helped them to react to the crisis. Of course some of them, as Italy and Spain, having adopted austerity measures for a long period before, have still to face high unemployment rate, but the combination of these forms of social help with the introduction of the flexicurity measures has driven them on the right path that's why all the EU institution and most of the maximum economic and employment expert are now stressing the need that all the Member States follow these examples.

In this way the EU not only could get out of the crisis without violating any fundamental labor rights, but it would also start to grow again.

The contrary would happen instead, if the EU signs the TTIP agreement. Researches are clear: on one side the most trustworthy datas give just negative signs and the few positive outcomes are reached by only empirical and very questionable analysis meanwhile, on the other side, we have all positive validations based on real experiences.

As a further evidence of the effectiveness of this mix – flexicurity and VOW – we are now going to analyze the Italian experience, the most directly connected to us.

3.3. Italy: one of the greatest example of a changing of perceptions

I've chosen to describe the policy this country has decided to adopt because it is one of the greatest example of the changing perspective which is currently on going in the EU.

In its previous past infact, it had adopted – following the main trend within Europe – austerity measures even in the labor law field, and this is because it had a well counter-balance due to the historical strength trade unions had in this country.

In the past infact, Italy was among those countries in which most of the employees were unionized and this gave so much power to the trade unions during the negotiations that in 1970 Law n° 300/70 – renamed “Statuto dei Lavoratori” - was approved.

This has been one of the first law in the whole Europe, where employees had the chance to “speak up” against the too strong abuses employers had carried on since the Industrial Revolution.

One of the most famous article of this law was art. 18 which provided for the full restore of the employment relationship in case of illegitimate dismissal. This article had been seen as one of the big achievement for the employees since before then, employers could fire anyone without neither having to specify the reasons. The ratio behind this statement was that according to the level of protection against illegitimate dismissal granted to the employee, the level of self-regulation on the execution of his work itself would vary¹³¹.

Another historical article, which had contributed together with art. 18 to set down the basis of the industrial relations, was art. 19.

This article set out the representativeness criteria and has been deeply modified by a referendum in 1995 which had abolished the “supposed representativeness” in favor of an “effective representativeness” - meaning that a trade union would have been recognized as representative within a company if it could prove its union competence by imposing its participation to the negotiation and consequently subscribing the agreed contract.

131 CARNICI F., *Il tramonto dello statuto dei lavoratori (dalla l. n°300/70 al Jobs Act)*, Rielaborazione intervento al Convegno di Napoli “il nuovo regime dei licenziamenti individuali e collettivi”, 2015

This requirement of signing the contract in order to be recognized representative in the company had given rise to an active debate which had reached its final outcome – as we would better describe later on this paragraph - during the FIAT case, when the Constitutional Court, in its sentence n°231/2013, had intervened once for all in order to define which interpretation have to be considered the correct one.

However before addressing the changes that are occurred since the draft of the Law n°300/70 in the labor law, we would outline how this law had deeply influenced the Italian systems of industrial relations until not so long ago, when it had to be modified in order to react to the substantial modification of the global labor market, first of all the membership loss.

The Law n° 300/70 was a subsequent effect of the already reached high level of voluntarism and “abstention of law” - except for the public sector – meaning that there are no law disciplining workplace representation, collective bargaining and strikes in details. Even article 19 that, as we have seen, disciplines representativeness, in doing so it just gives the general framework within which a trade union have to be recognized representative but it leaves room for different interpretations which, before the FIAT case, had varied according to the specific context of a certain company.

Anyway the beginning of the history of the trade unions started immediately after the World War II with a comparatively medium-high level of unionism and employers' density combined together with a strong propensity for social dialogue, as it could be easily witnessed by the intense activity in terms of multi-sector bipartite and tripartite concertation, agreements and social pacts which had followed during the years.

This capacity of composing tensions between social partners – which usually in the past had followed the strong mobilizations in industrial actions, strikes and demonstration carried on by the trade unions to affirm their power - setting a table of negotiation, had led both parties to refuse the legislative intervention on labor matters for years because it had been seen as a too strong intrusion which attempted to their freedom and independence.

Following this propensity to negotiate there was an high level of collective bargaining coverage, without an administrative or public procedure of binding extension of their effects had to be needed.

Taking a closer look to these social partners, the most important are: on one side historical interconfederal trade unions (CGIL – General Confederation of Italian Workers; CISL- Confederation of Workers' Trade Unions; UIL – Union of Italian Workers) and on the other the employers' organization – even this is an interconfederal entity – Confindustria.

Passing the time, then, the number of social partners have been extended, even because the kind of interests they represent either at the union or at the employers level have been differentiating more and more.

Anyway, those we have introduced above (CGIL-CISL-UIL on one side and Confindustria on the other) are the social partners that have been negotiating since the beginning of the labor law system as we know today and, with regard of the trade unions, these are the only three trade unions at which the “supposed representativeness” - i.e. the criteria which allowed a trade union to negotiate with the employer without having to prove its real representativeness within the company, pursuant the text of article 19 l. n° 300/70 before the referendum - had been recognized. They had this privilege infact, because they were those who have led the strikes during the 60s prior to affirm their power, and later to obtain the possibility to enter into negotiation with the employer trying to protect the employees' interests at their best.

These representative bodies are then divided in: sectoral federations (most of them referring to a certain interconfederal trade union) – which negotiate the industry-wide collective agreements – and territorial or company representatives – depending on the size of the units in which the agreement they negotiate it's applied; territorial if the units is a small one, company if it is a medium-large enterprise. Within the company, then, two formats of representativeness could be applied: the RSA, on one side, the RSU, on the other.

This division has been drafted from the Interconfederate Agreement of 1993, which has been considered the “founding act” of the Italian two tiers system of industrial relations that it is still in force nowadays.

This document is peculiar for its nature: it is not a law which disciplines the entire employment relationship but it is the outcome of a tripartite concertation, where the Government had just a warranty function¹³² – a perfect example of that

132 PESSI R., *Lezioni di diritto del lavoro (quinta edizione)*, Torino, 2012

voluntarism and abstention of law that we've introduced above.

In this agreement the RSU has been theorized for the first time.

The RSA , which had been the only model applied in the company before the Interconfederate Agreement of 1993, means a “company-level representing body”, and it is a smaller version of one of the three interconfederal trade unions which operates limited to the company in which it is established so that in each firm at least 3 RSA could be present.

The RSU format instead, meaning a “uniform representing body”, is a body of a mixed composition – partly designed by the vote of the employees of the firm, even those who are not unionized¹³³, and the other part designed by all the trade unions which have signed the agreement applied in the firm – so that the employer would deal with just one representative body.

According to the 1993 Agreement both of these formats cannot be present within the same company, all the trade unions which are already operating there infact has to freely choose – consulting the employer too - which one adopt.

Nowadays anyway, the RSU is the most utilized model in order to deal with the membership loss – and the subsequent decline of their power to impose a platform for negotiation - which has strongly affected all the trade unions and which has been drastically worsened after the financial crisis. Grouping all the votes and the employees' support in the same body, infact, they would be stronger and could exercise much more pressure than if they would act divided.

In Italy, as in the rest of Europe, infact, the number of the unionized employees has increasingly declined with the crisis of the 2008 being one of the main driving force. It is possible to infer this even from the drafting of three Interconfederal Agreements – named *union triptyque* – respectively that of 2011, of 2013 and of 2014.

These agreements constitute the latest attempt of the trade unions to operate a transition from a merely pragmatic and political vision of the union system – in which the political decisions, the balance of power and the relationships of mutual recognition are the fundamental basis – to a much more “institutional” vision of

133 For the election not only the organization representing a confederation which has subscribed the agreement applied in the company could present a list of names, but also one that, even if doesn't adhere to one of them, has a statue and an official constitution, has subscribed the Interconfederal Agreements of 2011 and 2013 plus has collected at least the 5% of the votes of the employees who are entitled to.

the industrial relations, in which rules are more important than the practices and where sanctions subsequent to the violation of one of their provisions are very influential.

With these agreements which seemed to try to promote a stricter law regulation – for the first time in Italy – and the favor in this regard of a part of the doctrine (among which Arturo Maresca), trade unions had tried to oppose the negative effects of the crisis which we have discussed in the previous paragraphs – i.e. decentralization of collective bargaining, individualization, influence of globalization which represents a race-to-the-bottom in the labor protection according the Italian standard set out by Law n°300/70.

But this ratio behind the adoption of these agreements has been just a theory¹³⁴ that, even if it were true during their negotiations, it couldn't have been demonstrated because the effects which have followed to their drafting have driven the industrial relations towards a completely opposed path – as we are going to describe.

The national debate concerning an effective reformation of the labor relations rules started with the letter sent by the ECB (European Central Bank)¹³⁵ the 3 August 2011 in which the major European economic body asked to the Italian government to reform the system of wage bargaining at the company-level agreements so that the wages and the working conditions would be adapted to the specific needs of companies. It added, then, to make these agreements more relevant than other levels of negotiation; to increase the competition; to improve the quality of the public services; to realize the total liberalization of the local public services and of the professional services.

According to the ECB these reforms, together with the reshaping of the regulatory and fiscal systems, would help Italy to better face international competition and to improve the efficiency of the national labor market – contributing to exit the crisis as soon as possible.

All these requirements have been met only after 4 years with the Renzi's Jobs Act, adopted on 2015, but the path to this huge reform has been stretched out by several “events” both at the institutional and at the social partners level.

134 CARUSO B., *Per un intervento eteronomo sulla rappresentanza sindacale: se non ora quando!*, WP CSDLE “Massimo D'Antona”, IT-206/2014, 2014

135 EUROPEAN CENTRAL BANK, *Letter to the Italian Government*, Brussels, 2011

The first of these “events” had been the adoption of the Interconfederal Agreement of 2011 which had promoted a coordinated decentralization of the industrial relation.

The context of this negotiation had been strongly influenced not only by the ECB pressures but also by, from the inside, the FIAT – we are going to describe its model in this paragraph – and the adoption of the art. 8 of Law n° 148/2011 by the right-wing Govern of the time, which we would discuss below.

The procedures for the definition of the two-tier bargaining system set out by the 2011 Agreement are still partially in force, even after the massive reformation carried on by the Jobs Act – this infact has reformed in particular the balance of force between company and industry level agreement, not the way on which they have to be negotiated.

As for the industry-wide collective agreement the 2011 Agreement states that only those trade unions which reach the 5%, at the national level, resulting from the average among the unionized workers¹³⁶ on one side and the votes gained by the specific organization in the RSU elections could be admitted to sit at the negotiation table.

Moreover, in order to be effective and collectable the agreement has to be subscribed by the 50% plus one of the representatives and has to be submitted to the employees' certified ratification; the categories would freely define the modalities of this collective ratification and how the representative delegation has to be constituted. This agreement, then, is binding for the signing trade union and it is applied to all the employees they represent – this is extended to all the employees of the company if the employer adheres to the employers' organization which have negotiated the agreement itself or he explicitly makes reference to it in the individual agreement with the employee (if the employer himself is not unionized).

For what concern the company-level agreement this is effective and collectable if it is approved by the majority of the RSU. If there are RSA instead, the effectiveness could be reached if the subscribing RSA have the majority of the unionized workers in the company.¹³⁷

136 The average has to be calculated: unionized workers per each organization on the total amount of unionized workers at the national level.

137 If required by another organization or by the 30% of the employees this agreement could be

As for the modalities according to which carry on the company-level negotiation these have to be prescribed by the industry-wide collective agreement.

Fundamental for clarifying who can negotiate this agreement is the sentence of the Constitutional Court n°231/2013, that we have outlined above, which has been pronounced during the FIAT case – as it is named nowadays – and which has extensively interpret the representativeness criteria required by article 19 of Law n°300/70.

According to this sentence, infact, RSA or RSU could be established within a company not only if it has signed the industry-level agreement applied by the employer, but also if the organization has taken an active part to the negotiations, embracing the arguments proposed by FIOM (the metalworkers' trade union of the CGIL) that have acknowledged that if the RSA/RSU would be granted only to those organization which sign the agreement, this would have influenced a union to ratify a contract which eventually goes against its interests – i.e. of the employees it represents – only because this is the only way to be recognized by the employer and so to benefit from all the special privileges conferring to them by the Law n°300/70¹³⁸.

A step further in the recognition of a derogatory function and of the possibility to extend the company-level agreement even to the non-unionized worker, applying the majority principle already described in the Interconfederal Agreement of 2011, has been taken with the approval of the Decree Law n°138/2011 (converted into Law n°148/2011), art. 8 in the specific.

This normative act aimed to ensure the stability of public finance and to foster economic growth introducing significant changes in the labor relations.

In general the new bargaining model thereby disciplined, would improve the provisions of the national collective agreement so that it could better deal with the specific needs of a company or of the companies of a certain specified territorial area.

Moreover, it has been introduced not only to face the deep financial crisis that was hitting all the Western World (Italy being one of the most affected EU country), but also to solve the FIAT case, that in those period had reached its critical point.

According to this article, local and company-level agreements have the possibility

subjected to the workers' consultation.

138 ITALIAN CONSTITUTIONAL COURT, *Fiat vs Fiom*, Cort. Cost. N°231/2013

to opt-out of terms and conditions set out by law and by national collective agreements. This new bargaining model has been called “proximity bargaining” within the text of the law itself.

The only limit which these agreements have to face is to be still conform to the Italian Constitution, EU norms and international requirements.

The subject matters they could deviate from what has been already disciplined by the national collective agreements or by law include:

- working hours;
- worker duties and job classification;
- fixed-term work contracts, part-time contracts, temporary agency work;
- audiovisual equipment and the introduction of new technologies;
- hiring procedures;
- regulation of freelance work;
- transformation and conversion of employment contracts;
- possibility to fire employees (still valid are the exceptions which would constitute a discriminatory firing already listed by law)¹³⁹.

In the text even the aims which allow the derogation have been described, but the wording thereby used is so general and broad that it is not very much realistic that the invalidity of the agreement – i.e. the sanction prescribed by the law itself if the contract violates its scope – could be declared.

For what concern the social partners which are admitted to the proximity bargaining, in the text of the law requirements have been set out only for the trade unions and from the expressions used it could be inferred that not only the comparative major representative organizations at the national level can submit those contracts, but also the RSA or RSU established within the company – with reference to only the company-level agreement – and even trade unions which don't operate within a specific company – this is usually used when the agreement is stipulated at the territorial level.

If the majority criteria – as set out in the Interconfederal Agreement of 2011 – is respected, even if the contract has been stipulated from a trade union external to a specific company, this would be considered valid.

Peculiar is the clause 3 of art. 8 which extend the general effectiveness of the

139 EUROFOUND, *Unions slam new law allowing opt-outs on labor rules*, Brussels, 2012

company-level agreement even for those which have been drafted before the 2011 Agreement entered into force. This is a clause inserted to implicitly comprehend – so that legitimate – the agreements signed by FIAT in its premises in Pomigliano and Mirafiori¹⁴⁰.

Another peculiarity of the agreement stipulated following this bargaining model, is that they could derogate in peius even to a previous national collective agreement. The only limit in this sense is to safety of the already accrued rights.¹⁴¹ In 2014 the Ministry of Labor has divulged an act aimed to interpret this provision - focused to the fixed-term contract but the ratio of which could be extended to all the matters which this article disciplines - in which it states that the proximity bargaining couldn't derogate in full to the quantitative limits set out by the national legislation and the national collective agreements with regard to the stipulation of fixed-term contracts, but it could provide only a different modulation of it. This interpretation, anyway, is in contrast with the art. 8 of Law n°148/2011 itself and the Directive 1999/70/EC on the fixed-term contracts. Moreover the expression “different modulation” is too generic so that it is impossible to understand what the Ministry wanted to mean with it; the strength of this bargaining model is decreased, reducing the possibility to stipulate fixed-term contract even more (violating the Directive) ; referring to itself as an authentic interpretation of the norm, it doubts the validity of the proximity bargaining already stipulated giving rise to huge difficulties to apply the sanctions¹⁴¹.

This Ministerial act, anyway, seems to not have so much importance due to a precedent sentence of the Constitutional Court¹⁴² in which the conformity of art. 8 with not only the Constitution but also with the above-mentioned Directive on fixed-term contracts has been recognized.

140 There is still a very active debate concerning this clause because for some legal experts it has to be considered unconstitutional. In order to gain general effectiveness the negotiation have to be open to all the representative trade unions (this hadn't been the case in FIAT, where FIOM had been excluded from the negotiation rounds) and the text has to be approved by the majority of the unionized workers not with a simple referendum among all the employees within the company.

141 VALLEBONA A., *L'efficacia derogatoria dei contratti aziendali o territoriali: si sgretola l'idolo dell'uniformità oppressiva*, Milano, 2012

141 DE COMPARDI L., *L'efficacia derogatoria dei contratti aziendali o territoriali: si sgretola l'idolo dell'uniformità oppressiva*, Milano, 2012

142 ITALIAN CONSTITUTIONAL COURT, *Toscana vs. Avvocatura Generale dello Stato*, Cort. Cost. N° 221/2012

Furthermore, the three major interconfederal trade unions (CGIL, CISL, UIL) have strongly opposed this law because according to them it is unfair from a social point of view since it would have a negative impact on the wage levels of workers. For this reason the three of them have entered into another agreement in which they commit themselves not to sign any agreements stipulated pursuant this model. But, even if they have ratified this official document, unofficially several of these pattern bargaining have been agreed upon.

As we have already outlined, this law has been adopted under the pressure of the FIAT case.

In that period infact FIAT decided to exit from Cofindustria, the most influential employers' association, and consequently to resign from all its system of agreements.

In 2012, then, it has replaced the comprehensive group-level agreement for metalworkers (signed by Confindustria) with a comprehensive group-level agreement which is actually a single-employer agreement and being ratified by the majority of the employees representatives (except from FIOM but we have already analyzed the sentence of the Constitutional Court n°231/2013 on this regard) it has provided a set of conditions which apply to all the companies in the Group, even to the non-unionized workers.

The closing article of this new agreement infact, provides that “the signatories agree on the nature of this agreement as a specific collective labor agreement, as it is designed to provide a comprehensive first-level economic and normative discipline and replaces the relevant national sectoral collective agreements for those companies that intend to implement it” - but it has been applied only by the FIAT group.

The official reason which has been given by FIAT management to explain this without-precedents exit from the interconfederal employers' organization is that the Group “can't afford to operate in Italy in a framework of uncertainty that is so incongruous with the conditions that exist elsewhere in the industrialized world”.

The uncertainty of the collective bargaining system – strongly hit by the crisis and the membership loss we have already dealt with – has attempted to the stability and the labor peace which could have been achieved in the past with multi-employer bargaining, making this model less attractive to FIAT which needs certainty of the industrial relations in order to build a strategy to face the global

competition.

Furthermore, the economic crisis, the international price competition, the rigidity with which it is possible to switch from a bargaining level to another, has contributed to weaken the multi-employer bargaining institutions¹⁴³.

Following what was considered an “American” model – but that now is labeled as one of the first practical example of flexicurity – the modifications applied by FIAT to its new agreement has flexibilized the working hours (increasing the number of hours per shift so that productivity would be improved), the job qualifications (much more freedom to allocate an employee from one duty to another), the productive balances (increasing the inner mobility) and so on. Some of these measures are considered the forerunners of the Jobs Act provisions.

Together with an increment of the flexibility anyway, in the agreement there are provisions to increment employment security as, for instance, the increase of the time an employee could benefit of the unemployment insurance (CIGS) and the duty for him to join training courses for all that period, incorporation of the additional retributions – other than wage – within a typical Italian institute, named “superminimo individuale”, the characteristic of which is that it cannot be reabsorbed by any future wage increases.

Except from FIOM, the Group hasn't had to face too strong opposition to their completely new, for the Italian standards, business strategy because the general public and all the social partners usually involved in the industrial relations were afraid that FIAT would cease to invest in Italy, deeply worsening the economic situation of the country.

For this reason, the Italian government had allocated massive investments in FIAT for decades to help its recover “signing” with the company an implicit deal in which the Group would have maintained the production in Italy, in which it has almost half of its employees and where the 40% of its plants are based. In exchange the government would have supplied to it around one-third of its revenue.

This state-intervention in order to prevent a big company to fall and/or face a recession period has then be applied in other relevant cases, the most famous of

143 TOMMASETTI P., *The shift towards single-employer bargaining in the Italian car sector: Determinants and prospects at FIAT*, E-Journal of International and Comparative Labor Studies, Vol 2 n°1, 2013, pag 93-11

which is the more recent ILVA case that has been dealt with adopting a very similar approach to those used by the US in the recovery of Chrysler and General Motors from their bankruptcies – as we are going to discuss in the second chapter. To ensure job security meanwhile the ILVA administration has failed being the research for the new buyer still open, in fact, the Government has injected several millions of euro into the treasury of the company, plus two special Decrees have been drafted aiming at specifically save the ILVA Group by facilitating the procedures to sell it rendering this investment more attractive to possible buyers – by relieving the social and economic burdens which have followed the company bankruptcy.

The first attempt to address the ECB request of a massive reformation of our labor market had been carried on with Law n°92/2012, also called “Legge Fornero”.

Its main focus has been the individual dismissal - which it has reformed pursuing the aim of reaching “greater flexibility in relation to dismissals”; for the first time the ultra protection against dismissals provided by art. 18 of the Law n°300/70 has been modified - and the rules governing some categories of contracts – aiming at reduce the improper use of these agreements while encouraging apprenticeships as a preferred route for access to the labor market – even if the open-end contract are still the dominant type of employment relationship.

Anyway it tries to increment the use of the fixed-term contract providing no restriction for their adoption for the first 12 months and to make them more expansive, attempting in this way to stimulate the insertion of new workforce in the labor market.

Moreover, it has introduced a new more encompassing (even if shorter in some cases) system of shock absorbers, lessening a bit the requirements to meet in order to benefit from them¹⁴⁴.

This reform has been strongly criticized from not only the social partners but also from the most of the political parties because, even if its aim was to comply with the ECB letters and the EU new standards, the mechanisms thereby provided haven't succeed in achieving a well-balance between flexibility and security.

A successful balance between the two, at least according to the datas on the

144 The social insurance for employment when losing a job had a shorter duration than those adopted before. On the other hand, it provided bilateral funds for temporary suspension, in sector excluded from the compulsory wage redundancy funds (such as banks, artisans, small commerce etc.), financed by employers and, in a minor part, the employees themselves.

employment growth collected following one year from its application, has been reached with the adoption of the Jobs Act – entered into force on September 2015 – which have modified again most of the mechanisms which the Legge Fornero had already started reforming.

To strengthen the importance of the adoption of the Jobs Act into the European perspective it would be useful to focus on the Communication of the European Commission named “Recommendation for a Council recommendation on the economic policy of the euro area”¹⁴⁵.

In this document the Commission has recommended that the Member States have to take action in the period 2016-2017 to:

- “pursue policies that support the recovery, foster convergence, facilitate the correction of macroeconomic imbalances and improve adjustment capacity;
- implement reforms that combine: flexible and reliable labor contracts that promote labor market transitions and avoid a two-tier labor market; comprehensive lifelong learning strategies; effective policies to help the unemployed re-enter the labor market; modern social protection systems that support those in need and provide incentives for labor market integration; open and competitive product and services markets;
- reduce public debt to restore fiscal buffers while avoiding pro-cyclicality;
- facilitate the gradual reduction of banks' non-performing loans and improve insolvency proceedings for business and households.”

The reformation period which the current Italian Prime Minister, Matteo Renzi, has started in 2014 and which is not still ended, is aiming to achieve as much of this goals as possible.

The Decree Legislative n°81/2015, better known as Jobs Act, is the best resulted expression of the flexicurity policy supported by the EU ever adopted in Italy.

The benefits of it, that the EU has been stressing since the first moment it has asked for its implementation, have already started to be produced.

According to the datas relative to the first period,infact, the occupation has started to grow again and the investments in the Italian market have started to be more

145 EUROPEAN COMMISSION, *COM(2015) 692 final*, Brussels, 2015

stable.

It's not sure whether this reformation package is the best solution for Italy because some of the typical employees' guarantees have been lessened very much, but what it could be affirmed without any doubt is that this attempt to reform the labor market is those which has met all the requirements asked for the ECB in its letter and which implement those set out by the EU2020 Strategy at its very best.

It tries in fact to reach the perfect balance between the flexibility asked by the employers and the security required by the employees.

The best example of its implementation of the flexicurity policy is the new contractual model it prescribes: the contract with growing protection (“*contratto a tutele crescenti*”).

The peculiarity of this new format, and the reason why it has been so called, is that the more an employee works for a company the more protection against dismissal he/she receives. Within the framework of the Jobs Act in fact, the process of demolition of the ultra employee-friendly art. 18 of the Law n°300/70¹⁴⁶ has been led to a conclusion.

The cases which would give an employee the right to be readmitted to work are reduced to merely the discriminatory ones or those which have been intimated for fictional reasons. In all the other cases, even if some rules have been violated, the employee would have right to only an economic indemnity – the amount of which would vary according to the violations occurred and to the lasting of the employment relationship between employer and employee.

Another provision inserted in the Jobs Act which acknowledges the requirement for more flexibility of the employers is the art. 51 which equalizes the national collective contract with those of second level (territorial or company-level).

Moreover, this article provides the possibility to the decentralized bargaining to modify the maximum length of the fixed-term contract¹⁴⁷.

Those flows of decentralization of the collective bargaining which all the EU Member States are experiencing – including Italy, as we have already seen – has,

146 As we have seen at the beginning of this paragraph, this article prescribed the readmission to work for almost any kind of violation. In a so changed context as those of nowadays this kind of protection has produced a too much uncertainty among the employers, leading them to not hire nobody – especially in times of crisis – because they wouldn't have been free to fire them if they couldn't afford them anymore, or at least this would have been very complicated.

147 CAMERA R., *Jobs Act, contrattazione aziendale: quanto può disciplinare il rapporto di lavoro*, Milano, 2016

in this way, been formalized.

Furthermore, reshaping what FIAT has already introduced in its company-level agreement in order to provide to the employer a much more flexible working organization, the Jobs Act has modified the discipline of the employees' duties. Nowadays in fact, it is possible to designate the employees not only to the duties for which he/she has been hired or to those equivalent to a superior job placement which he/she has successively gained, but also – and this is the added news which provides much more flexibility – to those duties which could be attributed to the same level or legal category of the job placement corresponding to the latest duty which has been carried on. This means that the amount of duties from which an employee could be moved back and forth according to what are the current needs of the company, is increased very much without having to hire people for very short or very unpredictable periods.

For what concern the individual relationship instead even in the Jobs Act it's stated in its art.1 that the open-ended contract are the dominant format.

It provides more incentives to hire, so to establish a new employment relationship, throughout fiscal benefits – as asked for by the above-mentioned ECB letter.

Thanks to this tax cut, numerous new employment relationships have been established since the adoption of this Decree.

But, as we have already outlined, this innovative labor reform balances flexibility with the employment security, in order to better comply with the flexicurity principles set out at the European level.

For this reason it has reformed, for instance, the discipline of the parental leaves in order to give to both parents more freedom to choose how to distribute the days spent at work and those spent at home with the kid, so that they could better conciliate their work with the effective needs of their “new”-born without having to respect certain periods set out by law.

Again, in order to help employees to achieve a better work-private life balance, the Jobs Act has introduced provisions regulating the so-called smart working¹⁴⁸.

This Decree has changed the traditional focus of the industrial relations in general: from a mere other-direction (i.e. the employer has the power to organize the work

148 This is a new format of employment relationship according to which the employee could carry on the duties he/she has been hired for without the necessity of being physically present within the company. The employee could work from wherever he/she wants without having to respect already settled hours and by using technological devices.

together with the disciplinary power) to an organization power (i.e. the employee has to individually determine how to develop his/her duties even with regard to the place and the time of the performance)¹⁴⁹.

Another core of this innovation period has been the Stability Law – i.e. the Italian financial act – (Law n°208/2015) which introduce the possibility for the employees and the employers to freely choose among secondary welfare and the benefit of production – i.e. a wage increase.

In period of global competition such as those of nowadays, during which Italy has been facing serious problems to gain new competitive strength, numerous company has started to privilege offering secondary welfare so that they could have a wage moderation as a counterbalance.

Secondary welfare would help competition even for reasons more connected with the production.

Economic researches have calculated infact that the employee's commitment rises of the 30% when welfare is introduced in a company and of the 15% when an already provided service has been improved. Consequently there is a consistent increase of the business productivity because the welfare services stimulate much more than the normal wage increase.

In this Stability Law, in order to improve the adoption of this system, direct economic advantages are provided. Together with a fiscal decontribution (financed also by the State), company infact save very much in terms of labor costs since they don't have to pay for salaries and the social benefits connected with the second welfare are provided with a huge intervention by the State.

There are also the long-term advantages such as:

- increase of the loyalty to the company;
- better balance work-private life;
- permanence of the older in conjunction with new hirings of young;
- improvement of the social role of the company so that its reputation on the market is strengthened.

There would be advantages also for the State if this system is adopted by a company: it would derogate to the company the responsibility to provide to the society social security, health and cultural protection.

149 MOBIGLIA M., MARIANI P., *Il Jobs Act in pillole*, Milano, 2015

The second welfare is then an attempt of the State to react to the crisis of the Welfare State model, according to which all the above-mentioned protections, have to be provided directly by the State but which has facing a very deep crisis because of the growing lack of resources.

Even if all these reforms have been strongly opposed at the beginning by the trade unions because of the risk of the detriment of the employees' protection, CGIL, CISL and UIL, having understood that, being this the best practice to successfully get out of the crisis – keep fighting for guaranteeing the employees an ultra level of protections, infact, is risky for the employees themselves because the employer wouldn't hire nobody anymore since he/she cannot guarantee to meet those very strict requirements – in January 2016 they've ratified a declaration of intent¹⁵⁰ in which they commit themselves to “strengthen quantitatively, through a major extension, and qualitatively, through a regulated transfer of competences, the secondary level collective bargaining, aiming to improve the working conditions thanks to the growth of productivity, competitiveness, efficiency, innovative organization, quality, secondary welfare, balance work-private life. This benefits would be achieved even through fiscal and contributory facilitation prescribed by law”.

They add that “the content of the bargaining have to look at the employees' protection in a broader way, offering a set of instruments which could face a new complexity of the labor market. Active policy, training courses and secondary welfare address these needs, not as alternative instruments of wage protection neither as substitute instruments of social protection, but as accessory instruments to a new system of citizenship rights.”

The objective of this document is that recognizing the importance the flexicurity has assumed in the global labor market nowadays and having understood that very little could be done to oppose it, the company-level bargaining negotiated by the trade unions side has to re-gain the ability to intervene on the working organization process, starting from the policies concerning the working hour, the reform of the job placement and the security.

This declaration of intent is very important then, since it symbolizes an historical turnover for the industrial relations in Italy that only the three most important

150 CGIL, CISL, UIL, *Un moderno sistema di relazioni industriali: per un modello di sviluppo fondato sull'innovazione e la qualità del lavoro*, Roma, 2016

trade unions could effectively put in place: the workers' representatives have understood that the time of the merely conflictual approach has to be lessened in order to re-gain credibility on the negotiation table – and prior among the employees themselves - having the possibility to still carry on their duty of employees' interests protection instead of leaving all the decision power to the employer who nowadays is very free to decide at the company-level since not being so much representative due to the huge membership loss they are facing, they couldn't strongly impose their position in the table.

CHAPTER 2

UNITED STATES OF AMERICA

1. National Labor Relations Act

1.1 Historical Background of the Act and the National Labor Relations Board

The US has a juridical system which differs very much from the others adopted in the EU, except from the British one – from which it derives.

They adopt a common law system while the EU Member States adopt a civil law system.

Even if today, thanks to the globalization, the differences between the two is diminishing more and more, they still deeply differ for some fundamental legal institutes and/or concepts.

For the purpose of our research, we would not enlighten the core one that is: while in the EU the rules disciplining a certain institute are mostly prescribed by law – i.e. primary and secondary legislation – in the US they are developed into the Courts.

In the common law countries, infact, the core of the legislation is the *stare decisis principle* according to which a judge have to rely upon a precedent ruling to decide a case, provided that the latter facts are identical to those of the prior sentence. In this way, those ruling becomes a source of law and the fundamental principles thereby expressed would be respected as a regulation valid for all legal purposes.

For this reason, within this chapter we would rely more on cases than on law codes.

The only reliable legal basis, which has been used as a guidelines for all the jurisprudence concerning labor matter, is the National Labor Relations Act (NLRA).

This Act has been introduced on request of the Senator Wagner in 1934 who wanted to give the needed federal support to employee's organizations and to collective bargaining – support that the precedent legislation concerning labor matters had failed to give – by creating a quasi-judicial tribunal having a defined

legal authority and the power to have its orders enforced by court decree, the National Labor Relations Board (NLRB), as we would see later on.

This need had been perceived for the first time in that period, because the US was facing a strong economic crisis: the Great Depression of the '29.

With the subsequent adoption of the New Deal, then, the political climate was favorable to recognize the necessity of the growth of organized labor.

It was hoped in fact that, providing them more power and protection, this would have led to an equitable division, between workers and employers, of the wealth produced by private companies, increasing the employees' purchasing power so that an important incentive to the revitalization of the economy would have been given⁸.

Moreover the Great Depression had showed that the employers' decisions were very far from the infallibility they had always gushed over - since they had led the economy to collapse - so their political influence, which they had used till then to impede a pro-union legislation, was considerably diminished.

According to Wagner the NLRA was not only the solution to the more and more growing fights between social partners, but it would have been also the launcher of a new economic and social progress.

The prime function of the Act, in fact, was to protect employees against employer's strategies aiming at either impede all the workers' attempts to organize or to deny the final results of these efforts⁹.

Since they were already the strongest part, no corresponding protection against union action had been given to the employers within the NLRA.

To succeed in its primary goal, within the Act a "triad of rights"¹⁰ had been settled:

- 4) the right to organize – and it has been made enforceable;
- 5) the right to bargain collectively (i.e. the employers have to bargain collectively with employees through representatives chosen by the latter);
- 6) the right to engage in strikes (i.e. picketing and other concerted activities).

8 The economist of that time, have already predicted in fact that the low purchasing power of the employees would prolong the depression even more.

9 During the depression a formidable employers' weapon was the threat of discharge aiming to frustrate any attempts to organize.

10 *"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection"*

Setting those core rights (and others that we would gradually described), the NLRA is the fundamental basis for the American industrial relations and, even if it is 70 years old, it has been modified only two times.

The first one was in 1947, with the Taft-Hartley Act which has reorganized the structure of the National Labor Relations Board, the quasi-judicial body created by Wagner aimed at manage the NLRA itself.

Whit this amendment both the juridical and the prosecution functions have been divided and they have been attributed to two separate divisions.

In addition, the Taft-Hartley Act added among the possible claims a party could present before the court, even those concerning the unfair labor practices that have resulted to be the most effective with regard to the protection of the employees' interests.

In 1959, the Landrum-Griffin amendment has been adopted and it introduced restrictions to the possibility of appeal for the unions in the second stage of proceedings.

In 1979, then, there had been an attempt to reorganize the NLRB again and to reinforce its weak interventions but this proposal had been stopped in the Congress because there wasn't such a great trust in the collective bargaining institute anymore.

Moreover the unions have lost confidence in this Act and some have also required its abrogation¹¹ because according to them it is based on a too strong “partisan prejudice” towards the employers – this approach differ very much from those adopted by the EU trade unions (especially, as we have already seen, in Italy).

This reluctance is the outcome of the typical American mindset which relies on the total contractual freedom and on the positivism so that the harmonization of the rules governing the employment relationship at a national level is seen as an intrusion.

Furthermore, starting from the 80's there had been two major factors which have led the NLRA itself to decline.

First of all, the Regan's Presidency had strongly influenced the trade unions

11 SEIU (Service Employees International Union), very influential in the US nowadays supports the voluntary agreement of representative recognition as a more effective alternative to the procedures prescribed by the NLRA.

decline either in membership or in negotiating powers.

The other factor had been the success of the Japanese and German economic and organizational approaches – those States have focused more on the system of the work councils where the employer participation is a fundamental asset. We would better deal with the effect of these two factors in the sub-paragraph dedicated to the bargaining unit.

Nowadays we assist, as in the rest of the World, to a decentralization leading to, as we have outlined above, the dismantling of the bargaining in favor of alternative representativeness and participation systems.

One of the main risk in the US is the affirmation of an individual bargaining – which is actually already the reality for the most of the American employees – and consequently an ulterior decrease of the welfare system that, since it hasn't the characteristic of universality as the European one, would lead to other detriments of the employees protection.

Example of this is the substitution of the collective pension schemes with new individual contributory pension plans in which their financial management is up exclusively to the company. The same would be valid for the health insurance.

Furthermore, trade unions membership loss has been one of the driven factor of this movement towards a more and more individualization. This reflect, also, the general trend of decline of the associative life in this State – whether it be political or religious.

Moreover the economic crisis of the 2008, have strongly increased this problem so that the AFL-CIO (the trade union which group together all the unions of a specific sector, being the biggest American trade union), had put in place an action to require a new law on the representativeness in the company¹².

The aim of this law was – following the European model - to give the possibility to the trade union to collect members within a unit and, once it has reached the 50% plus one of the employees consensus in the company election, to ask for being recognized by the company as the only trade union with the right to negotiate within that unit. This proposal had faced the oblivion, anyway.

With the crisis the Republicans and the employers in general, have attempted to the employees protection in several ways: blocking for several months the

12 Employee Free Choice Act, www.aflcio.org/joinaunion/voicework/efca , 2007

appointment of the members of the NLRB, firing those employees who were unionized¹³, utilizing lockouts as a blackmail to force the unions or the individuals to sign the contracts unilaterally proposed by the employer¹⁴ and adopting Right-to-Work Laws which aim to delete the collective bargaining system (attempting to the union's system to collect money to support its activities) in the Republican States since those political parties addressed it as one of the main cause for the debt in their administrations, as we would see in the dedicated paragraph.

This economic pressure which the employers have carried on under the crisis isn't considered an unfair labor practice, according to the stare decisis principle.

The Supreme Court in 1960¹⁵, infact, ruled that the economic power goes together with “reasoned discussion” to determine the outcome of collective bargaining negotiations.

There is no lack of good-faith (one of the fundamental principle stated by the NLRA) then, merely because, while bargaining, a party put in place tactics designed to exert economic pressure.

The Court added that, even if such economic activity is not protected by the Act, it is not inconsistent with the duty to bargain in good-faith prescribed by the Act itself.

In the same rulings it then provided the classical description of the American collective bargaining process:

“Collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth...The parties – even granting the modification of views that many come from a realization of economic interdependence – still proceed from contrary and to an extent antagonistic viewpoints and concept of self-interest.

The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties in part and parcel of the system...The truth of the matter is...the two factors – necessity for good-faith bargaining between parties and the

13 In 2009, for instance, 14000 unionized workers have faced disciplinary procedures, layoffs and other sanctions

14 The American Crystal Sugar, the biggest American company of sugar transformation, have adopted a lockout for 20 months hiring personnel in substitution of its employees

15 SUPREME COURT, *NLRB vs Insurance Agents (Prudential Ins.Co)*, 1960

availability of the economic pressure devices to each to make the other party incline to agree on one's terms – exist side by side.”

With a specific insight on lockouts then, the Court¹⁶ ruled that an offensive lockout carried on by an employer do not violate sections 8(a)(1) or 8(a)(3) – which we would discuss later on.

The employer infact, whether a bargaining impasse has been reached, could shut down its plant on a temporary base “for the sole purpose of bringing economic pressure to bear in support of his/her legitimate bargaining position”.

In later decision, the Board has allowed these kind of lockouts when there no union animus exists and the employer has been acting in support of his bargaining position¹⁷.

So, even if the NLRA has to be considered the “*less American among the American laws*”¹⁸ because of its attempt to reach an harmonization of the labor rules at the national level – as it has been evidenced by the strong critics that have been always targeted it, even from the unions – some of its provisions are still very important because they prescribe the core of all the industrial relations system.

Among these provisions there are:

2. SECTION 3 and 4: in which the NLRB is established;
3. SECTION 7: the employees' right to organize or to assist labor organizations, to bargain collectively through representatives choose directly by the workers and to engage in concerted activities for the purpose of collective bargaining;
4. SECTION 8(a)(1): it's an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guarantees under section 7;
5. SECTION 8(a)(2): prohibition for the employers to unlawfully sponsoring or assisting a labor organization;
6. SECTION 8(a)(3): prohibition for the employers to discriminate an

16 SUPREME COURT, *American Ship Building Co. vs NLRB*, 1965

17 A lockout is unlawful, according to the Court, if it is carried on over an illegal subject of bargaining (we would discuss it later); if negotiations are still in place; if one object of lockout is to compel the union to submit the employer's offer to ratification by mail ballot.

18 FAHLEBCK R., *The demise of collective bargaining in the USA: Reflections on the Un-American charter of American labor law*, Berkely Journal of Employment and Law, Vol 15, n°2, 1994

employee because of his/her union activity (not always strictly applied, as we have seen happened during the economic crisis of the 2008);

7. SECTION 8(a)(5): obligation for the employer to enter into a collective bargain with the representatives appointed by his/her employees;
8. SECTION 9(a): the representatives which are legitimate to enter into bargain are those which gained the majority of the votes of the employees in an appropriate unit and they have to be the exclusive representatives of all of them;
9. SECTION 9(b) and 9(c): the NLRB jurisdiction over the disputes concerning what should be defined an appropriate unit for bargaining and other questions concerning the election procedures.¹⁹

Before addressing the typical labor institutes in the next sub-paragraphs it could be useful to describe the body which administers the NLRA, the National Labor Relations Board (NLRB) since it is this body which stands for the NLRA provisions before the court, being those which – thanks to the stare decisis – influences the labor law developments for real.

This is divided in two separate and independent divisions – due to the amendment introduced by the Taft-Hartley Act. On one side there is the Board, the adjudicatory body; on the other the General Counsel's office, which deals with election cases and disputes over unfair labor practice cases.

The NLRB is composed of five members which are appointed by the President (after having received the approval by the Senate) and they would be in charge for five years. The removal of a Board member could be carried on only by the President and only for “malfeasance in office or neglect of duty” and there must be always a formal hearing before prescribing the sanction.

Moreover, it could take decisions at the presence of all its five members or it could delegate its powers to a panel of three.

As for the delegation, the Board could delegate its powers to the regional directors for cases involving union representation.

The two major functions of this body, then, are:

- to determine the criteria to choose the employee representatives within companies under jurisdiction of the NLRA – it has to certificate the

¹⁹ CARNES C.N., *Legalines: Labor law (14th edition)*, Chicago, 2007

exclusive representativeness of a union²⁰;

- to decide whether a particular challenged activity constitutes an unfair labor practice.

After having provided the historical and legal background - necessary to understand a juridical system so different from those we are used to – we are now going to discuss how the system of the industrial relations works in details starting with its the main element: the collective bargaining.

²⁰ Which would be granted only if that union would achieve the majority of the valid votes cast.

1.2 The Collective Bargaining Regulation

In the NLRA the Collective Bargaining regulation is very different from that we are used to in the civil law systems.

It focused merely on the subjects the bargaining deals with and on how to determine an “appropriate bargaining unit” but it doesn't prescribe a real bargaining procedures at a national level.

Since the very strong - and rooted in the US industrial relations – concept of the freedom of contract, infact, this has left to the parties' will.

The Board would intervene ex post, if necessary, to investigate whether a certain conduct is lawful or not. Even under this aspect, then, there are differences with the civil law countries.

There are, in the US, a list of conducts – divided according to the subject in: mandatory, permissive and illegal – connected with their legal effects but this list could be better seen as a guideline for the parties. It has happened (and it could easily happen in the future), infact, that this theoretical division has been revisited according to the specific case – i.e. a subject which usually has been seen as illegal, under certain circumstances could be accepted.

An example of this changeable regulation is those of the individual contracts, which – as we have already outlined – nowadays are almost the rule within the US company due to the membership loss and the economic crisis.

In the NLRA it's prescribed infact, that an employer couldn't negotiate contracts directly with an employee nor he/she could oppose that an individual contracts pre-exist to a bargaining unit certification as a ground for refusing to bargain with the union.

Moreover where a union has exclusive bargaining authority pursuant section 9(a), the individual employees who engage in concerted activities without asking for – and obtaining – the union approval would not be protected from all the guarantees prescribed by the section 7.

Nevertheless, the Supreme Court has recognized that individual contracts could be valid in certain situations²¹:

- if there isn't any recognized collective bargaining representative;

21 SUPREME COURT, *Order of Railroad Telegraphers vs. Railway Express Agency Inc.*, 1944

- if the individual contract deals with matter outside the scope of or not in opposition to the bargained collective agreement (for instance, a collective agreement could set a minimum wage rates and permit to enter into individual negotiation to define better terms for the employees with special skills²²).

It has to be noted anyway²³, that the employer couldn't rely on what has been negotiated with the individual employee to reduce his/her own obligations prescribed by the collective agreement, to increase the obligations of the employees or to take away concessions obtained by the union.

The collective agreement in the case of an individual negotiation round, then, has to be addressed as the contract setting those requirements of protection under which the individual social partners couldn't negotiate.

Quoting the Supreme Court infact,:

“Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay...collective bargaining...; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement...Whenever private contracts conflict with the Board's functions, they obviously must yield or the Act would be reduced to a futility”

An additional safeguard for the employees is provided by the NLRA itself, which in its section 9(a) allows employees to present and adjust grievances directly with employer, provided that:

3. the adjustment is not in contradiction with the collective agreement;
4. it has been given to the union the possibility to be present at the time the adjustment would be negotiated.

The collective bargaining, instead, differs from the individual contracts first of all because it is a written agreement occurring between the employer and the union which defines: the relationship between them, the relationship among the employer and the employees and the relationship between the employees

22 It has to be noted anyway that: *“Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargaining to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive to industrial peace as disadvantages”*. For this reason infact individual contracts are sanctioned by collective agreements in many branches of the entertainment industry, including the professional sports.

23 SUPREME COURT, *J.I. Case Co. vs NLRB*, 1944

themselves.

The collective agreement, then, is not an employment contract – as it is the case of the individual contract – but it is a document which has to be utilized to settle the terms of the employment relations to adopt when new employees are hired or to modify the discipline of those already hired.

We could infer then, that the nature of these contracts is that of an ordinary voluntary commercial contract.

It is infact, the outcome of a relationship prescribed by law; it deals with a complex and ongoing relationship that sets out the rights of each parties and, being subjected to periodic negotiation – it cannot be expected infact, to provided a detailed guidelines for both all the existing circumstances and the future contingencies - it is determined to last for considerable time into the future.

This nature (ordinary voluntary commercial contract) is confirmed even by the successorship regulation which in the American labor relations is typically referred to “contractual successorship”. The new employer (i.e. the successor), infact, has the duty to respect the terms and conditions set out in the preexisting collective bargaining except if:

3. new workforce is hired;
4. the successor has a good-faith reasonable doubt about the already existing union's majority status.

Back to the NLRA provisions, one of the most important one concerning collective bargaining is the section 8(d) which requires both the employer and the union not only to meet and confer at reasonable times but also to bargain in good faith.

This requirement means that both parties have to really try to reach an agreement, they have to enter into negotiations pursuing that end.

It has to be noted anyway, that this section doesn't oblige the parties neither to accept the other party's proposal if this is against its interests nor to make any concessions – this is left to the parties' will and to their negotiation strategy²⁴.

Moreover, if an impasse has been reached – i.e. when both parties are stick to their positions and no compromise seems to be possible to reach – the good-faith principle provides the possibility to suspend future meetings until circumstances

24 SUPREME COURT, *Truitt Manufacturing Co. vs. NLRB*, 1956

change enough to break the deadlocked.

The outcome of this general principle is that, in order to demonstrate bad faith before the court, the party claiming for it has to rely on the substantive nature of proposals made by the other party or on the tactics and conduct employed by it.

The approach in any of these cases anyway, is to look at the whole conduct of the party. This means that a violation of section 8(d) could also result from several events that, if addressed separately from one another, could also not represent bad faith²⁵.

Of course, a party's bad faith has to be investigated case by case because of the extent of the circumstances which could give rise to it, but the Board together with the courts have identified some situations from which the bad faith could be inferred, independently the actual reasons which had moved the parties.

With regard to the content of proposals bad faith could be presumed when:

- according to the employer's proposal he/she maintains full authority, being this a clause which no employee representative could never accept²⁶;
- a proposal is signed that would lead to a detriment of the employees conditions with respect to those which had been applied before the unions had been appointed²⁷.

With regard to the conduct or tactics in negotiations, the bad faith could be inferred when:

- the employer adopts dilatory tactics by changing his/her mind when an agreement seemed to have been reached²⁸;
- the employer hasn't made any effort to reach an agreement and he/she has also threatened to postpone negotiations until the union have dropped charges of unfair labor practices which it had previously lodged against the employer himself²⁹;
- the employer has adopted a “take it or leave it” attitude for all the time the negotiations have been carried on³⁰;

25 SUPREME COURT, *NLRB vs. Cummer-Graham Co.*, 1960

26 SUPREME COURT, *Alba-Waldensian Inc. vs. NLRB*, 1967

27 This is evidence for the union's refusal to bargain in good-faith.

28 On the other hand, if the employer withdraws earlier offers this doesn't mean necessarily he/she is in bad faith. It is not so, in fact, whether none of his/her earlier proposals had been unconditionally accepted by the union.

29 SUPREME COURT (10th Circuit), *NLRB vs. Southwestern Porcelain Steel Corp.*, 1963

30 SUPREME COURT, *General Electric Co. vs. NLRB*, 1964

- the employer refuse to bargain about racial discrimination³¹ (in this case he/she also violates section 8(a)(5) if the refusal concerns the practices already adopted by the company meanwhile it is negotiating for the inclusion of a nondiscrimination clause in the new contract);
- the employer wouldn't provide the union the required information (or he/she delay in doing so).

The core of the collective bargaining regulation, anyway, it's the part concerning its subjects.

The Board together with the courts have divided them in three major categories, as we have already outlined: mandatory, permissive and illegal.

If defining the category of the illegal subjects has been relatively easy, the differences among the mandatory and permissive ones instead have to be traced by the Supreme Court that through its rulings had provided the foundation to address questions concerning this not-so-easy dichotomy.

The starting point for the Board and the courts, anyway, had been the NLRA.

Precisely its sections 8(5)³² and 9(a)³³.

The Board started to draft the guidelines to recognize which has to be considered a mandatory subject. These guidelines hadn't been modified so much with the later adoption of the Taft-Hartley Act³⁴.

In response to those who sustained that the Board and the courts couldn't well-interpret the changes in the economy and in the society, but it would have been better if the Congress would have defined the substantive bargaining, Justice Stewart – joined by Justices Douglas and Harlan – stated that:

“There was a time when one might have taken the view that the National Labor Relations Act gave the Board and the courts no power to determine the subjects about which the parties must bargain...But too much law has been built upon a contrary assumption for this view any longer to prevail, and I question neither the

31 SUPREME COURT, *United Packinghouse, Food & Allied Workers vs. NLRB*, 1969

32 “It is an unfair labor practice for the employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)”.

33 “The employee bargaining representative shall be the exclusive representative of all the employees...for the purpose of collective bargaining in respect of rates of pay, wages, hours of employment or other conditions of employment”

34 Actually, by adding the section 8(d) the phrase “wages, hours of employment or other conditions of employment” which the Board had analyzed in the context of section 9(a), becomes “wages, hours and other terms and conditios of employment”, testifying that not so basic changes had been done to this part.

power of the Court to decide this issue nor the propriety of its doing so”³⁵.

The first case in which the Supreme Court had addressed the question of bargaining subjects was one occurred in 1952 and being the only major decision of the Court (before the Borg-Warner that we would referred immediately after) it has to be described in detail.

The case is named NLRB vs. American National Insurance Co.³⁶ and it is well-known because for the first time the Court has opposed a Board's statement.

In the specific, the NLRB had waived a claim of violation of section 8(a)(5) by an employer that had conditioned a collective agreement to the inclusion of a broad management-rights clause according to which certain subjects (i.e. promotion, demotion, discharge, discipline, work schedules) wouldn't be negotiable³⁷. The employer had done so, in response to the previous proposal of the union which effectively asked for unlimited arbitration.

The parties continued to bargain and reached an agreement on other matters but for that specific clause they deadlocked.

According to the Board, the clause per se wasn't unlawful but it stated that the insistence upon it was against the law because this level of insistence was a derogation of the obligation to bargain over conditions of employment.

From its side, the Court instead argued that such broad management-rights clauses were common in the recent collective bargaining agreements and it added that the Board's allegations had been an undesired interference with the collective bargaining process itself³⁸.

The broader significance of this ruling is that it addressed the collective bargaining as a method to solve industrial disputes, while on the other hand it minimized the role of the Board in questioning the content of the bargaining proposals.

35 SUPREME COURT, *Fibreboard Paper Prods. Corp. vs. NLRB*, 1964

36 SUPREME COURT, *NLRB vs. American National Insurance Co.*, 1952

37 The clause provided “The right to select, hire, to promote, demote, discharge, discipline, for cause, to maintain discipline and efficiency of employees, and to determine schedules of work is the sole prerogative of the Company and...such matters shall never be the subject of arbitration”

38 “Bargaining for more flexible treatment of conditions of employment would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices. On the contrary, the term “bargaining collectively” as used in the act has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States”

The Court has later added that also the industry collective bargaining practices are highly relevant in deciding which subjects are mandatory³⁹ and that the Board - not the courts - should be held primary responsible for the determination of which subjects declared mandatory.

Furthermore it has stated that, where it is necessary to decide whether certain managerial decisions are mandatory subjects the benefits that would derive from them to the bargaining process must be balance with the employer's need for unlimited decision making in certain areas which directly affect his/her business – the employer, for instance, could have a “great need for speed , flexibility, and secrecy in meeting opportunities and exigencies”⁴⁰.

However the most important case concerning the subject of the collective agreement is the NLRB vs. Borg-Warner Corp., Wooster Division case⁴¹.

This ruling drafted the distinction between mandatory and permissive bargaining subjects which is still in used today.

In this occasion, differing from its first sentence, the Supreme Court agreed with the Board's analysis which introduced for the first time the distinction between mandatory and permissive subjects.

In order to rule the case, the Court has also reinterpreted sections 8(a)(5) and 8(d) stating as follows:

“Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to wages, hours and other terms and conditions of employment...The duty is limited to those subjects and within that area neither party is legally obligated to yield...As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.”

In the case before the Court, the employer – even if he/she has bargained in good-faith on wages, hour and other terms and conditions of employment – had insisted that the agreement had to include:

3. a recognition clause which would have granted recognition only to the local union, even if the international union in this case was that certified by the Board as representative;

39 SUPREME COURT, *Ford Motor Co. vs. NLRB*, 1979

40 SUPREME COURT, *First National Maintenance Corp. vs. NLRB*, 1981

41 SUPREME COURT, *NLRB vs. Borg-Warner Corp., Wooster Division*, 1958

4. a ballot clause according to which nobody could lead a strike regarding non-arbitrable issues until all the employees of the unit (even the non-unionized ones) had voted on the company's last offer – this would have permitted to the company itself to submit another proposal within 72 hours to a similar secret ballot.

According to the Court, both of the proposed clauses weren't mandatory subject since they didn't involved wages, hour and other terms and conditions of employment and, agreeing with the Board, it held that the insistence carried on by the employer to include such non-mandatory bargaining subjects constituted a refusal to bargaining over those matter which instead, were mandatory, meaning that the employer's conduct were unlawful.

The broader significance of this case then is that a party, independent to the good-faith in bargaining, commits an unfair labor practice when it insists to impasse upon the inclusion of a permissive subject – which, then, is a subject which is outside the scope of “wages, hour and other terms and conditions of employment”.

The Court has then intervened again in the definition of mandatory subject, redefining it to include those subjects which “vitaly affect” the employee⁴².

According to the Court “matters involving individuals outside the employment relationship...are not wholly excluded from the mandatory bargaining subjects”. This means that the mandatory subjects category would be expanded to include matters that relate directly to non employees (for example, those who are retired) or to conditions outside the bargaining unit but which nevertheless have a substantial impact on the employees of the bargaining unit.

Taking a closer look to the mandatory subjects of the collective bargaining, we could better define what they deal about:

- “Wages” = it covers the most common forms of compensation for the performed labor, as well as most types of agreements designed to protect standards of compensation. In general it comprehends basic hourly rates of pay, piece rates and incentive wage plans, overtime pay, shift differentials, paid holidays, paid vacations, severance pay and compensation for

42 SUPREME COURT, *Allied Chemical & Alkali Workers Local 1 vs. Pittsburgh Plate Glass Co.*, 1971

services performed⁴³;

- “Hours”= it includes the work schedules and whether there should be Sunday work;
- “Other terms and conditions of employment”= it includes provisions for a grievance procedure and arbitration, layoffs and recalls, discharge, workloads, vacations, holidays, sick leave, work rules, use of bulletin boards by unions, change of payment from a weekly salary to an hourly rate, definition of bargaining-unit work, performance of bargaining-unit work by supervisors, employee physical examinations and duration of the collective bargaining agreement.

As for what concern the permissive subjects of bargaining, as it was outlined in the Borg-Warner Corp. case, these are those subjects over which the parties are free to bargain even though they do not fall within the mandatory subjects area.

There is no obligation to bargain on these subjects and if a party refuse to do so, this is not a violation of section 8(a)(5) or 8(b)(3).

Moreover, if there has been a voluntary bargain regarding a permissive subjects the refusal to include in within the final draft of the contract is not unlawful.

Furthermore, a party's conduct related to a permissive subject could be used as evidence of good or bad faith in bargaining.

It has to be noted that, when a permissive subject is included in a collective bargaining this doesn't become a mandatory subject for the mere fact it has been agreed upon⁴⁴. This means that, once that agreement has expired there is no obligation pending upon the parties to bargain over that permissive subject again⁴⁵.

The Court, in accordance with the Board, having noted that these subjects could have costs which would influence the employer's wage proposal, stated that the union couldn't unilaterally select which part of the employer's package offer accept, this would stand for a refusal to bargain⁴⁶.

43 Even if nowadays there is a federal imposition of a wage and price controls, several decisions have reinforced the rule that, despite subject to governmental wage controls, this is still considered a mandatory subject.

44 SUPREME COURT, *Allied Chemical & Alkali Workers Local 1 vs. Pittsburgh Plate Glass Co.*, 1971

45 Once an agreement including a permissive subject is agreed upon, section 8(d) of the NLRA requires that this agreement would be written down.

46 SUPREME COURT, *Nordstrom Inc. vs. NLRB*, 1977

Among these subjects there are the performance bonds and the surety bonds on which a party rely upon in order to get indemnity against a contractual breach of the other party.

Moreover, if the employer so decide, even the corporate organization, size and composition of the supervisory force, general business practices and location of plants could become permissive subjects.

Dealing now with the illegal subjects of bargaining, in 1948 the Board stated that insistence upon an illegal provision – to include it in the agreement – violates the duty to bargain.

Cases involving these subjects generally arise where other index of bad faith are present⁴⁷.

Moreover, even if the distinction between permissive and illegal subjects might be seen of a little significance, its importance is in a formality. Precisely, when both parties have agreed upon the inclusion of the clause while if this is a permissive clause it is embodied within the agreement at least until that contract has expired; if this is an illegal clause it has to be deleted by the text of the agreement and both parties would be held responsible for its inclusion.

The typical illegal provisions are the discrimination clauses, the “closed shop” clauses – prohibited by section 8(a)(3) and 8(b)(2) of the NLRA – and the “hot-cargo” clauses – prohibited by section 8(e) – that we would address immediately after.

Another issue that differ very much from the civil law tradition is that of inserting clauses which prescribe the membership of a union as mandatory within the collective agreements.

During the ages, infact, unions have always tried to include some clauses within the collective agreement that would effectively make all workers in the bargaining unit become members of the union. Some of these are lawful, some instead are illegal.

The most famous one is the “closed-shop” clause, according to which being a member of the union is a condition of employment that the employee has to meet before hiring. This is illegal, as we have already seen.

Then there is the above-mentioned “hot-cargo” clause, according to which the

47 There isn't any decision which has never stated that the NLRA is violated only by the proposal of an illegal subject.

employer is prevented to enter into an agreement with a third party with which the union has or may have a dispute. This too is illegal.

Furthermore we find the “union shop” clause, according to which becoming member of the union is mandatory after being hired⁴⁸. This clause is legal provided that the union which the employee has to join is the majority representative.

Then there is the “agency shop” clause, according to which even if the full membership of the union is not required, all the employees have to pay dues and initiation fees regardless of whether they join. This clause is also legal.

To conclude we have to address the changes in the American labor law. As in the rest of the World globalization and mobility of capital has decreased pressure on wages and undercuts the key mission principles which supported the Act.

Moreover the legal discipline of the employment contract has shifted from being totally ruled by private to having a framework sets out by severe federal and state regulation – i.e. Right-to-Work Laws.

Furthermore in the area left to the privates, the effects of the globalization could be seen also in the union action (at least in that of the strongest of them – which are still very few) which in the recent years is trying to adopt a bargaining scheme similar to the civil law national level contracts – through the pattern bargaining procedure that we would better see in the dedicated sub-paragraph.

According to a research lead by one of the most important trade union at the beginning of the 2016⁴⁹, most of the collective agreements are going to expire this year and, especially if the bargaining unit would be able to follow the pattern bargaining example, most of the American workers are likely to see their wages increases, this being the first time that it would happen after the financial crisis.

It is now time to describe in details which are these unions in charge to negotiate or, as the NLRA itself named them “the appropriate bargaining unit”.

48 Section 8(a)(3) of the NLRA provides for a grace period of 30 days after the hiring, before the membership becomes mandatory

49 AFL-CIO, *Collective Bargaining in 2015-2016: Analysis and Lists*, Center for Strategic Research, 2016

1.3 The “Appropriate Bargaining Unit” concept

The first provision concerning the representative union within the NLRA, is the section 2(5) which states that “the term “labor organization” means any organizations, or agency or a workers representative committees or plan within which employees actively participate and which exists with the purpose to, wholly or partially, bargain with the employer on subjects concerning grievances, working hours, or more generally on working conditions”.

During a cause⁵⁰, anyway, the Board declared that if the aim of a certain organization is limited to mere managerial or arbitration function it isn't a “labor organization” as those described by section 2(5) even if it formally negotiates.

There are other labor organizations that cannot be comprised within the section 2(5), those which consist only of a group of workers which join together to represent to the employer their position on a certain matter with not specific aim of reaching a compromise⁵¹ - so they neither negotiate.

A bargaining unit instead, is constituted by two or more employees which are grouped together with the specific aim of affirming their organizational rights or for collective bargaining - this unit, infact, provides the formal platform of the entire bargaining process.

The size and composition of the bargaining unit, however, is often subject to debate between employer and employees.

For this reason, as we have already outlined above, usually the Board itself is called to recognized a unit as representative – so to be allowed to take part into the negotiations, a unit has to be certified by the Board.

In the NLRB Annual Report of the 1951, it is stated that, in order to solve the unit issue “the Board's primary concern is to group together only employees who have substantial mutual interests in wages, hours and other conditions of employment” (the mandatory subject). This means that before certifying a union as representative, the Board has to investigate whether the employees who compose it share a community of interests.

Despite of this “principle”, anyway - since there are wide differences in the forms

50 SUPREME COURT, *Electromation vs. NLRB*, 1993

51 See the debate over the difference between the terms “dealing with” - typical of these kind of organizations – and “bargaining with” - which marks the real and effective bargaining unit. This debate is summarized in SUPREME COURT, *Polaroid Inc. vs. NLRB*, 1999

an employees' organization could assume due to the complexity of the modern industry - detailed criteria to guide the Board when it has to determine whether a union is representative couldn't be provide so that the Board would have to decide on a case-by-case basis.

To help the Board in its investigation, then, section 9(a) has used the general term “appropriate”⁵² and section 9(b) has set out the broad standard of “in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act”.

The Board then, has wide discretion in effectively determine this unit but the Congress, when the NLRA was amended in 1947, has imposed some restrictions:

- professional employees may not be included in a unit with other employees unless a majority of the professional vote for inclusion in that unit – section 9(b)(1);
- the Board may not decide that any craft unit is inappropriate on the ground that prior Board determinations established a different unit – section 9(b)(2);
- guards may not be included in a unit with other employees, and any organization that admit other employees to membership – section 9(b)(3);
- the extent of union organization shall not be controlling in determining whether a unit is appropriate – section 9(c)(5).

Together with all the restrictions and requirements the Board has to bear in mind when called for decide whether a certain union is representative that it has to carry on also other tests, including:

- the extent and type of union organization of the employees;
- bargaining history in the industry (if there is a longstanding bargaining unit, established by agreement or by certification, which carries on a very successful bargaining process for quite long time);
- similarity of duties, skills, interests and working conditions of the employees (i.e. a community of interests among the employees);
- organizational structure of the company⁵³ (change in an employer's

52 “Representative designated or selected for the purposes of collective bargaining by the majority of the employees in a a unit appropriate for such purpose, shall be the exclusive representatives of all the employees in such units...”

53 Usually, an employer wish that the collective bargaining unit coincides with his/her organizational or administrative structure. Lines of supervision and level of functional

organizational structure could affect workplace conditions and alter the established bargaining units);

- the desires of the employees (when there are two or more equally appropriate units, this test becomes fundamental. To understand which one of them has to prevail the Globe doctrine is applied⁵⁴)

There is, of course, the possibility to enter into negotiations with a union which hasn't been defined as "bargaining unit" yet by the Board.

This happens when both parties agree upon to be covered by the contract negotiated by that unit, in order to make the collective agreement effective⁵⁵.

Moreover, even when the Board has recognized a union as the representative unit the parties could decide to negotiate with a different union which both recognized⁵⁶. There could be, then, situations in which multiple bargaining units could be applied to the employees within a certified unit or one unit could include more than a single certified unit⁵⁷. In both of these cases, anyway, it's up to the party to decide how these units have to be combined through a consensual agreement.

Furthermore, in the case where there are several units which could be applied to the same group of employees, the parties have to decide which among them is covered by the contract.

It has to be noted anyway, that the scope of a certain unit couldn't be seen as a mandatory subject so the parties don't have the right to ask to bargain over it: while clauses concerning the jurisdiction of the union or the assignment of work are mandatory subjects of bargaining in general, these clauses have to be investigated by the Board in order to determine whether their inner aim is to modify the scope of the unit – being then a permissive subject⁵⁸.

integration in the employer's operations are important factors to determine the unit, factors that the Board has to keep in mind.

54 This requires that an election has to be announced among the employees to determine which desire has to prevail so that the unit which stands for it is the one which has to be recognized as representative (SUPREME COURT, *Globe Machine & Stamping Co. vs. NLRB*, 1937)

55 "The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining"

56 "But the party seeking to alter the unit (recognized by the Board) may not insist on the alteration to the point of impasse". This in fact would constitute a violation of section 8(a)(5) as we have seen above.

57 This kind of "consensual bargaining pattern" could assume very different forms. Some issues could be negotiated in local units while others in larger units (for example, it's pretty common that the negotiating unit dealing with pensions to be larger than those dealing with seniority)

58 SUPREME COURT, *Western Newspaper Publishing Co. vs. NLRB*, 1984

When we refer to the “parties” of the collective agreement, we could refer essentially to this kind of subjects: those who are essential and those who are additional.

For what concern the essential parties these are: the employer/employers in the unit/units covered by the agreement or the association to which the employer has delegated bargaining authority on one side, and certified bargaining unit or other representative of the covered employees (i.e. the non-certified representative selected by the majority of the employees in an appropriate unit).

What regard to the additional parties- those who are not obliged to enter into a specific bargaining - instead this could be:

3. the international union as well as the local, where only the local is certified;
4. the local union as well as the international, where only the latter is certified;
5. the employer as well as the employer association, where it is an employer-association-wide union;
6. the employer association as well as the employer.

If both parties agree, the law would recognize their presence as effective but, as we seen above, a party couldn't insist – till an impasse point is reached - on adding these parties to the negotiation⁵⁹.

Addressing now, the procedure to select which would be the bargaining representative we have immediately to state that this is a permissive subject.

This means that a union is found guilty of violating both section 8(b)(1)(B) and section 8(b)(3) of the NLRA when it insists for the designation by the employer of an association of employers as his/her bargaining representative – the employer has the right to choose whether enter into negotiation alone – or when it insists that a multi-employer association submit to its national office any agreement it signs for approval⁶⁰.

Viceversa, the employer violates the same sections of the NLRA when he/she insists on the acceptance by a union of a grievance procedure that first of all would forbid union representation and secondly it would state that only the

59 It has to be noted, anyway, that a union is found guilty of a refusal to bargain when it refuses to accept to bargain with the employer association when the employer with which it has to negotiate is a part of an established multi-employer unit which that association represents.

60 SUPREME COURT, *Electrical Workers (IBEW) Local vs. NLRB*, 1985

representatives of an international union could participate to the negotiation⁶¹ – with this proposal the employer attempts to smother the industrial disputes which are more common to rise if a local union is involved in the bargaining process.

Moreover, an employer couldn't refuse to meet with a union on the simple ground that it includes a non employee.

On the other hand, anyway, since a union-recognition clause is not a mandatory subject, if an employer decides not to adhere to a bargaining-unit provision which is applied to all the local enterprises when he/she acquires new sites, there is no violation of section 8(a)(5) provided that this provision is included in a contract which is expired. This because the employer hasn't had formally recognized those specific union within the new sites during the terms of the contract⁶².

As we have already had the possibility to infer from everything stated above, the NLRA express two core principles for what concern representativeness: the majority principle and those of the union's exclusive representation rights.

This means that, a union which has been chosen by the majority of the workers within a unit would be the only one which can represent their interests during the negotiations. This is valid not only for the negotiation of the collective bargaining agreement, but also for its administration.

The majority principle, then, followed the political model of the democracy of the majority, according to which the will of the most of the population is superior to those of the individual.

Moreover, the privilege status obtained by having reached the majority is in conjunction with the duty to represent all the employees of the unit, without discriminate those who aren't unionized.

The individual employee is, then, a “third-party beneficiary” of the terms of the collective agreement since he/she enjoys common benefits that he/she might not be able to obtain through individual negotiation with the employer.

The exclusivity principle, instead, impedes to an individual employee to attempt to reverse the majority's will, unilaterally modifying terms and conditions of the employment relationship. It is relying on this principle that the NLRA forbids, speaking in general terms, either the individual bargaining or those with groups of workers which are independents from the union.

61 SUPREME COURT, *Tomco Communications vs. NLRB*, 1975

62 SUPREME COURT, *Triple a Maintenance Corp. vs. NLRB*, 1987

Furthermore, this principle is another reason of difference between the American industrial relations system and those adopted by the civil law countries which instead give the possibility to seat on the negotiating table to more than one union. The outcome of the application of this exclusivity principle in the US is that the fragmentation and the dissolution of the negotiating power reached by the employees through the collective agreement is prevented.

It has to be noted then, that a union which acts in its own self-interest and which uses only lawful means isn't subject to claims under the antitrust laws.

These laws are applied to the union in fact, only when:

- the union combines with non-labor groups (i.e. employers);
- the outcome of these combinations is a restraint of interstate trade and commerce.

Of course, as long as employers and unions bargain over those subjects on which they are required to bargain (i.e. the mandatory ones) they are automatically exempt from the antitrust laws.

After having described the legal basis of the industrial relations and their developments through the case law, it's now time to address the two different paths the US States have followed to get out of the crisis.

On one hand, we have the Right-to-Work Law adopted by the Republican States which we have already outlined and on the other hand there is the Pattern Bargaining model, the contractual form which is closer to the European model because it consists on a labor relations process on which a union signs a new agreement with a single-employer unit and it uses it as precedent to ask for the same results, or even greater, during the negotiations with other companies of the same sectors.

2. Right-to-Work Laws

2.1 Historical Background

Right-to-Work Laws consist in a State-law which aims at strengthen the employers' rights to manage the company against employees by decreasing union dues revenues while increasing their expenses for representation.

From May 2016, these laws are not included in the US labor and employment regulations anymore, but they have been operational for more than a half decade and they are still in force in those States which have adopted it before that previously-said date.

According to the Legal Defense Foundation, this laws prohibit union security agreements. These clauses have been recognized as legally enforceable by the NLRA itself.

Section 8(a)(3), infact, prescribes that the employer has the right to discharge an employee for lack of union membership where a valid compulsory membership agreements exists provided that:

- the employer has no reasonable grounds to believe that membership was unable to the employee “on the same terms and conditions generally applicable to other members”;
- the employee's union membership was denied or terminated for failure of the employee to pay the periodic dues and initiation fees uniformly required to all the workers as a condition to acquire or retain membership.

This second condition is the main targeted by the right-to-work laws.

These are infact, a government regulation of the contractual agreements between employers and unions which prevents the latter to ask for a mandatory payment of the union fees – necessary to support the bargaining costs – to all the employees, even those who are not unionized.

The core principle of these laws is that each worker has to be free to decide whether to pay a contribution to the union or not.

These laws have been criticized from not only the unions but also from legal expertise, judges, politics, economists.

They are typical of the Republican States and we would see in this paragraph,

trying to sketch a socio-economic analysis of this phenomenon, why it has been so.

Before addressing the core of the debate anyway, it could be useful to give an historical background of the origin of this concept.

First of all it has to be said that support to unionization comes directly from the NLRA which states, in its Section 1, that:

“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow commerce and tend to aggravate recurrent business depressions by depressing wage rates and purchasing power of wage earners in industry and by preventing the stabilization of wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment and interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees...

It is hereby declared to be the policy of the United States to eliminate the causes of substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection”.

According to this statement then, the equality of bargaining power is the only way to let the workers negotiate fairly with the employers and the full freedom to organize is needed to reach this equality. So it could be inferred from this statement that the right-to-work laws are not supported by any the Federal Law.

This is not true anyway.

Employers infact, had always opposed such equality of bargaining power and had organized to undercut the protections given to the employees by the NLRA.

They have succeeded in their purpose using the emerging anti-communism flow - which had been spreading because of the beginning of the Cold War - the result of this pressure being the approval of the Taft-Hartley Act.

Even if this Act hadn't directly amended the declared favor to the equality bargaining power or the right to collective bargaining, it had introduced an internal tension within the law stating on one hand, the employees' collective rights to protect their interests through the membership of a union which has an equality bargaining power and, on the other hand the individual's right not to join any unions if he/she doesn't want so⁶³.

Furthermore this Act, inserting Sections 14(b) in the NLRA, declared “closed-shops” illegal and limited “union-shops”, allowing the use of them only in those States where requiring union membership as a condition of employment is considered lawful - also called “union security clauses”.

The States which had then adopted laws which forbidden these latter clauses had been called Right-to-Work States – even if, as we would see, nothing in these laws would give anyone the right to work.

Being so risky for the equitable bargaining power, these right-to-work laws have been legally challenged since the first period of their adoption.

Unions opposed these laws on several grounds:

- that they hindered freedom of speech, assembly and the right to petition;
- that they were in conflict with Art. 1 Section 10⁶⁴ of the US Constitution since they lessen the obligation of contracts which has to be of a primary importance for their enactment;
- that they denied equal protection of the laws;

63 From that moment it has been considered an unfair labor practice – violating the section 8(a)(3) of the NLRA itself – for an employer to encourage or discourage union membership. Moreover, union leaders had to sign non-communist affidavits, plus it has been granted to the employers to “express their opinions” against unions during organizing drives so that the neutrality, required by the NLRA, had been abrogated.

64 “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.”

– that they denied due process since it interferes with liberty of contract.

Each of these arguments had failed. In 1949 the Supreme Court⁶⁵ stated that these right-to-work laws were lawful and that the Taft-Hartley Act was lawful by extension.

Moreover, these laws have been addressed as anti-discriminatory because they ensured that unionized and un-unionized workers would have been treated equally with regard to their right to obtain and retain jobs.

It hadn't been taken into account the unions' concern about the negative impacts of such laws on their equality of bargaining power and on the right of self-organization for stability of wages, granted in the NLRA⁶⁶.

After a period of legal stabilization – started on 1980s - with “only” 14 States that chose to adopt these laws, the 2008 financial crisis and the general changing political climate at the end of the first decade of the 2000s – which have brought, through the 2010 election, the Republican governors to power in several US States – it has been registered a new strengthening of the Right-to-Work movement, which has led in March 2011 to the adoption of a National Right-to-Work Act before the US Congress.

Most of the legal scholars – i.e. those who oppose this set of rules - stated that this phenomenon is attributable, together with the “natural” widespread fear subsequent to periods of such a great economic recession as those started in the 2008, to the “Southerization” of the US labor relations which has resulted not only to address the private section unionism, but this time it has also targeted the public employees unionism as well.

To better understand this phenomenon, we have to examine the economic policy of the Southern States.

The characterizing factor has been the predominance of slavery as the foundation

65 SUPREME COURT, *Lincoln Federal Labor Union n°19129 vs. Northwestern Iron and Metal Co.*, 1949

66 Indeed, the Court stated that “there was a period in which labor union members who wanted to get and hold jobs were the victims of widespread employer discrimination practices. Contracts between employers and their employees were used by employers to accomplish this antiunion employment discrimination. Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave there required agreements the name of “yellow dog contracts”. This hostility of workers also prompted passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts”. In this way, according to the Court, if it was possible to ban yellow dog contracts the same has to be done for the discrimination against those who do not want to join the union.

of an economic system which had lasted for over 250 years, until the 1865 Civil War led this system to a conclusion.

Another driver factors has always been the culture, which is considered one of the main reason for the widespread of those laws in many other states.

According to Hogler⁶⁷ infact, “slavery and its underlying social structures” has created the “basis of hierarchical individualism as a worldwide”.

The US Southern States infact, are characterized of decreased union density, lower general trust, higher amounts of religiosity – very close to sanctimony – a propensity to violate labor laws when opposing the unions and so a greater possibility to adopt right-to-work laws in comparison with the other States.

But to deeply understand how this “contamination” of non-Southern States has been possible we have to analyze the role of the South in the adoption of the New Deal in 1930s.

Franklin Delano Roosevelt, infact, was strongly supported by the Southern Democrats both in the Senate and in the House – the two US political Chambers – so that he had to be careful to not embodied in his New Deal any provisions which attempted to overturn hierarchy – based on the race - existing in those States.

The result of this compromise was that agricultural and domestic employees had been excluded from the application of the guarantees prescribed by the NLRA – i.e. the right to unionized and to collective bargain with the employers. Traditionally infact, those works had been carried on mostly by Afro-American employees.

This link between labor provisions and South's racial hierarchy is proved also by the fact that in the early 1940s, the first organization to promote the right-to-work laws was the Christian American Association (CAA), based in Huston⁶⁸, which was strongly connected with the Texas Ku Klux Klan and the American Legion⁶⁹.

The Southerization of the US working class, anyway, had started during the World War II, when white workers coming from the South emigrate to the North Central and Western States.

The majority of them had been employed as industrial workers in small cities,

67 HOGLER R.L., *The end of American labor unions: the right-to-work movement and the erosion of collective bargaining*, Santa Barbara: Praeger, 2015

68 Texas is still today one of the US State that has the most racial discrimination issues.

69 Vance Muse was CAA leader and before sustaining the adoption of the right-to-work laws, he opposed women's rights, child labor laws, racial integration and the New Deal itself.

trying to move to suburban enclaves. At the end of the 1970s, anyway, these workers were employed as skilled-blue collar workers, in unionized industries and they were well-compensated.

While the adoption of the right-to-work laws in the South was strictly connected to the maintenance of the white superiority in the region, the strategies which had been utilized during the 1940s and 1950s in the Western States had been completely different. In some States infact, the un-American nature of the union shop had been stressed, in others the core had been to have the possibility to remove corrupted union officials from leadership positions.

Among the strongest oppositors of the propaganda for the adoption of this law in California – the most liberal US South State – there was the National Association for the Advancement of Colored People which created the slogan “Keep Mississippi out of California” and outlined that those groups which promote this law were the same groups which opposed implementation of fair employment practice laws.

Even Martin Luther King opposed this set of laws, stating that:

“ In our glorious fight for civil rights, we must guard against being fooled by false slogans, such as “right-to-work”. It is a law to rob us of our civil rights and job rights. Its purpose is to destroy labor unions and the freedom of collective bargaining by which unions have improved wages and working conditions of everyone...Wherever these laws have been passed, wages are lower, job opportunities are fewer and there are no civil rights”.

The widespread of these legislation, as we said, is attributable to the transposition of the Southern workers which, starting from their second-generations had remade the working class, reshaping consequently politics at both national and state levels.

The greatest example of the political strength gained by the right-to-work laws has been the Nixon's “Southern Strategy” with which he opposed the use of busing to end school desegregation and appointed conservatives to the US Supreme Court. Thanks to this strategy he won the elections and it was this same strategy that opened up to the effective Southerization of the US policy.

From an international point of view, on the other hand, the opposition to this laws hadn't be so strong as it was expected.

The Supreme Court, infact, hadn't been the only one to not consider the unions'

concerns.

Even the ILO hadn't take no position in regard to these laws but it, at least, had refused to put the right to not join a union at the same level of those to join it.

In 1948 and in 1949 infact, it adopted two conventions – the number 87⁷⁰ and the number 93⁷¹ - dealing with the right to organize and promote collective bargaining.

These conventions hasn't expressed themselves on the question of the union security agreements. The reason for this is that the employers members of the ILO asked for using a language similar to those used in the Taft-Hartley Act, in the ILC (International Labor Conference – the policy making body of the ILO) to address the right for a worker to not join a union.

Beside this, some of the same employers, sustained that the ILC had also to fully safeguard freedom of expression, meaning that no obligation to organize could be impose to both workers and employers.

On the other hand, the workers side of the ILO stressed that the right to join couldn't be put at the same level to those of not join. For this reason it opposed any inclusion of clauses guaranteeing it within the international regulations.

The result of this debate, as we have already outlined, was that the ILO decided not to include such language in its Conventions but, without taking a clear and firm position, it left the matter to the Member States. This means that even at an international level the US recently adopted Taft-Hartley amendments were lawful. The real impact of the Taft-Hartley Act, anyway, hadn't been perceived until the 1970s and the advent of neo-liberal globalization, the fundamental basis of which being the de-unionization and casualization of work.

In those period the NLRB, especially when the majority of its appointees were Republicans, had taken decisions which had elevated the workers' individual rights not to join unions over the collective needs for solidarity of the workers,

70 This Convention protects the right of freedom of association to form and join unions without restriction. Moreover, it guarantees the right of employers and workers to establish their own constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.

71 This Convention grants protection against acts of anti-union discrimination – i.e. unjust dismissal, suspension, transfer and demotion of workers only because of their trade union membership. Furthermore it protects workers' and employers' organizations from interference against each other and recognizes the employees' collective bargaining right.

Additionally it requires Member States to take appropriate measures to encourage and promote collective bargaining between social partners, in order to regulate the terms and conditions of employment through it.

relying on Section 14(b) of the Taft-Hartley Act.

This was possible in that period because the managements didn't worried about committing unfair labor practices since the limited remedies available to workers in this sense – infact, the NLRA has granted plenty of such remedies only to the unions.

During this period anyway, there was an international intervention.

International laws, infact, have developed since the ILO's adoptions of those early Conventions we've quoted above.

The right of workers to form and join trade unions in order to have their rights better protect, is a universal human rights and it is recognized within both human rights and labor laws, binding on all States.

The first statement on this matter could be found in Article 23 of the Universal Declaration of Human Rights which states that:

- “ (1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
- Everyone, without any discrimination, has the right to equal pay for equal work.
 - Everyone who works has the right to just and favorable remuneration ensuring for himself (and herself) and his (or her) family existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
 - Everyone has the right to form and to join trade unions for the protection of his (or her) interests.”

From this statements could be inferred that national laws must treat trade unions in a manner which allows those who decide to become union members to be able to effectively protect their interests – in this way favorable remuneration and conditions of work could be achieved, ensuring an existence worthy of human dignity.

This Declaration had been the basis of two Human Rights Treaties which better integrate the Declaration itself: the ICCPR (International Covenant on Civil and Political Rights) and the ICESCR (International Covenant on Economic Social and Cultural Rights). The first one had been ratified by the US in 1992 while it had only signed – without ratifying – the ICESCR.

Both of these Treaties stated that those States which have ratified ILO Convention

87 couldn't pass legislative provisions which would prejudice – or to apply the law in such a manner to prejudice – the rights granted by the Convention itself.

Even if the US hasn't ratified neither Convention 87 nor 98, these have to be considered binding as customary international law since they are almost universal. Moreover, in 1998 the ILO has drafted the FPRW (Declaration of Fundamental Principles and Rights at Work) which has set out the core labor standards – giving them legal status then – which any ILO members have to respect. Convention 87 and 98 have been included in those core labor standards.

Since the US is one of the ILO members, then, it has to comply with them too and even if they don't explicitly address the right-to-work laws issue, it has been stated by experts that they prevent unions from carrying on their duty of workers' interests protection.

These laws infact, aimed at weakening trade unions in order to prevent them from protecting in the most equitable way the employees interests and this is against the ILO Conventions above-mentioned⁷². For this reason their should be considered illegal.

But this is only one of the arguments on which the opponents of these right-to-work laws rely. We are now going to discuss in details which are the arguments stressed by the supporters of these laws and what has been the response of the critics.

72 Not to consider the US Constitution and the NLRA itself.

2.2 Debate over the legitimacy of Right-to-work laws

As we stated in the previous sub-paragraph, the right-to-work laws have divided public opinion since their introduction.

We are now going to represent the arguments which have been presented to support them and those, more reliable giving also the economic effects of these laws, to strike them down.

A well-explained sum of the pros arguments could be found in the Enrin Shannon's paper⁷³ drafted to expose how the right-to-work laws system works to the small and medium enterprises.

The first issue the supporters of these laws have always pointed out has been that of the necessity of an effective freedom of association.

According to them, infact workers should be free not only to join the union but, if they so desire, to resign. The also refer to those States where these laws haven't been applied as “forced unionism” States.

They argue that the imposition of paying union fees is actually - using the words of Simon Campbell in an article written to stop the teacher strikes subsequent to the adoption of a right-to-work laws concerning even their sectors - a “financial coercion and a violation of freedom of choice” since an employee, even if opposes the interests of the union, is forced to “financially support an organization they didn't vote for, in order to receive monopoly representation they have no choice over”.

Furthermore, as specified by Shannon, these laws don't forbid employees to become member of a union and so to voluntarily pay their fees. The principles behind them is, infact, that anyone could be forced to pay for a cause they may oppose.

According to them if the union offers a proper service and the employee would find “sufficient value” in the union approach to carry on their representation duty, he/she would voluntarily pay the union fees.

The supporters also responded to the opponents argument based on the principle of exclusivity – which would be better described later and which requires unions to represent all the workers of a company, even those who are not unionized –

73 SHANNON E., *Right-to-work: what it is and how it works*, Washington Policy Center, 2014

arguing that the NLRA doesn't oblige at all union to represent non-members since there is the possibility to them to sign a “members-only” contract, the conditions bargained in which would be applied only to those workers who have paid the union's fees.

The supporters theorized that labor unions insist to sign contracts applicable to all workers so that they would benefit from the exclusivity principle in order to gain the monopoly position in the workplace. They also cited a Heritage Foundation⁷⁴ study which stated:

“They (i.e. the unions) prefer exclusive representative status because it enables them to get a better contract for their supporters. Consider seniority systems: they ensure that everyone gets raises and promotions at the same rate, irrespective of individual performance. If a union negotiated a members-only contract with a seniority system, high-performing workers would refuse to join. Those workers would negotiate a separate contract with performance pay. The best workers would get ahead faster, leaving less money and fewer positions available for those on the seniority scale. The union wants everyone in the seniority system – especially those it holds back”⁷⁵.

What this research forgot to mention is that the individual protection against the unfair labor practices an employer could realize, are granted almost exclusively to the unions, so that if during an individual negotiation the employer threatens the employee with a behavior of any kind he/she wouldn't be able to claim any rights, being probably forced to agree to any conditions the employer would like to impose in order to not loose their job – this is what has happened during the first year of the crisis, as we've already seen above.

Again their supporters affirm that these laws don't prohibit unions. According to them infact, they rather forces unions to prove their value at workers, meaning that the union executives are obliged to be “more responsive and accountable to workers and to do a better jobs”.

They also state that the lower union membership in right-to-work States is not a consequence of the approval of this law, rather in these States there has been historically a general dislike for the unions in se and the adoption of this law is a

74 This is a conservative think tank that was established under the Regan's administration and it has kept on working for all the Republicans governors, either at national or at state level. Its statements then, couldn't be referred to as properly impartial.

75 SHERK J., *Right to work increases jobs and choices*, The Heritage Foundation, 2011

reflection of this preference.

Another argument used by the promoters to attack the unions is that in recent years they have turned more into organization that stand for political causes that benefit union leadership instead of for the protection of their workers. According to them, if unions focus more on representing and advantaging their workers, there would be less time and resources to sustain political activities. Consequently, this reshaping of union's activities would benefit the business climate which would attract and/or stimulate more business investments.

Related to that, the supporters of the right-to-work laws often report the results of economic researches to prove that these laws attract more new business in comparison with those attracted by those states which don't apply them. It has to be said since now anyway that – as we would see in the following sub-paragraph – most of these researches are based on wrong and/or false assumptions while others are cited in a fragmented way, so that the results seem to be positive⁷⁶.

All these arguments have been opposed - and, according to the author, properly - by experts in every field (mainly, but not exclusively, legal and economic) and, of course, by the unions.

Starting with the possibility to adopt the “members-only contract” instead of applying the exclusivity principle, one of the forte of the right-to-work movement, it has to be outlined that in a system as those settled in the US, trade unions cannot freely choose to represent just a small part of the employees. This would lead infact, to an excessive fragmentation of the bargaining power with a subsequent risk which would be run even by the unionized employees, since their representative union would lose influence at the negotiation table.

Having lost union's capacity to stand against employer's imposition and without having, in the US as a whole, a system of minimum standards set out by neither the national nor the state government, the risk for all the workers has to be seen in a lessen of the employees' protection and/or of employer's abuses.

Moreover, according to the opponents leaving to the employees the choice whether or not to pay union's fees would encourage the “free riders” issue.

76 An example being “The effect of endogenous right-to-work law on business and economic conditions in the United States: A Multivariate Approach” that it has been deeply studied for this thesis. In Shannon's paper it is reported only the part of this research which states that right-to-work States are more investment-attractive, omitting the other part in which the researches affirm that most probably it is so because in the same states there are much lower labor costs – because of the loss in union representation – than in the others.

This would arise because individuals, even if benefit from the outcomes of the collective bargaining – resulting from union's activities -, have the possibility to avoid paying any sort of contribution to support who has succeed in achieving those benefits. When a significant number of employees become free riders, there aren't so much resources left for the collective bargaining – this leading to an underperformance or even to a total failure of the union in reaching its negotiation goals.

Unions, infact, need resources explicitly to well-serve all the workers in the unit (even the non-unionized ones) and to ensure they would have an influence and meaningful voice within the workplace⁷⁷.

Consequently those unionized workers, who pay for the unions services, would start exit to the union itself first of all because they are paying to get back the same benefit of their colleagues, having nothing in return for their fees; and secondly because they would lose interest in belonging to a union so weak to neither have the necessary power to protect their interests.

The result of this trend sooner or later would be a disappearance of the union from the company.

This is the reason why businessmen are so strongly supporting right-to-work laws and for the very same reason why unions have re-named these laws as “right-to-work-for-less” laws.

Addressing the critics moved from the right-to-work laws supporters concerning the unions' involvement in political matters, just one fact need to be underlined. This is what management, especially in the US, have been doing since the beginning.

The business lobbies, infact, have influenced most of the laws which have been ever adopted in the US, lessening the protection of the weakest parts – being the consumers or the employees – with the National Right to Work Committee explicitly declaring to engage in lobbying activities on behalf of the “little guy”⁷⁸.

The unions have only understood that the real industrial relation dispute in a

77 Without resources infact, unions couldn't pay the costs of processing grievances to arbitration whenever there is a violation of the collective bargaining; cannot create a strike fund which would be use to prevent any harms which would come to workers from a strike; cannot organize more and more workers in the industry to promote a sort of wage stabilization which goes together with union density.

78 This Committee was constituted by a group of southern businessmen explicitly aiming to fight unions. They declared they “added a few workers for the purpose of public relations”

country such as the US⁷⁹, have to be fought within the executive and legislative offices so the campaign donations the promoters of the right-to-work laws contested to them, would be utilized mainly to be sure to have a voice on those rooms where the decisions are actually taken.

Expressing the deeply-rooted liberalism typical of the US – and which aims, among other reasons, most of the opponents of these laws – and in response to those who sustain that union security clauses are a violation of the freedom of association, a libertarian writer declared to Reason magazine: “I consider the restrictions right-to-work laws impose on bargaining between unions and business to violate freedom of contract and association....I'm disappointed that the State has, once again, inserted itself into the marketplace in place its thumb on the scale in the never-ending game of playing business and labor off against one another...This is not to say that unions are always good. It means that, when the State isn't involved, they're private organizations that can offer value to their members”⁸⁰.

The strongest arguments of the opponents of these laws have to be found in their economic effect, on which other debates have arisen.

We are now going to analyze those effects – and the debate which has arisen over them - in details.

79 A country in which even the Presidential elections are economically supported by private investors who, if their candidate wins, would obviously have a proper personal profit back - the effect of these would depend on the interests those specific lobbies want to protect.

80 TUCILLE J.D., *When right-to-work is wrong and un-libertarian – hit & run*, achievable at Reason.com, 2012

2.3 Economic Effects: different outcomes of the researches

We have already mentioned that on the economic effects of the adoption of the right-to-work laws are based the main arguments to oppose them.

As usually happens, according to which group commissions the research the result of it would be oriented to sustain those group's statements.

The same has been happening for the debate concerning the right-to-work laws but, according to the most of the economic experts from all over the World – and to the author - the results of the researches conducted by the opponents to these systems are much more reliable because, as it has been already pointed out above, the supporters of them based their researches – not sure how much involuntarily - on wrong/false assumptions which have been criticized by eminent economists and trustworthy associations and or when they cite independent⁸¹ researches – almost all of them outline negative effects of the right-to-work laws – they point out just a small piece of the reasoning, extracting it from the context and making it appears as it stands for “another” positive effect due to the adoption of these laws⁸².

Starting with the pros researches we would first of all list those assumptions which are more criticized.

The promoters stated that right-to-work States attract more new business than States without such laws because, since there is a better business climate, the employers consider the predictions over labor-management relationship coherent in those States – i.e. they are more confident in investing there.

Employers, they add, haven't had to face threat of strikes or bargaining disputes with the unions, meaning that the adoption of these laws would ensure companies peaceful industrial relations over the long term.

For these reasons, having a right-to-work status is considered the major factor influencing the business decision on where to locate the company – most of the researches which sustain this argument take the manufacturing sector as an example, affirming that the right-to-work States have one-third more manufacturing jobs than the others.

The researches have been drafted, then, based on these assumptions, that we

81 Independent, in the sense that they haven't been commissioned by none of the two parts.

82 See the example in note 69.

would better address later on.

One of the most important among these pro-studies, according to the supporters, is that carried on in 2012 by the Congressional Research Service⁸³.

It states that, in the past decade “aggregate employment in right-to-work States has increased modestly⁸⁴ while employment in union security states has declined”. In addition, according to other studies, in the past two decades both employment growth - precisely manufacturing employment growth - have been very much higher in those States than in those where right-to-work laws haven't been adopted.

Moreover, others sustain that “incomes rise following the passage of right-to-work laws, even after adjusting for substantial population growth that those laws also induce”.

Then the promoters address the claim of the opponents concerning the lower wages of the employees in those States.

They confirm that this is true but, they add, this is so because there are significantly lower living costs so that a lower wage is sufficient to support “the same or better standard of living” compared to how a family lives in the non-right-to-work States.

This means, according to those researches, that the workers have a higher real spendable income.

As we have already stated, anyway, both the assumptions and the outcomes of these researches are arguable and we would address the assumptions first to prove how muddled they are.

Starting with the statement that right-to-work laws attract more new business we have already pointed out that when declared that, the supporters have expressly made reference to a research but they have completely omitted all the remaining assertions of the same analysis in which the researchers affirm that most probably it is so because in the same states there are much lower labor costs than in the others.

These costs are lower, anyway, because there is no minimum standards that have to be guaranteed because agreed upon a contract with the unions and what an

83 This is a think tank of the Congress, working directly for its members. This means that it could be deeply influenced by the lobbies – that in the US Congress have very strong roots.

84 Even assuming that this is true, would it be worthy to give up to workers' protection for just a modest employment growth?

individual employee could succeed in bargain with his/her employer wouldn't reach the same level as if a strong union have been the employer's counterpart⁸⁵.

With regard to the assumption that there is a better business climate in the right-to-work States this is so only from the employer's point of view.

If there is no union – or it is very weak – the individual employee wouldn't risk to lead a protest since in that case, according to much of the US labor laws, they could be fired immediately. The same could be true if they would organize in group, the risk of an employer's reprisal is very high when there is no union to protect the workers.

For what concern, instead, the assumption that the employment growth registered in the past decade is higher, it has to be noted that all the researchers supporting this data based their analysis on the manufacturing sector. But, as the above-mentioned research partially cited in the Shannon's paper⁸⁶ pointed out, the right-to-work States are the US States which historically have always been more agricultural than the rest of the Country so this growth of the manufacturing jobs in those States, instead of being a sign of a positive overall employment growth as stated by the Republicans, “reflects the decline of agricultural jobs as agriculture has become less labor-intensive in the rest of the US” because of the introduction of the machines.

Moreover, for these kind of jobs an high education is not required and this contributes to maintain a low wage. A more highly skilled workforce, infact, generally would require higher wages because of their extra skills and human capital, but in States where the industry is based especially in sectors requiring non-professional workers the main concern would be to ensure that an adequate – i.e. the right number – group of workers exists.

It would be useful, then, to examine all the right-to-work laws negative effects at their best, reporting a table drafted by the Center for Economic Policy Research on 2012 and which is still very valid today.

85 Even if in isolated cases the employee succeed in obtaining high standard, this wouldn't be made the general labor costs rise since each contract, in right-to-work States, has value only among the signatory parties.

86 STEVANS L.K., *The effect of endogenous right-to-work laws on business and economic conditions in the United States: a multivariate approach*, Review of Law and Economics, Vol 5(1), 2009, pag 596-614

Variable	CB	RTW	CB-RTW
	M	M	Difference
Work and industry			
Wage (2012 dollars)	22.95	20.59	2.36
Labor force participation (all respondents)	64.1%	63.2%	0.9%
Employed workers (all respondents)	58.6%	58.5%	0.2%
Unemployment rate (all respondents)	8.6%	7.4%	1.1%
Union member	15.2%	5.7%	9.5%
Usual hours worked per week	34.0 hours	35.3 hours	-1.3 hours
Public sector (federal)	2.3%	2.7%	-0.4%
Public sector (state and local)	11.7%	11.9%	-0.2%
Manufacturing sector	10.9%	11.0%	-0.1%
Demographics			
Age	42.2 years	42.0 years	0.2 years
Female	47.2%	46.6%	0.6%
White, non-Latino	68.5%	64.4%	4.1%
African-American	8.5%	14.2%	-5.7%
Latino/a	14.6%	16.4%	-1.8%
Asian	7.5%	3.6%	3.9%
Immigrant	18.1%	14.7%	3.5%
Citizen	91.1%	91.7%	-0.6%
Married	55.6%	57.4%	-1.8%
Student and employed	4.9%	4.4%	0.5%
Veteran	5.8%	7.6%	-1.8%
Education			
Less than high school	8.5%	9.9%	-1.4%
High school or equivalent	26.5%	28.2%	-1.7%
Some college, no degree	18.7%	19.9%	-1.2%
Associates	10.2%	10.8%	-0.6%
Bachelors	23.0%	21.0%	2.0%
Masters	9.4%	7.3%	2.1%
Professional	1.8%	1.5%	0.4%
Doctorate	1.9%	1.5%	0.4%
Observations	114,911	71,856	
Weighted observations	83,414,410	59,054,685	142,469,095

Statistic are adjusted by the outgoing rotation group earnings weight to match the total population sixteen years of age and older.

CB = Collective Bargaining States (i.e. those who don't apply right-to-work laws)

RTW = Right-to-work States

As we could infer from the data of this Center⁸⁷ earnings are higher in those States where right-to-work is not applied : the average hourly wage of a worker being a \$2.36 higher than those collected by those who work within the right-to-work states.

⁸⁷ This center is a think tank based in Washington but which could rely on researchers coming from all over the World and which is joined also by Europe, being these guarantees of much more impartiality than those showed by the pros researches

Moreover – and this is a data which have been always recorded since the first researches in 1990s – the unemployment rate is lower in the right-to-work States; in the 2012, the year of maximum development of these laws within the US, infact, the amount of people already employed or who were looking for a job was a 1.9% higher than in the right-to-work States. Much of this difference could be attributed to the fact that in the non-right-to-work States much more people participate in the labor force – for example the percentage of women and non-Latinos employees is higher since, as we would see, the gender and the discrimination is still very present in the right-to-work States. This being true also because in the CB States an higher amount of individual are employed meanwhile they are still in school. Those who work in these States, infact, tend to be more highly educated than those who work in RTW States (evidence of this is also the greater number of people working in the manufacturing sector in these States, being this a sector where it's not necessary to posses a college degree in order to get a job).

We have to stress than that difference in education could be the core drivers to explain why some States choose to adopt these right-to-work laws. The education infact, is directly linked with wages, propensity to unionized, employment and fighting inequality.

Another great difference is the impact of these right-to-work laws on the union membership. In the CB States infact, the rate of unionized workers nearly triple the 5.7% of those in the RTW States.

This could lead only negative effects.

As outlined by the studies⁸⁸ infact, during the Great Recession the union membership rate has heavily increased in those State that weren't applying a right-to-work law and this had worked, since the unions protected their members' jobs while those who weren't unionized were among the first to be fired.

In the RTW States instead, where the union membership has been threatened since the very beginning, statistics recorded that there had been an high percentage of massive layoffs or of drastic reduction in wages.

In those States the non-white workers generally tend to be those who still support the unions; for this reason the decrease in union membership could be as little as

88 BRUNO R., ZULLO R., MANZO F., DICKSON A., *The economic effectis of adopting a right-to-work law: implications for Illinois*, Labor Studies Journal, Vol 40(4), 2015, pag 319-361

1.5% or as large as 9.9% in a company, depending on how much of these workers are employed in the State.

The racial and gender discrimination infact, in the RTW States continues to be high, with Afro-American workers who have to face a reduction of their real hourly wages going between 4.7% and 9.8%; women's wage reduction would go from 2.2% to 9.2%; Latinos' wage reduction would be between 8% loss in earnings to less than 1% increase. Even under this point of view then, union membership is useful: since what the union has bargained is applied to all the workers of the company, infact, it contributes to decrease wage inequality .

To sum up all these negative socio-economic effects connected with the adoption of the right-to-work laws – i.e. lower earning, lower union membership rates, negative effects on both female and Afro-American workers in conjunction with negative impact on integration of the Latinos – has led most of the experts to strongly oppose this set of rules.

As Gordon Lafer, an economist of the University of Oregon has stated, addressing the Republicans claims for an economic growth possible only with the adoption of the right-to-work laws “It may benefit employers not to negotiate with employees and to pay less, but that's different from saying this is going to help a state's economic development”.

In the following paragraph we are going to analyze another procedure which is very close to the European model of industrial relations, that we have already outlined: the pattern bargaining process. This has proved to be much more effective in terms of both employment and business protection and it could represent a good solution for the US to get out of the crisis and to achieve a legal development. This being one of the benefit of a more and more globalized system.

3. Atypical response to the crisis the auto-industry collapse

3.1 Pattern Bargaining

I would like to introduce this topic because it has been used for the first time in the auto-industry and, understanding how this sector have always worked, would help to better understand how atypical is the path followed in the years immediately after the crisis.

Pattern bargaining is a way of conducting the negotiation of a collective agreement which is quite atypical for the American standards, while it's very similar to the European model.

The strategy consists in attempting to bargain uniform standards in the contracts of workers across an industry or a sector.

The first trade union which has introduced this method has been the United Automotive Workers (UAW), immediately after the Second World War.

For nearly three decades, the adoption of this method, has allowed workers to obtain huge wage increases and a growing set of benefits⁸⁹. The results of the UAW's efforts had been that by 1955, it had been able to sign contracts with the major automakers which set the same pattern wages and with the same expiration date.

The main purpose of such a bargaining method is to set a common wage so that competition among companies would be based on the quality of their products or services not on how much the specific company is willing to pay its workers. The key concept infact, is “to take wages out of competition” preventing a race to the bottom led by the workers desperately seeking for a job.

The first UAW's President who set down the requirements to pattern bargain had a broader vision: he wanted to set living standards through this strategy, standard which he wished would have been widespread into all manufacturing, beyond the auto sector then.

Anyway, this has not been only a bargaining in wages.

⁸⁹ Workers of auto, steel, rubber, coal, airlines, packinghouses, trucking, oil, telecommunications gained brand-new benefit packages – including pensions and medical insurance

During the years infact, temporary relief from the strict standards commonly decided had been granted in case of crisis or special bonus payment had been remitted in time of great success. The core of this kind of bargaining too is to make sure that wages and benefits are the same, but this goal has to be reached over the long run.

The advantage in the adoption of this strategy is that adopting a comprehensive and a building block approach, the trade union which chooses to enter in this kind of agreement gains a strong collective bargaining power to oppose to the employer's requests and/or to ask for wage improvement or more benefits. This improvement, moreover – if agreed – would be applied to all companies covered by the pattern.

This is the main similarity with the European bargaining method, mainly with the Italian one.

There is infact, a “national” trade union⁹⁰ which sit with an individual employer (typically the owner of the biggest company of the specific sector to which the agreement would be applied) setting certain working standards.

This working standards would be valid for all the companies of the sector – in the US case if each employer enter into agreement with the trade union, accepting those standards; in Italy this is true if the employer is a member of the employers' organization which sign the contract at first or, if he/she is not a member of any organization, if he/she recalls the national collective agreement within the company contract.

The specific functioning is that the trade union (i.e. the UAW) negotiates with a first company which then signed the agreement reached with the employees' representatives. After having obtained a first consensus the trade union goes to the other companies and, taking advantage of its gained relatively strong position, it makes the employer agree immediately, through strikes where necessary, with the terms set out in the contract already signed by the first employer.

In order to convince the following employers to ratified what has been already discussed, without waiving any claims, the trade union deeply relies on the fact that another employer has already agreed with those standards so that if they

90 It cannot be considered “national” as the European standard. It is more a trade union which is generally recognized by the Federal State and what it bargains is applied to all workers, even if they are not its members (i.e. different from the Italian standard)

wouldn't be approved by the following company, the risk for the latter would be to loose in competitiveness. Moreover, the employer would have to enter into a bargaining process ex novo with a trade union that, at this point, upset to not having been able to convince the employer to ratify, would be anything but compliant. This is why typically the first employer with which the union would sign this kind of agreement is the owner of the biggest and/or most powerful company of that specific sector: in this way the following employers would be more tempted.

This system is in danger anyway. One of the biggest challenges traditionally recognized trade unions has to face is – as declared by the UAW itself in 2015 – the growth of nonunion companies, these are not part of the pattern wage agreement. In these companies then, lower wages and benefits are applied thus creating a competitive disadvantage for those which are unionized and have then to apply the agreed settings.

Moreover, it has suffered from international competition, from the shift of manufacturing to the South – where usually there weren't unions at all or if they existed, they were very weak.

In addition, the turning point was the recession of the early 1980s, namely the Chrysler bailout of 1979 and the UAW response. It had accepted \$203 million in givebacks; this has symbolized the beginning of the concessions era⁹¹.

After the concessions gave to Chrysler, those to Ford and GM had followed; all of them being around working conditions and benefits⁹².

The collapse of this method contributed significantly to the stagnation of wages which has characterized US workers for decades.

In those period working conditions were left to the locals even if, in rare cases, a framework was established.

Local then, were left to their own devices during the negotiation of working hours and reorganization – where employer asked for working intensification and, without a great power behind them, the trade unions couldn't oppose so much. There had been some strikes but these weren't supported by the international trade

91 This era was characterized by a membership loss, the number of strikes which dropped by almost half, a stall in the new organization and a decrease, if not a reverse, of the wage gained in the past.

92 The impact of this deregulation – i.e. concessions – was felt not only in the automotive sector but also within the airlines – one of the country most highly unionized industries – the packinghouse, the steel workers' and so on.

unions.

Being left alone, the local union tried to preserve the wage patterns that they had gained after years of riots – this is especially true in rubber, oil, steel and among the largest railroads trade unions – and in order to do so, they were forced to make deep concessions on working conditions, as we have already seen.

During the last years, anyway, subsequent to the 2008 crisis, there has been a return to this strategy because, aided by an enormous consolidation of ownership in industries there is again a need to reorganize them according to common standards to better face the international competition and extend union wages and benefits across the economy, in order to increase the employees' purchasing power so that to relaunch the market as soon as possible.

To address these needs then - since even if the economic conditions are tougher now, the same is true for the pressures on employees' living standards and on their working conditions – only a grassroots movement, as the pattern bargaining had been in the past, could help to turn thing around for real.

There are two kinds of pattern bargaining method – *pattern in wages* and *pattern in labor costs*. The difference between the two is that with the former the union holds all firms to the standard of wages agreed with the first firm; with the latter the union adjusts the wage paid by each firm so that it could equalize the labor costs across firms.

In the pattern bargaining in wages, a dollar increase in the wage negotiated by the social partners becomes a dollar increase in the wage of all the other firms – the same being true in the pattern bargaining in labor costs with equal productivity.

Companies infact, are more likely to accept to pay higher wages if other companies do so.

Furthermore the economist R.Marshall⁹³ has studied the very frequent case in which the firms differ in productive efficiency.

In this situation, the more efficient company could pay a higher wage than the less efficient one. The union then, want to take advantage of this difference.

In this case the union has to equalize the trade-off between obtaining a uniform higher wage at both firms through negotiation with the efficient firm on one hand, and increasing the asymmetry of the two companies in the industry by not offering

93 MARSHALL R., MERLO A., *Pattern Bargaining*, Research Department Staff Report 220, Federal Reserve Bank of Minneapolis, 1996

a wage concession to the less efficient one on the other.

The researches made on these situations stated that: when the two firms are close in terms of productive efficiency the firm's effect described prevails, while if they are very different, it prevails the non concession in terms of wages to the less efficient. In this last case, the union prefers a pattern in costs⁹⁴.

Theoretically speaking, the unions are the only partners to prefer pattern bargaining, while according to their setting, companies are more willing to accept – and sometimes to set out by themselves - an alternative bargaining mechanism. This is true especially for those companies which haven't been chosen as the first one to negotiate with. They in fact, would consider the bargaining platform introduced to them by the union as a take-it-or-leave-it wage demand so that it is not credible. If the firms reject this demand, then, it would always be in the union's interest to reopen the negotiation.

But this is not so often the case.

Companies, in fact, may prefer the pattern bargaining model and there are two reasons for this⁹⁵.

The first one is that, even if a company have a strategic advantage over its rivals in the short term, operating in a very dynamic market, this situation could change quickly and in a very unpredictable way so it could be useful being protected by a minimum standard setting to not being totally forced to get out of the market.

The second reason is that the bargaining structures of this scheme tend to be very stable, while determining by its own a whole bargaining mechanisms could be difficult and expansive since all the parties involved in it have different preferences. Thus, employers don't want to re-enter in negotiation after a short period.

Since firms and unions are in long term relationship, then, they would better succeed to take a long-run view and to establish a bargaining mechanism that would work well for all of the social partners involved, lasting over time.

Indirectly, if this path is chosen, the extent to which the union can influence the identity of the first company chosen to bargain, could determine the preferences

94 Information asymmetries could complicate the implementation of a pattern in labor costs. If a pattern in costs isn't a valid option for the union and a firm is much more efficient than the other, the union would turn to pattern in wages.

95 CREANE A., DAVIDSON C., *The trade-offs from pattern bargaining with uncertain production costs*, European Economic Review, Vol 55, 2011, pag 246-262

over bargaining mechanisms.

In many cases, infact, the union has a complete control over the target. This is what has always happened in the auto-industry, which we are going to address later on, with the UAW selecting even the order of the issues on which it has to be negotiated.

After having introduced the system which have characterized the industrial relations of the auto-industry sector since its very beginning and before addressing its collapse, we have to introduce the legislation which has been used in order to save the so-called Big Three – Ford, GM and Chrysler – the TARP legislation.

Comparing this two approaches in the last sub-paragraph, we would then understand why there has been in the US an atypical response to the crisis.

3.2. Troubled Asset Relief Program and its atypical use

The Troubled Asset Relief Program (TARP) has been adopted on October 2008 by the Bush administration in order to address the subprime mortgage crisis.

Through this law infact it has been possible for the US government to purchase toxic assets and equity from financial institutions in the attempt of strengthen the financial sector.

To better understand how this legislation works, the root cause of the recent recession have to be understand: the limitless availability of mortgage credit.

During the period going from 2000 to 2007, mortgage originators – i.e. the financial institutions – had offered these financial benefit, being confident that they could immediately group together the stream of mortgage payments and sell fractional interests of these groups to investors as mortgage backed securities⁹⁶ (better known as MBS).

This technique allowed the originators to immediately restock the mortgage capital and start again from the beginning.

The problem was that in the long run these MBS had increased the availability of mortgages, making the inflation of the housing prices rise exponentially and creating an “housing bubble” - as the economists called it.

In 2007, both the prices and the MBS were so far from the real economy that this bubble has burst and the value of the MBS itself has drastically dropped down.

Moreover, the demand for these MBS at that point was so high that not enough healthy mortgages (i.e. those which had income and values ratios under the control of the government) were left to satisfy all of them. This has encouraged a shift towards the risky mortgages in order for the population to be able to pay their house rents⁹⁷.

What happened in 2007, from an economic point of view, was that there was no credit for new lending so the economy froze as a consequence.

It was clear then, that in such a situation the only financial rescue package possible had to be one which aimed to implement credit availability.

96 BRENT J., In defense of private-label mortgage-backed securities, Florida Labor Review, Vol 61, 2009, pag 868-870

97 Some of these mortgages had an income ratios of 50% (previously the 33% was the safe ratios), some were loans of a value ratios of 95% (previously the 65% was the safe ratios) others instead had been granted without verifying income or ability to pay.

It is to reach this goal that the TARP has been drafted and its stated purpose was “to restore liquidity...to the financial system of the United States”.

In order to do what it has stated, TARP authorized the Treasury to purchase toxic mortgages and MBS from financial institutions⁹⁸.

The Department of the Treasury in charge of the purchase was the Secretary of the Treasury but its authority has been limited by two terms used in the TARP's wording. First of all, only “*troubled assets*” could be purchase and secondly these had to be owned by “*financial institutions*”.

The limits to the government authority derives from the definition attributed to both of these terms.

Assessing the “troubled assets” definition, these have been recognized in any:

2. “residential or commercial mortgages and any securities, obligations or other instruments that are based on or related to such mortgages that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability;
3. any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determinations, in writing, to the appropriate committees of Congress.⁹⁹”

Assessing the “financial institutions” definition, instead, the Emergency Economic Stabilization Act (EESA), in which the TARP provisions are embodied, has described them as: “*any institutions, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory or possession..., and having significant operations in the United States, but excluding any central bank or, or institutions owned by, a foreign government*”.

98 The precise wording of the TARP is “*The Secretary is authorized to establish the Troubled Asset Relief Program (or TARP) to purchase, and to make and fund commitments to purchase, troubled assets from any financial institutions, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary*”

99 HORTON B., VRABLIK J., *The Troubles Asset Relief Program (TARP): uses and abuses*, Banking & Financial Services Policy Report, Vol 29 n°9, 2010, pag 24-33

So, as we could already infer, these definitions - and the TARP provisions in general – hasn't conferred the Secretary of the Treasury the power to bailout the auto industry, contribute to small business lending or pay private and overextended borrowers to modify mortgages - as instead had been effectively done with its funds, as these being their real purposes. The Treasury had gone well beyond of its legislative mandate.

The days immediately after its adoption, anyway, had seen a correct interpretation of the TARP provisions.

The first TARP program was adopted 11 days after the drafting of the law itself and it was called the Capital Purchase Program (CPP). This program was available to “ private and public US controlled banks, savings associations and bank holding companies (engaged exclusively in financial activities) that are deemed healthy and viable”¹⁰⁰.

With this program the authorities wanted to give more liquidity to the above said financial institutions, hoping that it indirectly lessen their dramatic losses. In return for these credits, the Treasury received senior preferred shares in the participating institutions – practically speaking this meant that the government could, as it did, limit the executive pay and impose restrictions on dividend payments¹⁰¹. It also obliged all financial institutions to join this program – even if theoretically it was on a voluntary basis – so those which had been truly in need of the bailout were shielded from scrutiny.

There was then the Systematically Significant Financial Institutions Program (SSFI). This program, through a very complex mechanism, aimed at fulfill all the obligations coming from the insurance the MBS holdings of the financial institutions purchased by the American International Group Inc.

Both of these programs anyway, had one common feature: they made the Treasury using taxpayer dollars to rescue financial institutions from losses caused by troubled assets, as the wording of the law required.

100 SIGTARP, *Initial Report to Congress* 49, http://www.financialstability.gov/report/congress/2009/SIGTARP_Initial_Report_to_the_Congress.pdf, 2009

101 Moreover it was forbidden from Section 111 of the EESA any compensation that would cause executives to take “unnecessary and excessive risks that threaten the value of the financial institution”. In addition, those bonuses based on performance such as “statements of earnings or gains” had to be taken back whether the performance is “materially inaccurate”. Furthermore, participating financial institutions are forbidden from making “golden parachute”.

TARP, anyway, had been used especially to fund programs that have nothing to do with the purchase of the MBS from financial institutions but rather to serve a favored constituency or to implement a desired social policy, constituting a great abuse of power from the Treasury – and not only.

The first of this unconventional program had been the Troubled Asset Loan Facility (TALF) in accordance with the Federal Reserve. The aim of this program was to purchase the asset backed securities (ABS), which are: student loans, auto loans, credit card loans or small business loans.

Focusing on the purchase of this last assets – i.e. the small business loans – the Treasury decided to extend the TALF creating the Small Business and Community Lending Initiative (SBCLI)¹⁰².

The most famous abuse of the TARP, which above all have had positive effects as we are going to see on the last sub-paragraph, anyway, has been the auto-industry bailout with the rescue of Ford, General Motors (GM) and Chrysler.

On November 2008 infact, when the crisis was at its beginning, the CEOs of the Big Three appeared before the Congress asking for loans of huge amounts in order to exit the crisis and not to be obliged to fill for bankruptcy.

In that occasion the Congress sent them back, requiring to prepare a plan in which it had been described in details how each company would spend the money they asked for.

These plans were showed to the Congress on December 2008 and their essential content was:

- GM: immediate injection of \$4 billion to survive til the end of the year;
- Chrysler: injection of \$7 billion by the end of the month (December 2008);
- Ford: asked for \$9 billion credit line because much more confident in its possibility to succeed.

To address these requests the House of Representatives adopted the Auto Industry Financing and Restructuring Act the week after the hearings of the CEOs before the Congress, but this bill failed to pass in the Senate the following day¹⁰³.

At this point, since if the Big Three failed, a huge number of jobs would be deleted – contributing to improve the already dramatic effects of the financial

102 This allowed the Treasury to purchase pooled loans for a total amount of \$58.6 million.

103 The timing was awkward infact: the new Congress had been elected two weeks earlier but wasn't in office, so the bill proposals had been presented to the outgoing old Congress.

crisis – President Bush decided to bypass the block imposed by the Senate to rescue such important companies, directing the Treasury to bailout the auto-industry anyway.

According to Bush, infact, this intervention was allowed by the TARP provisions embodied within the EESA so that another TARP program had been established: the Automotive Industry Financing Program (AIFP)¹⁰⁴.

What can be inferred by Bush's behavior is, according to Gary Lawson – a very well accredited professor of Boston University – that it seemed “to claim that if the President considers something important for the country, the President can do it whether or not Congress authorizes it by statue...such claims are totally inappropriate under a Constitution...executive power simply does not include the power to do anything that the President thinks is important for the country”¹⁰⁵.

In its original purpose, TARP was intended to provide for the purchase of MBS from financial institutions, not to provide for the bailout of auto-industry.

For this reason the Treasury gave immediately an advise to Bush in which it opposed this use of the TARP because, as it stated the Treasury Secretary of that period – Henak Paulson – the \$700 billion were designed to bolster the financial sector.

It explicitly stated that “The overriding objective of EESA was to restore liquidity and stability to the financial system of the United States in a manner which maximizes overall returns to the taxpayers. Consistent with the statutory requirement, Treasury's four portfolio management guiding principles for the TARP are:

- protect taxpayer investments and maximize overall investment returns within competing constraints;
- promote stability for and prevent disruption of financial markets and the economy;
- bolster market confidence to increase private capital investment;

104 President Bush's justifications of this abuse of the TARP were: “Unfortunately, despite extensive debate and agreement that we should prevent disorderly bankruptcies in the American auto industry, Congress was unable to get a bill to my desk before adjourning this year. This means the only way to avoid collapse of the US auto industry is for the executive branch to step in...So today I'm announcing that the Federal Government will grant loans to auto companies under conditions similar to those Congress considered last week.”

105 LAWSON G., *Burying the Constitution under a TARP*, Harvard Journal of Labor & Public Policy, Vol 55 n°70, 2010

- dispose of investments as soon as practicable, in a timely and orderly manner that minimizes financial market and economic impact.”¹⁰⁶

Among these four goals there is no reference to save the auto-industry economy.

Then, under President Obama, and his Secretary – Geithner - , there was an acceleration of the TARP bailout of GM, the outcome of which was that the federal government took a majority ownership stake in GM. The consequences of this change in the ownership would be described in the next sub-paragraph.

Chrysler too received an additional amount of loan but, differently from GM, after these second loan from the TARP it didn't ask for another aid and, thanks to the merger with FIAT S.p.a., it was able to even restore its debt with the US government very quickly – as we would describe in the dedicated sub-paragraph.

GM instead, received other two aids from Obama administration, one in April and one in May. Both of these loans helped the auto factory to survive the drastic restructuring led by the Auto Task Force – a body created by Obama specifically to deal with the Big Three failure.

Old GM – it's so called because after the intervention of the TARP a new and smaller GM had been created, as we would address later on – drafted a restructuring plan working with its stakeholders (among which the UAW, bondholders, creditors, dealers and suppliers) in order to make it approved by the Auto Task Force, so avoiding bankruptcy.

Unlikely, in this occasion, even if GM reached an agreement with most of its stakeholders, a tiny group of its creditors didn't agree with the terms offered to them by the company, forcing GM to file for bankruptcy on June 2009.

To face the bankruptcy proceeding, then, the government provided new loans from TARP fund.

The amount of these concessions was \$30 billion and they would be utilized by the company to transform Old GM to a new, smaller company. Of these \$30 billion anyway, the majority wasn't immediately used (specifically \$16.4 billion) remaining in the escrow account till September 2009.

It has to be noted moreover, that under normal circumstances a bankrupt company cannot carry forward any previous tax losses when it is transformed to another company, since the bankruptcy process consists also in a change in the control of

106 TARP, *Monthly 105(a) Report to Congress*, US Department of the Treasury, July 2010

the company.

What the government has granted to GM and Chrysler cannot be threatened as giving rise to a change of control. It has been for this reason that both the GM and the Chrysler were able to transpose their previous taxes and other costs of the Old structures into the new ones. These tax savings anyway, cannot be counted as TARP support, this would benefit infact other common shareholders.

Thanks to the TARP intervention and the subsequent creation of the New GM also this company was able, even if with a certain delay respect Chrysler, to restore from bankruptcy and following the first positive financial results in the quarters it obtained after a very long time, New GM gave back \$ 6.7 billion in outstanding loans by April 2010 to the TARP fund, using the cash deposit in the escrow account.

Moreover, the US government had acquired – even in Chrysler – large common ownership stakes but exercising managerial control over the companies which it aided was not the US government's primary goal.

Its purpose infact was to compensate taxpayers for having helped the companies while not entitling the company itself with large liabilities that could hamper its final recovery.

In order to guide the management then, the Obama's administration set out a list of four core principles:

- “The government has no desire to own equity any longer than necessary and will seek to dispose of its ownership interests as soon as practicable;
- In exceptional cases where the government feels it is necessary to respond to a company's request for sustainable assistance, the government will reserve the right to set up-front conditions to protect taxpayers, promote financial stability and encourage growth;
- After any up-front conditions are in place, the government will manage its ownership stake in a hands-off, commercial manner;
- As a common shareholder, the government will only vote on core governance issues, including the selection of a company's board of directors and major corporate events or transactions.”¹⁰⁷

107 US TREASURY, *FACT SHEET: Obama Administration Auto Restructuring Initiative*, http://www.financialstability.gov/latest/05312009_gm-factsheet.html, 2009

New GM anyway, as we stated above, was able to restore all its debts towards the TARP funds through several institutes: through installments (\$ 7.4 billion), through conversion in shares of preferred stocks held by the US Treasury which had been redeemed in December 2010 (\$ 2.1 billion), through an effective conversion into an initial 60.8% equity stake (\$ 40.7 billion)¹⁰⁸.

TARP referring to all these repayments, stated that they are to “be paid into the general fund of the Treasury for reduction of the public debt”.

Using TARP funds to save GM could be defined as a subsidy. A subsidy infact is defined as “a capital investment that the competitive market does not support...it creates a barrier to entry by non-subsidized competitors...by enfusing the existing business with cash untethered to performance”¹⁰⁹.

The logical consequence of such a subsidy – i.e. the effect of which is the government erecting a protective barrier for GM – is that other firms will be squeezed out since they cannot compete with a company which benefit from external capitals injected by the US government¹¹⁰. The billions of dollars that the GM has saved infact, could be used as a competitive advantage at disposal of additional researches or even to lower product prices below that of GM's competitors. There is no evidence this has been the case, anyway.

As we already mentioned, one of the main argument that the critics have opposed to this use of the TARP funds stating that the rescue of a business sector that hasn't had nothing in common with the original addressee of the EESA provisions, was aimed to introduce social policies that wouldn't be possible to pass in other ways.

This was indirectly confirmed even by President Obama when he declared, in a speech to the Business Council, that he wanted to “use the crisis as a chance to transform our economy...and put people to work building wind turbines and solar panels and fuel-efficient cars”.

Following this statement, since it has used Treasury fund searching for support, GM became receptive to cooperation in the implementation of an

108 The partial sale of these equity stakes has returned around \$ 20.6 billion plus the US Treasury received \$ 0.8 billion in dividends and interest along with approximately \$0.1 billion in other recoveries from the bankruptcy process of Old GM.

109 SUPREME COURT, *Reilly vs Hearst Corp*, 2000

110 GM infact has access to funds which accrue only a 5% of interest per year while other companies could obtain loans producing a 10% of interest, if the could obtain them at all.

It is important to consider anyway that a barrier to entry not only prevent prospective firms from competing between each other, but it also removes existing firm from the marketplace as well.

environmentally-friendly social policy.

Under the financial crisis emergency then, the Obama administration succeed in stretching the legal limits of TARP, driving GM into a 21st century auto maker, manufacturing, fuel-efficient cars and trucks.

In order to better implement this policy, then, Treasury reconstituted the GM's board of directors since it held a 60.8% equity interest so it could take managerial decisions. But a receptive board of directors alone is not sufficient to meet the Obama's administration goal. When GM presented its definitive restructuring plan, infact, it renewed its commitment to produce advanced technology vehicles – i.e. the more environmentally-friendly hybrid ones¹¹¹ - in order to grant major support to the US social policy.

Despite this use of the TARP has been strongly criticized, especially by the Republicans when Obama, hadn't become President, decided to turn the Bush's investment without any precedent – and strongly against the conservative and liberal mindset of the Reps, Bush's party – to something new which hopefully would make the Country take a step forward to the environmental protection, its effects – besides for the pollution – have been extremely positive for the auto-industry in general and especially for all the millions of jobs saved from the massive unavoidable lay-offs which would have followed whether the government would had stepped in forcing a little bit the legislative procedures and an estimated \$ 39 billion (up to \$ 105 billion) of tax and revenues losses. The government too would have been called to take action in such a situation because it would have had to pay billions for promised pension payments to autoworkers. Likely, this is not what has happened and the US economy in the Auto-industry is more and more recovering.

Now that we have introduced both the pattern bargaining, the contractual approach automotive trade unions have traditionally adopted, and the TARP, an abused legislation used to realize something which would have been inconceivable for the US otherwise – i.e. State intervention in the economy market – we are going to address the auto-industry collapse and its atypical

111 GM agreed to the Obama's goal as the following: “General Motors fully understands and appreciates the challenges to energy security and the climate from increased global consumption of petroleum...it will invest heavily in alternative fuel and advanced propulsion technologies during 2009-2012 timeframe. This investment is substantially to support the expansion in hybrid offerings”

recovery.

3.3 The auto-industry collapse and its recovery

After having introduced the instruments which have characterized the industrial relations in the automotive sector, it's now the time to describe its collapse subsequent the crisis and its recovery, the driving force of which has been – as we have addressed in the previous sub-paragraph – the use of the TARP funds on one hand, and the intervention of the FIAT S.p.a, on the other.

The severe recession which has characterized especially the 2008 and the 2009 financial and economic market not only has contributed to a sharp rise of unemployment, but it has also led to a dramatic drop in the vehicle sales sector. The declines of this sector in the first years of the crisis had been the heaviest since World War II, in fact:

- sales of light vehicles dropped of the 38%;
- production of light vehicles dropped of the 46%;
- employment declines of the 34% in assembly plants and of the 32% in parts plants.

This data were particularly dramatic because the auto-industry had recorded, for an unusual and very long period, high number of sales being de facto one of the leading sector for the US economy, both internal and external¹¹².

Among the main reason for this decline had been the dependency of the carmakers on the sales of their light trucks – a portion of market which, as we have reported above, declined rapidly during the financial crisis.

One of the element which played a major role leading the sales of this specific products (i.e. the light trucks) to drop down had been the sharp increase of the gas prices which have characterized the first half of the 2008.

Moreover the Detroit Big Three – General Motors, Ford and Chrysler – lacked of competitiveness, especially in labor costs since they always had been applied the pattern bargaining method for negotiation. Method which, as we have already discussed, aiming to set the same common standards – especially with regard to wages – in every firm which signs the contract, has reduced a lot the competitiveness within these companies at least for what concern the labor costs, typically the part of the industrial relations which could really make a difference

112 Most of the economic analysts agreed that the US economy would have been dramatically affected whether one or more of the Detroit Big Three were go out of business.

in the competitiveness of a firm.

Deepening the recession, the financial conditions of Chrysler and GM in particular worsened dangerously¹¹³.

GM had recorded a loss near of \$ 30 billion with a cash supply of only \$ 14 billion. Chrysler had a very dangerous low amount of cash supply which threatened its ability to meet day-to-day obligations.

Ford, on the other hand, even if it had recorded a loss of \$ 14.6 billion loss, didn't face the immediate cash crisis of the other two. This was because it had borrowed \$ 23.5 billion in 2006 and they were secured by virtually all of the company assets.

We have already described in the previous sub-paragraph how the CEOs of the Big Three went to the Congress asking for loans under the Bush's administration and how they had been firstly rejected before being granted to them (to GM and Chrysler actually, since Ford could restore its loss by its own) the lending of TARP funds.

In that occasion, the conditions impose to these companies were very strict and they involved executives, unions, investors, dealers and suppliers.

The main condition anyway was that each firm had to become “financially viable” which means that they had to maintain “a positive net value, taking into account all current and future costs and can fully repay the government loan”.

In order to demonstrate their viability the companies were required to submit their restructuring plans within February 2009.

When they did so, they were found viable so they received a first tranche of TARP loans, amount that gradually had been extended by the Obama's administration – the real aim of which we have already mentioned above.

Before addressing the bankruptcy process of GM and Chrysler, it would be useful to deal with the Ford case since, as we have already outlined, has been a very peculiar case.

Even if it asked for money at first, infact, Ford didn't apply for other loans neither it has filled for bankruptcy.

As previously said, it reported a \$ 14.6 billion loss for 2008 – the largest in history - but it had \$ 26 billion line of credit that it had put together since 2006.

113 According to the CEO of Chrysler at the time, Robert Nardelli, “by the beginning of the credit they needed to conduct their day-to-day operations”

When went to the Congress the first time, asking for loans then, it did so not because it hadn't enough money to survive its loss but because there was the risk that Ford would have been hit by the panic sweeping through the auto industry.

An adviser of JP Morgan, asked to study the case, stated that “The concern was that Chrysler and GM would go into free fall, creating a ripple effect hitting the industry and the supply chain”.

Willing to solve the situation instead of passively waiting for the government to decided – since it was in a position to choose what it could have been done, differently to the other two companies – on March 2009 Ford started a broad restructuring of its debts, dividing it in three different transactions¹¹⁴.

Since there was the risk that one group of debit holders would refuse the company's offer, Ford adopted a plan to force them to accept the offer: if some didn't agree with it, the company would simply take all the cash it has allocated for that specific offer and it reallocate it in one of the two other tranches, increasing their amount.

With this strategy Ford granted that none of the creditors opposed the tranches and on April 2009 Ford announced it had restored its debts for a \$9.9 billion amount (the total of them being \$25.8 billion) and that it had lessened \$500 million of its annual interest expenses.

Moreover, during the summer of 2009, the firm has signed numerous deals consisting in “advising Ford on a \$ 1.6 billion registered offering of common stock...taking the lead on a \$ 2.875 billion convertible notes offering...and handling the amendment and extension of maturity on its \$ 11 billion revolving credit facility”¹¹⁵

As we have already mentioned, Obama appointed an Auto Industry Task Force the composition of which was peculiar because it didn't include individuals closing related to the auto industry. Members of the task force, instead, were financial investors and legal experts with experience in restructuring troubled companies and they did so adopting metrics for evaluation and processes for decision making from other industries, rather than using those in long use in Detroit Big Three

114 A \$ 4.3 billion exchange for the outstanding convertible debt, a cash tender offer for \$ 3.4 billion of the company's outstanding unsecured bonds and an auction tender offer to be led in The Netherlands to buy \$ 2.2 billion of senior secured term loans.

115 LLOYD R., *Ford gets tough: hardball tactics helped the troubled Big Three automaker avoid bankruptcy*, Down Jones, Vol 32, Issue 4, 2012

accounting offices since they have been revealed to not being so well managerial oriented.

After having taken in consideration three different options to restore the companies, the Task Force decided that the best one for both GM and Chrysler was to grant them additional financial resources tied to restructuring.

According to the task force, then, the best chance for Chrysler and GM to survive the crisis rely on bankruptcy even if it had to be lead in a “quick and surgical way”.

According to the Task Force infact, restructuring “would not entail liquidation or a traditional, long, drawn-out bankruptcy, but rather a structured bankruptcy as a tool to make it easier for Chrysler and GM to clear away old liabilities.”¹¹⁶

To accomplish “a quick and surgical” bankruptcy, the Task Force relied on a rarely used section of the US Bankruptcy Code: Section 363(b) of Chapter 11.

It is rare to use this Section because its use is controversial, especially if compared to Section 1129 of the Bankruptcy Code.

Section 363, infact, gives the debtor the possibility to sell his assets outside the ordinary course of business at any point during the bankruptcy case, provided that the bankruptcy court has approved the selling.

Quoting the Section it states that “the trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate...”. From this wording any sales outside of the ordinary course seems to be allowed provided that notice is given to the parties¹¹⁷, but applying this provision courts have interpreted it as including additional requirements before giving its approval to a sale – we would assess them immediately after.

Section 1129, instead, is considered the core of the Chapter 11 – i.e. of the bankruptcy proceeding - and it requires that the court, before giving its approval to a restructuring plan, has to make sure that the plan is in compliance with the usual priorities. If the plan deviate from those priorities, infact, the creditors wouldn't give their consent to it¹¹⁸.

116 CONGRESSIONAL OVERSIGHT PANEL, White House, 2009, pag. 13

117 There is an exception to this: when the debtor discloses a “policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor”. In this case, it is usually forbidden to the trustee to go on with a sale unless it fits within the debtor's policy and there is the approval of the court

118 It has to be noted that in a simple sale these two section are well-balanced. For example, the debtor sells a subsidiary which cannot be managed anymore by the firm and it's now

Even if usually these two Sections don't conflict with each other, in the complex cases it could happen that specific priorities and conditions of that sale are structured in a way to be determined by Section 1129 and not under Section 363- as has been the case of the Big Three – because they determine core aspects.

Congress has tried to compose this debate in a formalist way: Section 363 would be limited to simple sale of assets in exchanging of cash, while Section 1129 would be relied on by the judge for complex sales requiring full disclosure of company's business operations and the evaluation of the impact of the plan on the creditor groups. For this reason creditors are required to vote for the plan thereafter.

This formalist composition, anyway, cannot be accepted for two reason: one it's of a theoretical nature and the other is practical.¹¹⁹

As for the theoretical one, each sale involves the Section 1129 bargaining so it could happen that the parties couldn't reach an agreement over the restructuring plan. In this case the judge can force them to accept it, but in order to do that he has to evaluate this plan before the firm could have the time to rise any claim, and this process is usually highly inaccurate. This means that a sale affects reorganization by reducing the valuation uncertainty but this process would have beneficial effects only if the sale value is proper.

With regard to the practical reason, if restructuring plans are all rejected by the creditors because they don't see them as being good enough this could be rise to important problem: a sale of business assets is too attractive for many bankrupts to give up.

Most of these bankrupt companies infact, derives from declining industry that should have shrunk. These firms can be reorganized in a way that the managerial team would do a much better job than the previous one, simply changing the members of the team.

Then, if in this process some conditions of the sale have to be determined under Section 363 even if normally they would be addressed by Section 1129, the courts

deteriorating in value. In exchange for the asset the debtor receives cash, so being available to the pre-bankruptcy creditors who could at that point start a litigation and/or negotiation over all the possible legal matters which could arise around amount of money deriving from a bankruptcy case.

119 ROE M.J., SKEEL D., *Assessing the Chrysler Bankruptcy*, Harvard Center for Law, Economics and Business, Harvard, 2009

have to find a way to compose the quick sale but without distorting the entire 1129 structure of protections and priorities. This could be relatively easily done by identifying the targeted features of the Section 363 and making sure that they would have succeeded even under Section 1129.

To better investigate whether the sale is in compliance with the quickest proceeding set by Section 363, the appellate courts have developed a set of standards that have to be respected:

- the sale must have a valid business justification¹²⁰;
- the sale cannot be a sub rosa plan¹²¹ of reorganization;
- if the sale violates the protection granted to the creditors by Chapter 11, the court has to eventually approve it only after having assigned appropriate protective measures to be inserted in the plan.

Moreover any proposed sale have to be made for a fair and reasonable price.

These requirements were all met in the Chrysler case. The issue of the need for a valid business justification consisted in maximizing and preserving the value of the debtor's assets and estate. In contrast, the issue of the prohibition of being a sub rosa plan ensured that the value of the debtor's estate would be distributed not following the private agreements between claimholders and outside buyers, but according to the rules of Chapter 11.

Since the use of this Section and the terms of its use in this case had been strongly criticized, being also a matter of debate within courts, in future reorganizations interested parties should not assume they could use Section 363(b) to adopt reorganization plan not having to comply with all of the Chapter 11's requirement – i.e. those set out in Section 1129.

Buyers which propose sales like that proposed in Chrysler should not assume that they would be approved only because they serve business purposes. Instead, buyers and claimholders should be careful because a court could be rules that that proposed plan is a sub rosa plan, as the majority thought of the Chrysler's one, and

120 The “business purpose test” has been settle down by the Court in the Lionel case in which the Court provided a non-exclusive list of factors that have to be considered to determine whether there is a good business reason for a sale under Section 363 (i.e. the proportionate value of asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future and so on).

121 In the Barniff case the sub rosa plans under Section 363 are described as sales of assets that “would change the composition of the debtor's assets and have the practical effect of dictating the terms of the future reorganization plan”.

thus being prohibited the use of the Section 363.

In order to be able to sell under Section 363 then, the plan hasn't only to maximize the value of the debtor's estate, it has also to redistribute any portion of the value of the debtor's estate to the debtor's claimholders.

The practical effects, the same which have been realized both in Chrysler and GM proceedings, of this sell is that the viable assets – i.e. properties, contracts, personnel and other assets necessary to move forward as a viable operation – are allocated to a “new” automotive company while the “old” one would keep the toxic assets which have to be liquidate or to write-off, as required by bankruptcy laws.

In Chrysler cases, the company filled for bankruptcy on April 2009 and it was ready to sell all its viable assets to the “new” company on May; GM, instead, filled for bankruptcy on June 2009 and the purchase of the viable assets from “new” GM occurred on July 2009.

For what concern the Chrysler case, the filling for bankruptcy could have been avoided only if all its creditors would have approved the plan but this was not the case for Chrysler. This lack of unanimity, then, justified the opening of the bankruptcy proceeding and allowed the Task Force to cite Chrysler's “greedy” stakeholders describing them as the reason for the opening of the process.

The US Supreme Court, at that point permitted the Chrysler's sale, ending up all the legal proceedings. Subsequently the government gave the “New” Chrysler a new – and the last one – loan from the TARP funds in order to help the company transforming to a new, smaller automaker. In exchange the latter ceded an 8% equity stake to the US Treasury (and a 2% to the Canadian government, that was one of the creditor of the company too).

Moreover, Old Chrysler has sold all its still operating assets to the newly-created company in exchange for \$ 2 billion in cash from the latter and the assumption of some of the old Chrysler's liabilities.

These \$ 2 billion had been distributed then, among the secured lenders and there hadn't been no assets left for junior secured lenders or for unsecured creditors, this means that the Chrysler's equity holders hadn't received nothing.

The Obama's Task Force anyway, stated that in order to be viable Chrysler has to enter into a partnership with another automotive company. This is when the Italian carmaker, FIAT S.p.a – which originally held 20% of new Chrysler equity without

direct financial contribution – stepped in.

The bankruptcy court, to enable FIAT to raise its equity stake in Chrysler set three performance benchmarks:

- “a technology event = FIAT could increase its stake by 5% manufacturing in the US a fuel-efficient engine based on a FIAT design;
- a distribution event = FIAT could increase its stake by a further 5% exporting vehicles from North America;
- an ecological event= FIAT could increase its stake by another 5% assembling vehicle in the US that achieved at least 40 miles-per-gallo (mpg) fuel efficiency”¹²².

In accordance with which were the guidelines, when asked what had changed at Chrysler to be able to make pure profit already in the first quarter of 2014, Sergio Marchionne – FIAT chief executive – replied “the culture, the technology that's in place, the way in which the cars are manufactured, the attitude of the workforce, the efficiency, the land speeds, the output of the system has completely changed. I mean if you took a Japanese guy into our plant today he'd be impressed”.

In return for the improvement on technology, distribution systems and other capabilities, then, the New Chrysler has awarded FIAT S.p.a. with a 35% of its equity stake.

FIAT has also restored the retiree healthcare benefits to be paid by the company. During the bankruptcy process, infact, they were paid by the UAW Trust but the New Chrysler has entered into an agreement which was not such burdensome as the one that drag down the precedent Chrysler so it could afford again to pay for its workers healthcare. On its side, the UAW Trust received, for the aid it has given during the crisis, a greater payout than what it would have received if it had remain only an Old Chrysler's unsecured creditor. The bankruptcy court described this payment to the UAW Trust as “provided under separately-negotiated agreements with New Chrysler” and not on account of their pre-petition claims on Old Chrysler.

Opposing to the Chrysler case, GM had emerged from bankruptcy thanks to the US government which has transformed the “Old” GM's TARP loans into an ownership stake of 60.8%

122 KLIER T., RUBENSTEIN J.M., *Restructuring of the US auto industry in the 2008-2009 Recession*, Economic Development Quarterly, Vol 27(2), 2013, pag 144-159

The main reason for GM recovery had been, as for the Chrysler, its sell and the subsequent formation of a new entity since New GM purchased the still operating assets of Old GM together with the assumption of some of its liabilities.

Moreover New GM issued 10% of its common stock to Old GM and it promised to purchase an additional 15%. The Old GM's shareholders received nothing.

In addition, New GM has changed the regulation of the pension scheme for those employees who had been hired before 2001: they would keep their existing pension, but the future contribution would follow a defined contribution scheme rather than a defined benefit scheme; healthcare benefits are no longer paid to the retired employees and the company's commitment towards those who are entitled to it because they had been already perceiving it was reduced. The reason for this is that the labor costs related to those benefits had become a too unbearable burden which deeply affected competitiveness.

Furthermore the car models – i.e. marques – had been reduced in the North America, declining from eight to four. By slowing down or selling them, infact, the company would be able to focus its resources on those four profitable – or so considered by the board of managers – brands.

To sum up, the reorganizations of both companies have lead to a wiping out of the existing shareholders, substantial losses for many creditors and to give equity and debt to the UAW Trust. Some creditors strongly opposed to the role played by the government in the whole process, then, because they were afraid that their investments in the old companies, giving all these concessions (to the UAW Trust so as to the unsecured creditor), would be sharply reduced.

After both Chrysler and GM had exited the bankruptcy and have started again to rise, the Task Force which Obama had established to deal specifically with the relative issues was transferred to the Department of Labor and renamed the Office of Recovery for Auto Communities and Workers in August 2010. The principal function of this office is to identify which among the sources of federal funds are appropriate to assist those communities negatively affected by the auto-industry restructuring.

After having exited the crisis, the wholly new management of the Detroit Big Three has started to take decisions in order to rise their competitiveness, being so able to successfully re-enter the market – that after the crisis has become much more competitive.

To meet this purpose the government-managed companies, in addition to the debt reduction, reduce labor costs and their production capacity.

In order to lower labor costs some strategies could be adopted, such as:

- employ fewer workers = employment in Detroit declined for all the core period of restructuring (from 250,639 in 2007 to 169,966 in 2009);
- reduce the wage premium= this because the Detroit workforce, before the crisis, was paid way more than their colleagues in the rest of the US;
- transferring the health care costs of retired US union workers= these were very high in Detroit so the Big Three had reached an agreement with the UAW already in 2007, through the pattern bargaining procedure, to transfer the financial responsibility for the retired workers to the union's voluntary pension funds.

The need to reduce production capacity derives by the historical link between this and the capacity utilization. The latter has sharply reduced after the crisis decoupling the traditional relation with the level of production – around 2.6 million units have been removed from production capacity in the US. This has given the carmakers the possibility to become profitable at relatively low output levels, being the reason why the new managements have indicated the reduce of production capacity as one of the main intervention that has to be done to restore companies' competitiveness.

After having closed both the proceedings, the Withe House has clearly stated that it considers the restructuring of the companies “one of the clearest success of tough presidential decision making”.

The Congressional Oversight Panel added:

“GM and Chrysler are both more viable firms than they were in December 2008...The industry's improved efficiency has allowed automakers to become more flexible and better able to meet changing consumer demands, while still remaining profitable.”

Nevertheless, the Panel has addressed the use of TARP as being “controversial” since, as we have already described in the dedicated sub-paragraph, its original purpose was to restore financial firms, not the manufacturing ones.

According to this body this move has been a “moral hazard” because it sent a powerful message to the marketplace – some institutions will be protected at all cost, while others must prosper or fail based upon their own business judgment

and acumen”.

Moreover, independently from the financial accounting, these without any precedent restructurings modified the structure of the North American auto-industry in two fundamental ways.

First of all, the labor costs structures of the three Detroit companies has started to be in competition with their international competitors.

Secondly, the break-even point of these three have been lowered subsequent the restructuring and the new managerial approach.

From an economic point of view, using the TARP funds have been a theoretical huge loss of money since the US spent around \$80 billion to rescue GM and Chrysler (plus their auto-part suppliers). Taking in account even the government-held shares sold the Treasury has lost \$10.5 billion on its GM investment and another \$1.2 billion on the Chrysler one.

Anyway we said it has been a theoretical loss because according to Lew, an economic expert, “inaction could have cost the broader economy more than one million jobs, billions in lost personal savings and significantly reduced economic production”.

As we could infer from this statement, the US government had to take action since the entire industry were in depression, risking that it could have dragged down the whole country.

The targeted companies, as first, would have immediately laid off their workers and this would have had widespread spillovers into supplier industries and those who sell the cars of the Big Three¹²³ . Such massive job losses would have imposed much grater spending for the government rather than the use of TARP funds. Infact, additional spending on safety net, health care, unemployment insurance and other programs would have to be provided by the Treasury.

When interviewed by the Detroit News in 2015, Obama explained its decision for the auto-industry bailout in this way “There was a clear-eyed recognition that we couldn't sustain business as usual. That's what made this successful. If I had been just about putting more money in without restructuring these companies, we would have seen perhaps some of the bleeding slowed but we wouldn't have cured

123 The Congressional Oversight Panel have addressed the possible auto-industry collapse as “a potentially crippling blow to the American economy that Treasury estimate would eliminate nearly 1.1 million jobs”

the patient.” And this cure has been revealed as the best one to adopt in that moment.

The two companies infact, had been able to restructure to a greater degree than ever before and, since they were under pressure partially because they had to repair their debts with the US government (and not only it) and partially because for all the period during which the government held shares of the company it influenced the decisions, had returned to profitability in 2010 – the general slow recovery of the economy and the new growth in cars demand, have undoubtedly helped.

Furthermore, the lesson Ford gave to the future companies – and not only them – is that the good managerial decisions concretely help to survive the crisis by being able to take precautionary steps and by making great efforts to restructure after being hit by such an unpredictable period of recession.

CONCLUSIONS

Before concluding this paper, I would like to draw some conclusions of what has been emerging since the financial crisis has started, in order to reflect on which could be the best option to get out of the recession once for all and start to grow again both under the economic side and, especially, the social side to not let all the lessons this crisis has given to us go lost.

One of the first thing to realize after having addressed the auto-industry collapse and how the US government had reacted is that the refusal of Europe to get rid of its failed institutions is crippling its recovery. It should follow the example of the US where there is a greater willingness to dispose of lost causes so that activities with greater prospects of success have room to thrive.

When GM and Chrysler filled for bankruptcy, the city of Detroit too collapse and it had to fill for bankruptcy on its own. Its debt was around \$ 20 million and its creditors would have done everything to have their money back, as shown by the request to the federal government of the trade unions themselves which while claiming for a huge amount in compensation, didn't take into account the workers' interests at all.

Anyway the characteristic which distinguish the US the most is that they have always been ready to react without thinking too much at the consequences of their actions. This could be – and it has been – a very risky attitude but in these kind of economic catastrophes, in which a decisions is needed to be taken as soon as possible to avoid it would deepen even more, it's those which produces the most positive effects.

This had been the case with the 1929 crisis and it has been the case nowadays.

Detroit has exited the bankruptcy in 2013 thanks to a temporary federal management because of the injections of liquidity from the Federal State. The same has been true for other “giants” which the US has left going to bankruptcy such as very important banks (Lehman Brothers being the most famous example), economically strategic companies (we have addressed the auto-industry collapse) and several local governments other than Detroit.

This has being so because for the US mentality running a risk and eventually fail, is not such a big deal: basing all their way of thinking on the “self-made man” concept as a model for all the aspects of life - and failings being a way to learn

important lessons and improve himself from these experiences – being able to recover yourself after any bad events of your life (bankruptcy is just an example) is very honorable.

In the specific case of a collapse leading to bankruptcy, the latter is seen as a new opportunity which encourages to keep on fighting. The typical US dynamic economy is attributable in a great part to this soft attitude towards who runs some risk in the market.

Europeans, instead, consider insolvency a much darker moral stain.

Traditionally, indeed, having to deal with a bankruptcy means being labeled as unreliable, a shame to hide so deep that the employer is "forced" to leave the world of business forever. The repulsion for this idea derives not only to a much less inclination in bearing risks but also to policies which leave alone and isolated those who, deciding to run a risk, has fallen.

The bankruptcy is a concept so unacceptable that, in the current economic crisis the EU has opted for paying the debts of the Countries which were going towards bankruptcy and it is now facing all the consequences.

This could be clearly seen in the Greek case where, even if the country was strangled by its numerous debts, its creditors (i.e. the other EU States) have labeled as unacceptable a recovery plan.

But, since the fact that a sovereign State couldn't afford to repay its debts was even more unacceptable, the EU has lent Greece money – even forcing the Monetary Fund to take part to this rescue – to postpone the date of the effective payments.

The same mindset used to “rescue” Greece, had been adopted with the banks.

In 2010 the Irish government had tried everything in order to cover the gaps in the annual balance sheet of its banks using the taxpayers' money instead of declaring them insolvent so protecting the account holders and letting the creditors deal with the process to have their money back.

Moreover, when the Ireland understood that its public funds weren't enough, the EU Member States forced it to lend other money from them – this has meant new debts for the Country of course – to be able to conclude the recovery.

The reality (i.e. the following events) has brought rationality back in Europe which at the end restored the Greek massive debt but when it decided to do this, it was too late to achieve the typical benefits which could rise from a restructuring

and to pretend this has been a bondholders' voluntary decision – when instead it was the only solution at that point and it had been so since the very beginning actually.

In 2010, the US instead has tried to leave the banks alone and to give all the liabilities to their creditors, defeating once for all the “too big to fail” argument – so beloved by the EU -, since the ability to let even huge firms die is a sign of strength, not weakness. This is valid especially for the banks.

The US attitude is repaying the American population. Since the debts payback gradually and rapidly are decreasing, people start to purchase again and fresh and new injections of privately-held money is driving the overall economic recovery of the States.

In the EU instead, the banks are unstable being on the top of too weak shock absorbers which have derived from the refusal to transform debts into net worth when all the other sources of capital, which had been used in the EU for decades, have run out.

What could be learned from the US approach then, it's that failure – i.e. bankruptcy – hasn't to be considered as a shame which has to be regret for the rest of someone's life. It has to be perceived, instead, as an opportunity to start rising again so that if the possibility to collapse is quickly given, the real and effective recovery would start immediately – as we have learnt from the GM and Chrysler cases for example.

This EU approach could be seen reflected in the a broader policy of the austerity which, as we have seen in the sub-paragraph dedicated to the flexicurity, has characterized the EU economic decisions for over a decade and, in some extents, is still present today.

This policy have resulted only in emphasizing the difference between richer and poorer Member States within the EU, in deepening the skepticism of the EU citizens toward the European Union institutions and its concept in itself.

The EU bodies, infact, are perceived as too rigid from a social point of view, willing to effectively offer aids only to banks and when they agree to rescue a State – i.e. Greece –, the common perception is that they impose such strict terms and conditions in order to increase its dependency to the EU itself or, for the most obstinate critics, to a group of the most economically strong Member States.

In order to improve the image most of the EU citizens have of this Europe and to

successfully get out of the crisis – which, we have seen, the austerity has contributed to deepen -, the EU Parliament has stated that the path has to be changed and that now is the time to adopt a whole new and fresh approach in some way deriving from the US liberalism: the flexicurity.

What is derived from the US is the need of flexibility of the companies which require more freedom of organization of both employment relationships and industrial relations.

But, thanks to the well-rooted tradition of strong social policy characterizing the most European Member States, it has been possible to balance this need for flexibility with the employees' need of job security.

This balance has been reached shifting the required job security towards a warrant of employment security – i.e. what it has to be granted nowadays is not a specific job position anymore, but it's the possibility to be employed for all the period previous to the retirement and, if sometimes this is not objectively possible, the State has to provide a form of social sustenance which would differ depending on the specific tradition and historical background of a Member State.

As we have seen, Italy is the perfect example of this changing socio-economic approach thanks to the adoption of the Jobs Act, the law which has deeply modified the industrial relations and the labor market in general.

The deepest change provided by this law is the role of the second level agreement which replaces some of the functions typically held by the national collective contract so that the employer would have much freedom in determining the work organization in his/her company, adapting the regulation on the basis of the effective and specific needs of the company itself – i.e. flexibility.

According to the first datas the Jobs Act has effectively helped to, at least, stabilized a scenery which had been falling down since the start of the financial crisis and nowadays it has also started to slowly grow.

This being the proof that a much more liberal approach, as those embodied in the flexicurity program, is more efficient – at least for exiting out of a dramatic period as that which has characterized the last years – than the very strict and severe one that is the core of all the austerity policy.

As we has said above, the flexicurity idea has been taken by the US liberalism approach. This interconnection of cultures has been possible thanks to the globalization that, of course, have characterized the economic relations all over the

World as first.

The US also, have been influenced from policies adopted by other countries.

In the paper the pattern bargaining system has been described, a method in use in the US since the end of the World War II (when a general internalization started) and its very similar to those adopted by most of the European Member States.

It consists infact, in the most representative trade union entering into contract with an individual employer of a certain sector and then it makes the other companies of the sector sign this agreement, which is used as the standard for the labor regulation of that sector.

Since the tradition in the US is to not having a trade union bargaining for the individual employee's interests at all or the adoption of Right-to-Work laws where, as we have seen, the role of trade unions is strongly reduced and marginalized, the pattern bargaining approach has to be considered as a very impressive change in the American's mentality, all attributable to the comparison with other legal traditions.

Being such an innovative method anyway, it's not so widespread as it could be but it's meaningful and promising that it's in use in the automotive sector because this has always been one of the most important industry in the US, from an economic point of view.

After the crisis, anyway, and the subsequent successful rescue of the Big Three this path of negotiation has started to be adopted by other sectors too (even if its full implementation is still very far) because it has been perceived as effective to address the dramatic period started in the 2008.

The reason for this is that on one side, having bargain terms and conditions of employment with the representative trade union strikes would be avoided¹²⁴ and on the other side, the employers don't have to enter into agreement with a single employee or, if a trade union is present in the unit, they don't have to put too much efforts on the negotiation, having the possibility, then, to direct their energies (and their time) trying to find new market solutions to face this thorny period at their best.

If we now take a look closer to the pattern bargaining model we could notice it's

124 Even if in the US there has never been such a huge tradition of strikes - as, for example, those which characterized Europe during the late 60's - being the rate of unemployment extremely increased with the start of the crisis, the fear that there are going to be some is legitimate.

very similar to the second level agreement which is now being implemented in Europe through the flexicurity.

They are two sides of the same coin because, even with their divergences due to the different historical and legal background which characterized them, they have been widespread after the crisis to respond to the same requests and needs: flexibility from the employers' side, social protection from the employees' side.

These are the perfect examples to enlighten a positive effect the globalization has on the legal and economic paths: the possibility to compare with other Countries and subsequently improving regulations at his own home, sometimes modifying them learning from the others' fails or adapting them according to the specific national legal system.

To be able to effectively protect the employees' interest anyway, the unions have to increase their membership which we have seen being strongly decreased in the last decade, particularly after the crisis.

If they don't succeed in that infact, they wouldn't have so much power to oppose to the employer's request during the negotiation, especially in second level agreements as those which are preferred nowadays.

However, the method unions have to use to start attracting new employees convincing them to join the union, has to be different for US and EU because of the different functions trade unions have in those macro-States.

In the US infact the trade unions could bargain almost exclusively about wages and not so much more; while in the EU they have much broader functions: not only the negotiation on wages is of their competence but also – and primarily nowadays – they fight for introducing more secondary welfare benefits in order to balance the general reduction of salary, as the ProWelfare research - that we have showed on the dedicated chapter - has enlightened.

In addition, these difference of functions is another argument against the signing of the TTIP that we could add to the others we have outlined in the thesis. With its adoption then, for what is our focus of interest, the standard of the employees' social protection would be lessen as it could be inferred precisely by the differences between the concept of trade unions, differences that denote the historical less regard the US companies have towards the employees' protection.

The solution for both the US and the EU to increase the economic growth is not the TTIP, as it seems in the recent days being understood by some of the EU

Member States.

The best solution for the EU would be the implementation of the EU2020 Strategy which, we have seen, through its guidelines it strongly supports the flexicurity approach and, as Italy has shown, it would give positive outcomes.

For what concern the US instead, the best solution would be to implementing the pattern bargaining method, especially in those States that are still applying the Right-to-Work Laws.

This implementation anyway, could be realized improving the first scheme pattern bargaining has adopted – i.e. those set out by the automotive sector: the topics of bargaining should not be limited to the monetary benefits, they should comprehend also some other benefits aimed to improve the employee's private welfare. The latter, moreover, shouldn't be circumscribed to the healthcare and the retirement – as it already is – but they should be oriented in granted more protection to the employee's every-day life.

To sum up, the crisis has been a dramatic period for all the Countries and especially for their population but it has taught us a lesson: the economic and social model which has been adopted since the 80's, independently on where – whether the EU or the US - , is no longer sustainable because the World has completely changed and the balances needed before are becoming heavy burdens now.

What could be learned by the Big Three collapse anyway, is that a crisis could be also an opportunity and we have now the opportunity to modify the socio-economic model which no longer fits into our need and to create a whole new one, learning from the collapse of the 2008 so that we would not repeat the same mistakes.

If we would be able to do so, the era is going to start would be an era of increase of employment and of welfare benefits (i.e. social protection) on one hand, and a decrease of labor costs and more freedom of organization so that the business is stimulated to grow on the other hand.

If these missions would be accomplish economy would bloom again and a period of great investments and interconnection in the respect of everyone would start and, since the globalization, this new model would widespread allover the World even to those Countries which haven't neither a specific labor law – contributing then, to sustain fundamental human rights in those Countries.

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