Towards socially sensitive corporate restructuring? Comparative remarks on collective bargaining developments in Germany, France and Italy

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Abstract. Rapidly changing markets in the context of globalization call for increasingly frequent restructuring to sustain the competitiveness of individual firms. To meet this need while minimizing consequent job loss, the social partners in major European countries have devised a variety of decentralization mechanisms that enhance local-level flexibility without fundamentally calling into question the traditional national models of collective bargaining. Analysing the use of “opening clauses” in German industry agreements, France’s firm-level “derogation agreements” and mandatory bargaining on “workforce planning”, and Italy’s tripartite “territorial agreements”, the author concludes with a plea for a supranational framework to support socially sensitive restructuring across Europe.

European industrial relations are undergoing profound structural changes, which are having a significant impact on how firms and employees react to corporate restructuring at country level. Against this background, this article offers a comparative analysis of Germany, France and Italy in an attempt to show that these countries’ approaches to restructuring, while still shaped by nationally different legal, social, cultural, political and historical factors, are nonetheless moving towards a common pattern of action.

There are many reasons why these three countries were selected for the study of this convergence, but two of them are particularly important. First, two large-scale international research projects co-financed by the European Social Fund (ESF) have generated a number of very useful and up to date case studies and essays on these countries’ corporate restructuring processes. And second, these countries feature a number of common trends, albeit to different extents:

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trade unions and union density are declining; working conditions are increasingly determined at enterprise level; pressure is growing to downgrade working conditions in return for employment security; derogation and deregulation are being widely sought and accepted; and extensive restructuring of important local firms has created a widespread sense of shock. At any rate, the question of how to strike a balance between workers’ protection and the necessity of corporate restructuring is the key issue in every country. In this context, the role of labour law is not simply to protect workers, but to balance protection and efficiency within national economies. While protecting workers affected by restructuring is unquestionably an important goal in the short term, broad trends in the pattern of union action suggest that workers’ representatives are beginning to acknowledge that facilitating corporate restructuring, although painful in the short term, will serve workers’ interests in the long run. At the same time, the European Union (EU) is criticized for lack of intervention and excessive confidence in market freedoms.

Following a brief introductory presentation of the framework of enquiry, this article concentrates on the impact on corporate restructuring of recent developments in the structure and functioning of collective bargaining, first, in terms of the shift in collective bargaining from the national or industry level towards the company or establishment level; and, second, in terms of the role of trade unions and/or employee representatives in the flexibilization of protective labour regulations. Finally, a concluding section looks at the challenges and opportunities that should be addressed at EU level.

The evolving structure of collective bargaining in the context of corporate restructuring

Business restructuring used to be an occasional occurrence, an immediate response to urgent necessity brought about by an unexpected change in circumstances. But in today’s context of economic globalization, restructuring follows as a natural consequence of the growing international connections between markets. Continuous and pervasive company restructuring has thus become a fact of life (European Commission, 2004). And its effects are a cause for increasing concern among public authorities and trade unions.

Change is driven by economic and social factors that include the development of new technologies, globalization, changes in corporate ownership, mergers and acquisitions, transition from “industrial society” to “information society”, growth of foreign direct investment, changing consumer demand, and new expectations from workers – all of which create challenges and, of course, opportunities.

Company restructuring is often inevitable in managing this continuous process of change. It tackles issues of economic, social and environmental significance simultaneously, often in transnational context. In labour law, restructuring is typically approached either from the perspective of collective dismissals or from that of “transfer of undertaking” (for this methodological approach, see
Morvan, 2007). In this article, by contrast, the focus is on collective bargaining and on emerging trends in business restructuring in European countries, with a comparative analysis grounded in a number of case studies drawn from two large research programmes funded by the ESF, namely AgirE and MIRE.¹

For a number of reasons, collective bargaining has traditionally played a marginal role in business restructuring. Indeed, given its far-reaching effects and the conflicting interests at stake, restructuring poses many difficulties when public authorities and civil society in general demand that it be carried out in a socially sensitive manner. Although it is widely agreed that the restructuring process should – in addition to aiding a firm’s profit maximization – encompass a genuine attempt to minimize the associated social costs, the outcome is not always “socially sensitive” in practice, while downsizing appears to be the first action taken by companies in the face of worsening economic conditions (on this very general issue, see Rogovsky et al., 2005). Indeed, effective social dialogue occurs rarely in this context, and when it does, it is mostly unproductive. European institutions and scholars, as well as trade unions – both at the European and national levels – take the view that anticipatory negotiation is crucial to socially sustainable restructuring. It is important, they argue, to manage the allegedly needed change properly from the very beginning. In other words, if restructuring is to proceed smoothly, it has to be based on planned action, negotiated well in advance and agreed between employers, workers and, possibly, central or local government. In the near future, it is hoped, the transposition in all Member States of Directive 2002/14, extending information and consultation rights to employees, will, as stated in its preamble, actually “strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation”.² To this end, the Directive provides for a set of specific rights and duties, and for effective sanctions in case of violation.

For a variety of reasons, however, anticipation and early warning remain elusive. In the first place, companies are often unwilling to share information with trade unions. At the same time, experience shows that trade unions are seldom inclined to deal with unpopular issues until they really have to, being traditionally more active as a counterpart to the employer’s decisions, rather than being burdened with a substantial share of the responsibilities and consequences ensuing from decisions taken, as the Directive would end up requiring if duly respected. As a result, corporate restructuring typically comes to public attention in crises, amidst large-scale collective redundancies and/or plant closures. As a preliminary assumption, it follows that in order to control and manage change and to protect workers effectively during restructuring it is necessary, on the one hand, to achieve a greater involvement of the social partners through effective social dialogue as a means of enhancing synergy between

¹ On AgirE, see http://www.fse-agire.com (some of its research findings have been already published, see Moreau, 2008 and forthcoming). On MIRE, see http://www.mire-restructuring.eu/.
policies and financial levers, and, on the other hand, to adapt the framework of legislation and collective agreements. Indeed, in this field, there is no doubt that “law is shaped more by the interplay of social forces than by great declarations of principle, whether domestic or international” (Arthurs, 2006, p. 66).

As the social partners themselves put it, “[t]he existence of a good social dialogue […] and a positive attitude to change are important factors to prevent or limit the negative social consequences”.3 However, legislative action is also needed to put trade unions in a better position to influence restructuring processes, as they do not want to be left only with the burden of managing the negative consequences of restructuring. As will be shown below, each of the three countries under study here provides a good example in this respect: France, with the enactment of mandatory bargaining every three years (obligation triennale de négociation); Germany, for its effective use of so-called opening clauses in collective agreements (Öffnungsklauseln); and Italy, for its reliance on tripartism in shaping “territorial agreements”.

In the traditional structure of labour law sources, state law or broadly applicable collective agreements (as a functional equivalent of the former) were considered the main vehicles of social and labour regulation, with very limited space left to decentralized collective agreements. Since the end of the 1970s, however, there has been a growing trend towards decentralization and enterprise-level collective bargaining (for some useful comparative figures on this and related issues, see ILO, 2004, pp. 64–74). This topic has indeed become one of the most debated themes in industrial relations research (Katz, 1993). A question of growing importance in this context is: who has bargaining rights at company level? As a rule, the answer is local trade union branches. But in many Member States, this rule is accompanied by various provisions specifying which unions enjoy such rights or how they have to work together at company level to conclude a collective agreement.4 Some of the main features of the decentralization process are reflected in the reinforcement of the powers of company-level actors and a shift in their attitude, from distributive to cooperative bargaining based on partnership at that level.

This trend, however, is far from representing an automatic gain in union power. Indeed, research on restructuring processes shows that the decentralization of bargaining is often a shift sought by management in order to maintain asymmetry of bargaining power to the disadvantage of workers. In particular, trade unions are incapable of reacting to the dramatic internationalization of firms through equivalent internationalization of their action. Thus, far from achieving the objective of enhanced union power at local level through greater flexibility and responsiveness to the challenges posed at that level, the decen-

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4 For specific information on the 25 countries of the EU, see European Commission (2006). For a more theoretical approach, with particular emphasis on the legal dimension, see Sciarra (2005).
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ralization process tends to leave unions isolated in local firms far removed from the centre of corporate decision-making, which may be located in another country, if not on another continent. This pattern is widely confirmed also by trade unions at European level, which realize that the current context of globalization calls for decentralization to be counterbalanced by and/or integrated with a mechanism of coordination among the various levels of bargaining. This question – especially in regard to the need for timely reaction to and anticipation of restructuring processes – is the focus of particularly intense debate in Italy, France and Germany.

Given the huge number of restructuring processes that affect European firms each year, it is extremely difficult to obtain aggregate data on trade union action at the different levels. Some initiatives have been taken in this respect, however. First, the European Monitoring Centre on Change (EMCC) was established with the specific aim of providing up-to-date information and analysis on company restructuring in Europe through quarterly reports which summarize restructuring trends and their effects on employment. Its database now contains the details of almost 3,500 cases of restructuring involving job losses in EU Member States over the period 2003–06. Second, the European Commission has been taking a growing number of research initiatives aimed at providing more in-depth analysis of the restructuring process (e.g. AgirE and MIRE, as mentioned above).

While the EMCC provides a useful source of quantitative evidence – but also a growing number of reports and research papers – the Commission’s research initiatives give academics and experts in the field an opportunity to develop more sophisticated analyses of current trends and their impact on the evolution of collective bargaining. Although the 25 case studies underlying the AgirE project and those of MIRE do not amount to many, they are nonetheless useful in highlighting trends in collective bargaining concerned with restructuring in the EU.

Indeed, the research shows that the scope of collective bargaining is expanding. On the one hand, the role played by local actors is becoming increasingly important at firm level; on the other hand, the nature of the agreements sought through collective bargaining is shifting towards a pattern of flexibilization which is intimately dependent upon the decentralization process itself. At the same time, within the context of corporate restructuring, other types of agreement have also developed across the various countries, namely procedural agreements and partnership agreements. In other words, both the kind of actors and the kind of collective agreements are changing in their structure, functioning and scope.

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5 See http://www.eurofound.europa.eu/emcc/.

6 For example, in the last quarter of 2007 alone, the EMCC recorded 214 cases of restructuring across the EU.
The decentralization of collective bargaining and the restructuring process

Germany

As noted above, decentralization is a widespread trend in all three countries covered by this study. Germany is an interesting case in point, with decentralization emerging as the main characteristic of developments in its collective bargaining model during the past ten or 15 years (Fuchs, 2005). More precisely, the process consists of a shift from the industry level to the company or plant level.

Germany has always been classified as having a strictly dualistic system, with trade unions operating only outside firms and works councils only within firms – each with its distinctive functions. But this system has been increasingly called into question by scholars who have highlighted how the underlying division of functions was going to be eroded by a more cooperative approach (Hassel, 1999). Indeed, cooperation has recently become a characteristic feature of the German system of collective labour relations (Frege, 2002) – and the cooperative approach has turned out to be very effective in case of restructuring. This development is characterized first by the fact that collective bargaining does not take place at industry level but at firm level and, second, by the principle that bargaining within a company is subject to prior agreement with the trade unions, which set the framework for the company agreement to safeguard the interests of both parties as best as possible. In this way, the firm-level actors are in a better position to restructure and eventually limit recourse to dismissals.

Successful management of business restructuring can thus be achieved without changing the formal legal structure of the collective bargaining system, but through a change in the approach of the parties characterized by intensive exchange/sharing of information and the abandonment of a strictly dualistic division of functions in favour of a more cooperative relationship. Decentralization was thus effectively achieved through coordination of the strategies of trade unions and works councils, which are evolving towards more complementary and integrated roles.

For their action to be successful, trade unions put the emphasis on the underlying decision-making process. To that end, the different organizational levels (local, district, Land, federal) interact with each other. While collective bargaining committees frequently seek out the opinions and demands of union members, it is usually the central board of the trade union which ultimately weighs up the different proposals and takes a final decision. As mentioned

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7 From 67,289 in 2006, the number of valid collective agreements officially registered by the Federal Ministry of Labour and Social Affairs rose to 69,592 by the end of 2007. Of these, 36,996 were “association agreements” between trade unions and employer organizations, and 32,596 were company agreements between trade unions and individual employers.

8 In Germany, industry-level bargaining dominates, with some company-level bargaining in certain industries or companies. Most industry agreements contain “hardship” and “opening” clauses, which allow companies to diverge from collectively agreed standards under certain defined conditions and on certain defined issues.
above, this vertical decision-making process is supplemented by efforts to structure collective bargaining through horizontal coordination mechanisms (which are mostly informal, though). Such coordination is typically achieved by focusing initial collective bargaining on the conclusion of a so-called “pilot agreement” for a particular geographical area, which then often serves as a model for the rest of the industry and exerts influence on other industries.

EU-wide collective agreements and, more generally, the conclusion of transnational agreements remain distant objectives in Germany for a variety of reasons, including the unwillingness of the social partners and the lack of a legal basis securing the conclusion of such agreements. Nevertheless, German trade unions have begun to strengthen their European ties and to participate in – and strongly support – European coordination activities.

In summary, collective bargaining over enterprise restructuring in Germany is largely decentralized to the company or plant level and laid in the hands of management and the works councils. This is not to say that multi-employer agreements are inexistent in this field, but works councils clearly play the dominant role. It follows that the general prerogative granted to trade unions and employers’ organizations for the conclusion of collective agreements is expressly put aside in this area.

**France**

One cannot but acknowledge that France too is experiencing steady and significant decentralization of collective bargaining. While industry-level bargaining remains the most important, company-level bargaining has been gaining strength, especially with the implementation of the Act of 19 January 2000 on the negotiated reduction of working time and the 35-hour week. As in the case of Germany, this does not imply that the other levels of bargaining are disappearing, but the firm level has come to enjoy a degree of autonomy unprecedented in the traditional structure of French collective bargaining.9 Such autonomy is controlled by the industry level – particularly since the passage of the Act of 4 May 2004 on life-long vocational training and social dialogue.10 Thus, while firm-level collective bargaining is institutionalized, it is specifically aimed at balancing economic interests within a given undertaking or group of undertakings (Ray, 2004). From this perspective, decentralization is not a spontaneous development managed autonomously by local-level actors, but an

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9 Industry and company bargaining have traditionally co-existed in France, and inter-industry agreements also are signed on some specific issues. Only in exceptional circumstances can agreements signed at industry and company level dilute the benefits secured at a higher level (e.g. by inter-industry or industry agreements or by legislation).

10 While specifying a few issues to remain exclusively within the scope of industry bargaining (e.g. minimum wages, occupational classification), this legislation provides, inter alia, that enterprise-level collective agreements may depart from the provision of industry agreements except where the latter expressly prohibit it, and that in enterprises without trade union representation, collective agreements may be negotiated and concluded by elected representatives of the workforce.
organized process aimed at creating more space for negotiated flexibility. The firm has thus become the locus of flexibilization and negotiated deregulation not only in response to economic pressures involving extensive restructuring with heavy consequences for employment, but also with the help of supportive legislation. This can be seen as an acknowledgement that policies like decentralization result from common acceptance by the social partners and lawmakers that such reforms are essential and cannot be understood as being merely the product of a change in the relative weights of the actors.

Within this framework, however, in all the industries where firm-level collective bargaining is strong (e.g. chemical industry, banking and auto industry), the relationship between the industry level and the firm level is one of competition, not complementarity. The future of industry-level regulation is therefore uncertain. This evolution resembles what has been happening in Germany, i.e. a shift towards “coordinated decentralization”.

In France, to the extent that the law can be regarded as a proactive factor in the evolution towards decentralization through adaptation of the legal framework, the trade unions have accepted the shift. Besides, they have also been forced to review their strategies and patterns of action in response to the worsening economic situation (structural unemployment, restructuring, shocks linked to globalization). Indeed, France has been hit by a number of large-scale and painful firm closures and severe corporate restructuring in recent years.

Such developments in collective labour relations in regard to restructuring are thus not exclusive to Germany. In comparative perspective, France and Germany present a number of similarities, at least prima facie. Both systems can be classified as dualistic in their approach to industrial relations, with trade unions representing workers’ collective interests outside the firm and specific actors operating within the firm (e.g. works councils, shop-stewards and trade union representation). Generally speaking, however, the role played by trade unions in France is much more important than it is in Germany. And as far as the structure of collective bargaining is concerned, the French system is hierarchical and based on the “favourability” principle, as is also the case in Italy: company-level collective agreements can only depart from the provisions of industry-level agreements to the extent that they provide for better conditions. Nonetheless, France too has experienced a significant shift of collective bargaining from the centre to the periphery. This was mainly due to the introduction into the system of an “obligation to bargain”. Such mandatory bargaining requires representative trade unions to make proposals and initiate discussions, but it does not carry any obligation to conclude agreements. The obligation to bargain is in fact an obligation for the employer to meet the representative trade unions and engage in bargaining over issues specified by law. Under the so-called Borloo Act of 18 January 2005 on “social cohesion”, the obligation falls due every three years and is aimed at anticipating change and its consequences for employment. The scope of such mandatory bargaining centres on “workforce planning” (gestion prévisionnelle des emplois), thereby providing an effective and substantial means of anticipating restructuring.
A first comparative remark is that unlike what has happened in Germany – where decentralization stems directly from the autonomy of the collective subjects, and the voluntaristic approach remains a characteristic of industrial relations – the law has played a more decisive role in shaping the shift towards decentralization in France. Another point of contrast is that the trade unions in France still play a predominant role in comparison with the more balanced and cooperative approach which seems to characterize the pattern of action under Germany’s industrial relations system.

**Italy**

Italy also deserves close attention in regard to decentralization, which has been widely discussed there for the past two decades or so, although the process is far from complete and, in any case, not as advanced as in Germany or France.

In Italy, the structure of collective bargaining is regulated by a Protocol signed by the social partners in July 1993, which scholars regard as a sort of constitutional charter for industrial relations. This instrument establishes a model of controlled and coordinated decentralization. The basic rule is that decentralization is accepted, but within strict limits imposed by the “national contract”. In practice, Italian trade unions were never willing to delegate much bargaining power to the territorial level, not to mention the firm level, arguing that this would lead to social dumping in breach of the principle of equality of all citizens enshrined in article 3 of the Constitution. Differential treatment – however justified by economic pressures in the context of dramatically increasing competition from poorer EU countries and, most recently, Asia – was thus always basically contested. The spread of forms of worker participation induced by secondary EU law did put some pressure on Italy’s system of collective bargaining but there have been no recent moves towards unregulated decentralization. Overall, the structure and contents of bargaining remain largely centralized, although scholars and some of the more moderate unions increasingly acknowledge that to react effectively to restructuring – and even more so to anticipate it – there is a strong need to push for decentralization to company level.

Although national collective bargaining still has a central role, being the pivot of a coordinated two-tier bargaining system, there have been some

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11 The “Tripartite Intersectoral Protocol on Incomes Policy and Employment, Contracts, Labour Policies and Support for the Production System” of 23 July 1993 (available at http://www.eurofound.europa.eu/eiro/1997/09/feature/it9709212f.htm). This Protocol “directly affected the contract system because for the first time conventional rules were introduced governing the structure of collective bargaining, the relations between the various contract levels, the duration of agreements, bargaining procedures and representative bodies in the workplace” (Caruso and Zappalà, 2005, p. 45; see also section 3.2 et seq.). Italy has a two-level bargaining system with dominant industry bargaining and complementary bargaining at company or territorial level. The two bargaining levels are essentially coordinated by the provisions of the Protocol as far as wage dynamics are concerned, and by the prevalence of industry over company bargaining, since the former sets the framework rules that define the scope of the latter. A limited number of industry agreements also contain “opening clauses” that allow for divergence at company level in certain cases, notably when company restructuring is under way, but these clauses do not apply to wages.
innovations which may be considered as foreshadowing a new trend, including rationalization of the current structure centring on the national contract. Moreover, decentralization was also advocated by the new Government which took office in 2002 and which harshly criticized the 1993 Protocol for being anti-economical, recommending reorganization of the role of the national contract into a sort of framework agreement (Caruso and Zappalà, 2005). To counterbalance the diminished role of the national contract, the proposed solution was to strengthen decentralized bargaining in order to make wage structures more flexible and redistribute productivity gains while avoiding possible overlap with the higher level. The main proposal was to create a model based on a single level of bargaining – at national industry or company/territorial level – to be chosen by the social partners. In such a system, the regional level would have gradually replaced the national level (in harmony with the federal reform which was actually implemented) with the possibility of authorizing the conclusion of company or territorial agreements in derogation of higher-level agreements (“coordinated derogability”). The Government, however, declared that the proposed reforms were to be pursued on a voluntary basis, not via legislative intervention. Although the social partners were mostly reluctant to pursue such a path, there have been cases in which decentralized action was successfully taken, as will be shown below. However, the 2002 reform was only very marginally successful and the present Government, led by the same centre-right majority since the spring of 2008, is engaged in a broad debate aimed at accomplishing a stronger federal reform, which could give new emphasis to decentralized bargaining. But the lack of unity among the unions and the critical economic situation leave little hope that this will work.

Flexibilization and derogation agreements: Increasingly important tools for restructuring

The need to react in a timely and effective manner and to take action at the local and/or firm level has also called for creativity on the part of the social partners in reaching agreements aimed at effectively counteracting the negative impact of corporate restructuring. All three of the countries under study have basically moved in directions entailing flexibilization of legal rules, with derogations from the legal framework based on various mechanisms and agreements. What is then relevant from a general perspective is the fact that the traditional structure of labour law sources – with state law or collective agreements with *erga omnes* effect as the main vehicles of social regulation – is being called into question, not to say disrupted, by this new wave of decentralization. Indeed, the processes described above have led to an increase in the power of the social partners at local level, which has probably made them more confident to abandon the traditional modus operandi whereby agreements concluded at national level were then implemented at local level, leaving very little to the autonomous deter-
mination of local actors. From this point view, the three countries examined here have recently developed interesting patterns of action, which deserve closer analysis.

**Germany**

In Germany, a number of agreements have been concluded between trade unions and works councils aimed at the signature of “flexibilization agreements”. Specifically, the trade unions delegate bargaining power to works councils – especially to conclude derogation agreements in exchange for job preservation – while limiting their own role simply to designing the framework within which the bargaining must take place. Recent examples of large-scale restructuring include Ruhr Kristall Glass (a centuries-old German firm producing high-quality household glass) and GE Energy Products (a German subsidiary of the American conglomerate General Electric, specialized in energy-production equipment). In these cases, the unions and works councils successfully cooperated in sharing information in order to achieve their common goal of maintaining the highest possible employment levels, notwithstanding the restructuring process. In practice, this objective was achieved via different mechanisms put in place by the parties. In the case of Ruhr Kristall Glass, the bargaining process led to an agreement containing a so-called opening clause, which allowed the works council to sign an agreement in derogation of the main collective agreement, especially in regard to some aspects of wages, thus allowing the firm to restructure at lower cost, but with fewer dismissals. At GE Energy Products, the trade unions gave the works council even more room for manoeuvre, basically allowing it to negotiate the restructuring process within a framework they had designed.

Beyond the specific details of each individual case, what emerges from the underlying processes is an increasingly prominent role played by the works councils in corporate restructuring, one which typically centres on the negotiation of company agreements in derogation of higher-level collective agreements in exchange for job conservation. Other implications of recent trends in German industrial relations can be summed up in three main points. First, there has been a clear shift from multi-employer to single-employer collective agreements. Second, the incorporation of “opening clauses” into collective agreements in favour of works agreements has become widespread, being initially concerned mostly with working time and now extending to other items of regulation. And third, employers and works councils have, to a considerable extent, concluded works agreements at variance with applicable multi-employer agreements and, therefore, in obvious violation of section 77 (3) of the Works Constitution Act, 1972 (*BetrVG*).12

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12 “Works agreements shall not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement. The foregoing shall not apply where a collective agreement expressly authorizes the making of supplementary works agreements” (English translation from *Legislative Series*, LS 1972 – Ger.F.R 1, p. 32).
The consequent upgrading of works agreements vis-à-vis industry agreements through the device of opening clauses reflects the inadequacy of industry agreements in providing for all the different situations and interests of the undertakings affiliated to the signatory employers’ organizations. Accordingly, the social partners began to make increasing use of opening clauses as an instrument of flexibility allowing for solutions better suited to the economic situation of each particular company or plant. Opening clauses were originally intended to help plants overcome a critical economic situation and financial difficulties by allowing decisions to be taken at the plant level in derogation of the pay standards set in a collective agreement – hence the common reference to such clauses as “hardship clauses”. Within the framework established by section 77 (3) of the Works Constitution Act, 1972, opening clauses are an exception to the general and central rule whereby trade unions and employers’ organizations enjoy a clear prerogative in setting terms of employment through collective agreements. And it goes without saying that trade unions and employers’ organizations have a legitimate interest in making sure that the introduction of opening clauses does not undermine their general competence and powers in regard to standard-setting. Accordingly, most opening clauses make works agreements between an employer and a works council subject to the prior or subsequent assent of the signatory trade union and employers’ organization. But there are also opening clauses which do not require assent by the parties to the collective agreement. In such cases, the discretion granted to the plant-level actors is restricted by a framework set by the parties to the collective agreement.

Restructuring cases such as Ruhr Kristall Glass offer very good examples of how the opening clause works: it actually allows the parties to bypass the legal distinction between trade unions and works councils in order to redefine their traditional roles in line with the trend towards decentralization of the locus of collective action in the event of firm restructuring. At Finger & Pelz, a medium-sized German enterprise specialized in electronic and electrical equipment for the chemical and steel industries, agreement was reached on a reduction of wages coupled with an increase in working time in order to reduce the number of dismissals from restructuring. The underlying arrangement, however, provides for centralized control against excessive deregulation, which might otherwise entail a risk of social dumping, with different plants competing in a race to the bottom on degraded conditions of employment. To this end, German trade unions remain the watchdog of the general interest since the industry-level unions retain the power to control and limit the content of derogations agreed at plant level, thereby providing for nationwide coordination and ensuring that flexibilization does not go too far. The degree of maturity of the industrial relations system in Germany allows for such social control to be exercised with credibility and demonstrable effectiveness.

France

In France, too, there has been a number of interesting developments. The above-mentioned Act of 4 May 2004 (Combrexelle, 2008) introduced a special kind of
flexibilization agreement (*accords dérogatoires*). This legislation thereby broadened the scope of enterprise-level bargaining to include a number of issues which were not previously open for derogation. Article 43 of the Act allows plant-level bargaining to determine hours of overtime and overtime pay rates. Generally, except for those topics expressly mentioned in the Act itself – such as minimum wages and collective rights under article L.912-1 of the Social Security Code – on which enterprise or works agreements cannot depart from what has been agreed at higher levels, plant-level bargaining is given full freedom of action.

This major change in French law has allowed company-level agreements to be concluded in derogation of collective agreements at the industry level except where the latter expressly prohibit such derogation. The new system thus strengthens the plant level, while eroding the role traditionally played by the industry level. This shift is intimately related to the decentralization process that has been under way in France in recent years. By providing for considerable flexibility at the plant level, it allows employers and workers' representatives at that level to act and react, and thus anticipate and manage such enterprise restructuring as may be needed.

Another very important legislative development, leading to greater involvement of the social partners in corporate restructuring, has been the framing of “agreements on procedure” (*accords de méthode*). These were first introduced on an experimental basis under legislation known as the *loi Fillon*, of January 2003. Provision for such agreements was then confirmed and officialized by the Social Cohesion Act of 18 January 2005 and incorporated into the Labour Code under article L320-3.

In line with the Communication of the EU Commission of 31 March 2005 on Anticipating and Managing Restructuring and other relevant EU legislation (mainly Framework Directive 2002/14), France’s lawmakers addressed the criticism that French labour law left too little space for anticipation in collective bargaining over change management – hence the triennial obligation to negotiate on “advance planning for jobs and skills” (i.e. workforce planning). Specifically, the Social Cohesion Act (*loi Borloo*) provides that an agreement may establish the requirements to be met for convening a meeting of the works council where the latter is informed of the economic and financial situation of the firm in order to propose alternatives to the firm’s economic plans for restructuring, where they have an impact on employment, and to receive a justified response from the employer (Petrovski and Paucard, 2006). Such agreements can also be used to determine the conditions in which the establishment of a job protection plan (*plan de sauvegarde de l’emploi*) translates into an agreement anticipating its content.

The 2005 Social Cohesion Act thus provides for new rules aimed at major development of social dialogue at plant level and effective participation of the social partners in the anticipation and management of workplace change.

At the very heart of the new set of rules introduced by the 2005 legislation lies the obligation to engage in bargaining over employment in the company every three years (see Rouilleault, 2007a and 2007b). This is incumbent upon
companies and groups of companies of more than 300 employees and Community-scale undertakings. The obligation covers three distinct components: (1) information and consultation of the workforce representatives on corporate strategy and its foreseeable effects on employment and wages, (2) workforce planning (including measures in support of employability) and (3) an optional job protection plan (consisting of an “agreement on procedure”).

This innovation in French legislation was introduced with the intention of helping the social partners to cope with the need for flexible adjustment to the constant changes induced by economic globalization by means of a procedure conducive to agreement. Of course, the fact that there is an obligation on the parties to bargain does not mean that they necessarily share the will to do so, but the law in this field cannot go further than obliging them at least to meet periodically to discuss common problems from their respective standpoints. Based on anticipation and proactive preventive management in a climate of collaboration and cooperation, however, this approach should prove effective in preventing traditional reactions from the unions, such as industrial conflict. Workforce planning, together with the related “agreements on procedure”, thus become the focal points for the organization and anticipation of change through collective agreements.

These agreements give greater relevance to company-level representation. And the diversity of actors and their overlapping functions reflect concern with the need to ensure effective dialogue at that level. Workforce planning can thus be seen as an anticipatory and preventive instrument both for managing human resources in response to economic constraints and for the firm’s strategic decision-making.

Actually, the concept of workforce planning was not legislated into being out of nowhere. It was originally developed by the social partners and emerged from their efforts to find new ways of managing the restructuring process. For employers, the aim was to set up a fast-track procedure bypassing complaints; for the trade unions, it was to negotiate the right to propose alternative options for restructuring and to bargain provisions that would make the process more socially sensitive (number of dismissals, redundancy plan provisions, etc.). Agreements along these lines were originally concluded autonomously, as an expression of the parties’ needs, but they subsequently attracted the attention of lawmakers and were eventually provided for in statute law. The “agreements on procedure” are interesting in that they offer the possibility of bargaining over restructuring both at the procedural level and at the substantial level.

In practice, however, relatively few of these agreements have been concluded, since they only occur in connection with the restructuring of very large firms. Yet they show that a negotiated procedural framework can be developed within which the actors can find sufficient ground for compromise. At the

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13 For a list of firms that have signed such agreements and their full texts, see www.anact.fr.
Socially sensitive corporate restructuring

root of this common interest of the trade unions and the employer lies a context of legal insecurity. At any rate, agreements on procedure for the management of restructuring have opened up new space for bargaining in France.

Workforce planning is a very important innovation which could change the culture of social dialogue in French companies. Indeed, France’s traditional resistance to the introduction of German-style co-management practices has led its lawmakers to seek more imaginative solutions for the promotion of social dialogue at company level. From this perspective, the framework of workforce planning – literally “advance planning for jobs and skills” – comes in a line of evolution that has been persistently attempting to bring the parties to dialogue and compromise, but without imposing overly intrusive measures which could be criticized for hampering collective freedoms.

The restructuring of Dexia – a Franco-Belgian banking group historically specialized in financing for local authorities – illustrates both the tendency towards decentralization of collective bargaining and the increasingly crucial roles that can be played in such cases by the actors at company level. At Dexia, an agreement on procedure was signed whereby (1) the employer undertook to engage in bargaining with company-level workers’ representatives in order to reduce the negative employment effects of the restructuring process, and (2) company-level employee representatives undertook the task of managing a job-centre based on an internal reallocation programme designed to avoid redundancies. This approach to restructuring proved successful in so far as it achieved the aim of limiting the number of redundancies, also showing how much power could be exercised by the actors at company level.

A sufficient number of “agreements on procedure” has been concluded to prove that they are a useful procedural tool in developing social dialogue at company level based on the idea of compromise and commitment by both parties (Petrovski and Paucard, 2006). Such agreements are invariably underpinned by acknowledgment on the part of both the firm and the employees’ representatives that each side has to take account of the interests of the other, namely, competitiveness, on the one hand, and employment protection, on the other. This is achieved by working through the firm’s existing system of labour relations to establish a procedure for balancing the parties’ interests. This approach, when successful, represents a significant departure from the traditionally conflictual nature of collective labour relations in favour of a more cooperative relationship – one in which employees are recognized by the firm as actual stakeholders whose satisfaction thus becomes a priority of corporate action.

Other examples of successful restructuring on this basis include ABN Amro (banking sector), Alcatel (telecommunication sector) and Thomson Video Glass (manufacturer of radio and television sets). The principal innovative feature they share is that their strategies were based not merely on collective dismissals, but on a shift from a reactive remedial approach to a proactive preventive one. Indeed, contrary to the usual pattern whereby collective bargaining begins once
the firm has informed the workers’ representatives of its intention to proceed with collective dismissals, here the “agreements on procedure” provided a framework for bargaining in advance of restructuring, which, in the context of a globalized economy, is seen as an ongoing process that one has to live with. Recognition and acceptance of this “permanent state of crisis” leads the actors to modify their traditional pattern of action in favour of new cooperative procedures that turn out to be satisfactory for the maintenance of both competitiveness and jobs.

As observed in the German cases, in all of these innovative cases in French industrial relations it was the company level that played the key part, contrary to the traditional centralization of bargaining by national/industry-level trade unions: the trade unions set the framework, while negotiation of the actual agreement was left to the plant-level works councils.

Last but not least, convergence with the German model can also be seen in the increase in recourse to “derogation agreements” (accords dérogatoires) in France, which are operationally equivalent to Germany’s aforementioned “opening clauses”. Traditional collective bargaining aimed at redressing the balance of power between workers and employers is thus evolving in a new direction which, without calling this function into question, shows how much more space there still is for the development of social dialogue. Indeed, recent restructuring cases provide good illustrations of how the spontaneous behaviour of actors confronted with an increasing if not permanent situation of crisis has led to agreements which are comparatively novel in content. Basically, such agreements can be grouped into three categories: flexibilization agreements, procedural agreements, and partnership agreements.

The aim of flexibilization agreements is to make provisions in derogation of standards set out in the law or in national or industry-level agreements. This mechanism has long been used in collective labour law to give lower-level actors the possibility of negotiating better conditions for workers at plant level. Now, the novelty resides in the fact that in dealing proactively with crisis and change, the unions agree at local level to concede unfavourable exceptions from standards set at a higher level. The opening clauses in Germany and the derogation agreements in France represent the main examples of this new trend.

The most innovative feature of recent collective bargaining in the field of corporate restructuring in Germany and France thus seems to be the diffusion of derogation agreements and the reconfiguration of the relationships between the different bargaining levels.

However, derogation agreements remain somewhat exceptional. In most cases, the social partners tend to conclude procedural agreements that stipulate how and when the workers’ representatives must be informed and consulted about the financial and economic situation of the firm. Indeed, such agreements are particularly useful when it comes to anticipating the social consequences of restructuring and, in a number of cases, they have proved very effective in designing alternatives to decisions entailing job losses. Thus, pending the estab-
lishment of permanent institutions for dealing with restructuring, such proced-
uralex agreements provide a means of “reacting proactively” to specific events
faced by the firm. They can be classified as instruments of self-regulation: left to
the autonomous capacity of the parties, their main feature is to regulate every
step of the procedure in order to achieve satisfactory, commonly agreed solu-
tions and thus avoid the more drastic outcomes typically associated with cor-
porate restructuring, i.e. mass collective dismissals.

\textit{Italy}

In terms of the evolution of the structure and functioning of collective agree-
ments at plant level, Italy is of less interest than Germany and France. As dis-
cussed above, Italian industrial relations remain centralized at the national level
because of the strong reluctance of the major trade union confederations to
leave space for lower-level bargaining on the argument that this would breach
the principle of equal treatment and invite social dumping. This position is not
merely ideological; rather, it is linked to Italy’s peculiar division into three broad
areas of development: north, centre and south. Firms in the north are extremely
well positioned for global competition – partly on account of this region’s
“industrial districts”, a characteristic conferring a distinct advantage on the Italian
economy – but the competitive position of firms deteriorates dramatically as
one heads south.

In this context, labour law has traditionally developed to sustain the unions,
never substituting for them, while consistently endeavouring to involve them in
decision-making on labour market reform – a process known as “concerted
action” (\textit{concertazione}). But this has hardly affected the field normally left open
for social dialogue to seek solutions within the hierarchical organization of col-
lective relationships, with the national bargaining level at the top and the plant
level at the bottom.

However, something new is happening in Italy too: the recent wave of
restructuring, which created significant difficulties for Italy’s most productive
firms, gave rise to demands from the country’s northern regions for more scope
for local-level action. Indeed, during recent years, the intensity of business
restructuring has highlighted the need for firms to take decisions which go
beyond national regulations and the capacity of trade unions to exercise mean-
ningful influence. Accordingly, as some cases of successful restructuring show,
there has recently been a shift towards tripartite agreements between workers’
and employers’ organizations and local government. This development was
assisted by the partial federal reform implemented by the former centre-right

Italy offers one of the world’s best examples of institutionalized tripartism,
with the Government actively involved in the negotiation, signing, implementa-
tion and (sometimes) follow-up of “social pacts” (Regalia and Regini, 2004;
Caruso, 2002 and 2001). Although tripartism was already established in the 1980s,
it was during the 1990s that it reached its peak.\textsuperscript{14} Basically, it is a method for shaping public policy and social and labour reforms through cooperation between the Government and the social partners. In spite of the wide use of social pacts during the past 20 years, there are no formal provisions regulating their conclusion: the system relies on agreements being negotiated by the parties each time. In addition to the social partners, negotiations normally involve the Prime Minister, the Ministers of Labour and of Economy, and the tripartite National Committee on the Economy and Labour (CNEL), which participates in an advisory and monitoring capacity. Social pacts have mostly been used to address critical economic challenges – high inflation, large public deficits and debt, high unemployment and labour market rigidities – and the pressures arising from EU membership for Italy to reduce its budget deficit. Such challenges confronted the Government with very difficult choices which it could not make on its own: it therefore sought the social partners’ support to implement measures that would be painful for firms and workers alike.

According to the most recent statistics compiled by the CNEL, more than half of the country’s tripartite “territorial agreements” have predictably been concluded in northern Italy (55 per cent), while the centre and the south account for 23 and 22 per cent of their total number, respectively. Territorial bargaining is particularly widespread in the construction industry (38 per cent of agreements) and agriculture (31 per cent), relegating crafts (18 per cent) and retail, tourism and services (8 per cent) to a secondary position in this respect, although these industries have been catching up progressively. In manufacturing, however, territorial bargaining is having difficulty taking off because of the widespread practice of company-level bargaining.

Recent case studies point to a considerable increase in the number of tripartite territorial agreements concluded in response to – but also, albeit to a lesser extent, in anticipation of – cases of corporate restructuring. One interesting example is that of Sabaf. Headquartered in the crucial industrial district of Lumezzane in the province of Brescia, Sabaf Group is a world leader in the manufacturing of components for domestic gas cooking appliances. The firm had to undergo extensive restructuring, which proved extremely successful for a number of reasons, including foresight as to the future development of the industrial district, a far-sighted view of the importance of social cohesion, and – most relevant here – the strengthening of many participative mechanisms. That Sabaf was such a success in terms of cooperation between management, the trade unions and the local authorities can be attributed to the firm’s corporate

\textsuperscript{14} Aside from the above-mentioned Protocol of 1993, other tripartite agreements were signed by the Government and the social partners, namely: the 1995 Agreement on Pension Reform, which benefited from extensive consultations; the 1996 “Pact for Labour”, which was signed against a background of double-digit unemployment rates and rigid labour market legislation identified as the main cause of unemployment. This pact embodied a consensus about the need to increase labour market flexibility, with all parties agreeing on the introduction of new labour legislation. It was also important in that it sanctioned the “territorial pacts” introduced by Act No. 662 of 1996. Other achievements of this process of concerted action are the 1998 Christmas Pact and the 2001 Pact for Italy.
identity, based on social cohesion and employee participation, and its good relations with the local authorities, which turned out to be helpful when support was needed. The proactive participation of the local authorities was also stimulated by the firm’s commitment to urban requalification, transport and housing plans, and facilities for employees.

Moreover, Sabaf is also one of the few Italian firms to have adopted an effective anticipation strategy, based on transparent external communication policies. Indeed, by making its workers and the local authorities aware of its intention to relocate to another industrial district nearby, and by explaining correctly and precisely its reasons for doing so well in advance – together with its environmental commitment – the firm contributed to creating a good “social reputation” for itself, thereby maximizing support and collaboration from both the unions and the local authorities for its decision to restructure and relocate. Of course, a key facilitating factor was the locational advantage of being in the rich and well-developed north-east of Italy, surrounded by industrial districts, but the strong social cohesion that the management was able to build up around the restructuring was at the heart of this very successful case.

Sabaf represents a case of proactive territorial governance, whereby restructuring was conducted on the basis of a firm-level agreement that gave the workers financial incentives to accept a degree of geographical mobility (housing, stock-option system, etc.). Crucial to its success was the fact that the entire process was planned and decided well in advance: the workers were informed in 1998 of restructuring to begin in 2002 for completion in 2005.

Concluding remarks

“Europeanization” and decentralization are the two processes that best typify the most recent developments in collective bargaining in the European Union. They have one crucial feature in common: they reduce the efficacy of multi-employer collective agreements. The concurrence of both processes means that multi-employer bargaining is under pressure from two sides. Yet, both processes are analytically different: while decentralization means that collective bargaining increasingly occurs at plant or company level, Europeanization does not mean that collective bargaining increasingly takes place at European level, but that the European level is becoming increasingly influential in negotiations at national and sub-national level (Alaluf and Prieto, 2001).

Within this context, collective bargaining in anticipation of corporate restructuring is still a novel practice in need of further development, yet there are already numerous examples of socially sensitive restructuring in which significant union involvement can be observed. It might therefore be extremely useful to reflect upon the role that collective bargaining has managed to play in recent years in some European countries in the light of growing awareness of these issues, as evidenced by a number of European initiatives in this field.

In general, the actual influence of unions in the current context of permanent restructuring still appears to be weak and, in most countries, everything
happens as if the only option were to delay action until after the main decisions have already been taken. However, there is practically no innovation in this field that is not provoked, or at least strongly supported, by trade union organizations. Indeed, the in-depth case studies conducted in recent years under the two research programmes mentioned above show that the situation is evolving: a number of innovative practices have emerged from extensive and effective collective bargaining within the framework of a significant shift to decentralized bargaining across major European countries.

The prevailing model of industrial relations affects the way in which restructuring is carried out at every stage of the process. However, across European countries, the progress of transnational social dialogue on the “management of change” remains timorous. The most relevant steps made in this field so far are the agreements or joint texts signed by European Works Councils and “international framework agreements” (IFAs) concluded between transnational companies and international union federations (see Papadakis, 2008). Most of these deal with the fundamental rights of workers and trade unions, though the number of those dealing specifically with corporate restructuring is constantly rising. Although these instruments are not used frequently (Ales et al., 2006), they represent a very interesting development: a set of devices which can be used, together with traditional “hard law” tools, to provide for binding or voluntary regulations on restructuring.

More generally, the nature of restructuring itself is widely acknowledged to be changing because the nature of the firm is changing. Collective bargaining must therefore also change in order to deal with these new challenges appropriately. In principle, depending on the prevailing model of collective bargaining, countries favouring a more voluntaristic, typically Anglo-Saxon approach will prefer plant-level bargaining, while those taking a more normative approach will possibly encourage multi-industry or industry bargaining. Reality, however, invariably turns out to be much more complex than such theoretical conceptualizations. Despite what looks like a worldwide trend towards decentralization of bargaining, most EU countries still have largely centralized systems – with the very notable exceptions of France and the United Kingdom, where lower-level bargaining is more widespread. Unquestionably, however, most countries are engaged in a wide debate over decentralization, and further study will be necessary in order to appreciate its full potential for dealing with cases of business restructuring. Indeed, the evidence suggests that the instruments currently available to workers for reacting to corporate restructuring are extremely weak and underdeveloped.

In the rare cases where strong, combined mobilization of trade unions and local public actors is achieved, the restructuring process does tend to be less disadvantageous to the workers (Boni, 2009). Indeed, as the Final Scientific Report of the AgirE project concludes, while it is true that anticipation is essential but

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15 See also the contribution by Edoardo Ales in the “Notes and debates” section of this issue of the International Labour Review.
extremely hard to achieve, a sensitive approach to restructuring requires respect of the so-called 3M rule: it has to be multi-dimensional, multi-actor, and multi-level. This is far from the reality of most restructuring cases, but the closer the process comes to following this rule, the more successful it is likely to be. Unfortunately, the EU level is still largely absent from this debate because restructuring per se is not a focus of European policy: “it is the consequence of choices made by companies which enjoy economic freedoms set up within the internal market; it is therefore only considered in a subsidiary way, by European policies which hesitate between favouring restructuring and enacting mechanisms for limiting its effects or for promoting an imperfect procedural management of it”.16

Restructuring is thus seen as an instrument of economic change, but its social sensitivity deserves greater attention at EU level too: only through supranational strategies can the involvement of trade unions and EU institutions – e.g. through the establishment of mechanisms for anticipating and managing change at EU level – prevent the social consequences of restructuring from being left to Member States. Besides, there is an urgent need to address the current macro-economic trends of relocation and internationalization that are making the traditional means of industrial action completely useless, since trade unions cannot follow the flow of decisions and actions taken in some faraway boardroom located in another EU country or even outside the EU. Unions are then left to act only after the decisions have been taken, without any opportunity for altering the balance of power through the traditional medium of collective bargaining.

In the real world, socially sensitive corporate restructuring remains a distant dream. Yet this should not prevent the EU – especially at such a difficult time for the world economy – from considering the development of adequate instruments and, ideally, a forum where the trade unions could join forces at supranational level and work out concerted strategies to counteract corporate restructurings insensitive to workers’ needs. Every effort must be made to attain this objective, whose importance and relevance are mounting day after day – the challenge cannot be postponed any longer. Indeed, the evidence produced by the first two EU-sponsored research projects carried out in this field broadly supports this approach, providing the European Commission with valuable food for thought.

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