

*The role and functions of workers' representatives in the transnational company.
Ideas for discussion from the Open Corporation ranking*

by

Ornella La Tegola

Labour Law researcher at the University of Bari

In the Community idea of a transnational undertaking, which emerges from the European directives on the rights of employees and their representatives to be informed and consulted (Directive 2009/38/EC, later also the EWC Directive; Directive 2002/14, later also the Framework Directive on Information and Consultation; Directive 2001/86, the so-called SE Directive and Directive 2003/72, the so-called SCE Directive), the harmonious development of economic activities is also linked to the proper information and consultation of employees on decisions affecting them. Almost to say that, in order to cross national borders, the company must equip itself with forms of involvement of workers¹ systematically and not only in times of crisis during the life of the company, as in the case of collective redundancies and transfers of business, where, as is known, the rights of information and consultation are binding procedural constraints or constitute real “obligations to negotiate”².

Moreover, the rights of involvement of workers’ representatives are fundamental rights recognised by the Charter of Fundamental Rights signed in Nice in 2000 and which, as such, must be managed and demanded by workers’ representatives. First and foremost from the union. While it is true, in fact, that the representation provided for in Directive Ewc does not include trade union representation, it is also true that the trade union plays a prominent and almost exclusive role not only as a subject naturally called upon to protect working conditions but also as a subject technically prepared to manage the processes of information and consultation of workers from a transnational point of view³.

Directive 2001/86 also expresses a clear preference for trade union representatives over neutral employee representatives when it announces that Member States “*must be able to foresee that trade union representatives may be members of a special negotiating body whether or not they are employees of a company participating in the formation of an SE*”, in particular “*where trade*

¹ In this sense, also L. Zoppoli, in *Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese*, in Acts of the study days A.I.D.LA.S.S. Lecce 27-28 May 2005, Giuffrè, 2006, p. 106, which states that Europe “shows that it does not like an expansion of companies outside the national borders that is not accompanied by some form of participation. In the same sense, G. Baglioni, *La nozione di partecipazione dei lavoratori nella direttiva sulla società europea*, in DLRI, 2003, p. 173.

² As is well known, in business crisis situations, the objective protected by the European legislator is to increase - through the rights of information and consultation - the protection of employees. For this reason, the Court of Justice, through the exaltation of the part of the Directive in which the rights of information and consultation are finalised “with a view to reaching an agreement”, has interpreted them as a compulsory and binding moment for the validity of the entrepreneurial decision (see Court of Justice No 383/92 of 8.06.1994, in NGL, 1995, p. 151). In this sense, see M.G. Garofalo, P. Chieco, *Licenziamenti collettivi e diritto europeo*, in AA.VVV., *I licenziamenti per riduzione di personale in Europa*, Cacucci, Bari, p. 4 and p. 20-21; L. Zoppoli, *Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese*, cit., p. 172-173.

³ See Article 5 of the Ewc Directive which provides that the special negotiating body may be assisted by experts chosen from the trade unions participating in the negotiating meetings.

union representatives are entitled to be members of the supervisory or administrative bodies with voting rights in accordance with national law” (see recital 19 of Directive 2001/86)⁴.

Moreover, as we know, in some cases the Ewc - thanks to a developed trade union membership - has managed to carve out a bargaining space aimed at developing tools with which to bind companies to ensure - wherever they are established - the respect of fundamental rights, even when these rights are not invoked because of the non-ratification of international conventions or because of the weakness of the institutional apparatus. The use of instruments such as transnational collective agreements allows, in fact, to extend the scope of application of the rights or institutions contracted beyond the company and its subsidiaries, to involve other companies belonging to the same group, as well as the chain of suppliers and subcontractors, according to the approach that makes the transnational company responsible for monitoring the operation of the entire production chain, wherever it is located.

In short, the tools to face the challenges of digitization and, more generally, of the so-called fourth industrial revolution, are to be found in the rights of information and consultation as endo-procedural rights since they are mandatory moments of a procedure (such as, for example, on matters provided by law or collective agreements), but also exo-procedural, because the information received is useful and can be used in the negotiation of business agreements both national and transnational.

In fact, the natural evolutionary path of the industrial relations of multinationals can only be the experimentation of regulatory models of soft governance based on global and/or transnational agreements. Evolution, to some extent, anticipated by authoritative doctrine which, long before it became obvious, denied any distinction between collaborative participation and conflictual participation, affirming that *“participation - as, moreover, bargaining - is not an alternative to conflict, (but instead, ed.) is an instrument for managing it, arriving at solutions, to some extent, shared”⁵.*

Employee involvement (*alias*, information and consultation procedures) is precisely what European law has designed to mean for managing a flexible and agile company capable of meeting the challenges of digitalization and, more generally, of Industry 4.0, while at the same time protecting workers’ needs. Hence the importance of bodies such as the Ewc and the representative body in the European Company which, in this sense, are proposed as mechanisms for offsetting and reacting to the greater risk borne by multinational workers due, as is well known, to the fact that decisions affecting their conditions are often taken in a Member State other than that in which they work, without prior and adequate information and consultation being provided for.

From the Open Corporation ranking (<https://www.opencorporation.org/en/>) we can see that there is a steady increase in companies experimenting with soft regulatory models with

⁴ This, as well as the need to ensure the highest possible level of employee involvement rights, explains the clarification contained in Article 13(4), according to which the structures of employee representation of participating companies which, on the other hand, cease to exist as separate legal entities after registration of the European Company.

⁵ M.G. Garofalo, *Qualche osservazione su partecipazione e conflitto*, in AA., *Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese*, Atti Aidlass Lecce 27-28 maggio 2015, Giuffrè, 2006, p. 358.

European trade union federations which, in some cases, also involve the internal representatives of workers at European level.

Indeed, the involvement of workers also requires an effort on the part of the multinational company, since it involves a review of the model of doing business focused on the social implications and implications of the decisions taken⁶. The multinational, in the words of the European Commission, in fact, "is not an isolated monad but (...) also takes on the particular interest of all those (...) within the company as employees, (...). This is, in essence, the mission of the company"⁷. However, if not for "mission", the company could move for "reputation". The company fears, in fact, the effects of the reputational prejudice that one or more choices not in line with the safeguarding of its own employees (but also, for example, of the consumers) can have on the opinion of the stakeholders, affecting, therefore, its capacity of attraction in the market, with an economic return (positive or negative depending on the perceived image)⁸. This fear - which should be adequately exploited by workers' representatives - should lead to the defence of one's own image and role as an economic actor⁹ and, consequently, to the respect of the rights of all stakeholders and of the respective roles of the parties involved in the market and in the employment relationship¹⁰.

In other words, the transnational company can no longer exploit the possibility of moving smoothly across state borders just to condition States, subordinating investment choices in their territories to precise political and fiscal conditions, but must use the fundamental freedoms laid down as the foundation of the European Union ensuring respect for human rights (including workers' rights) and therefore remain responsible for its conduct towards employees, individuals or any other community. To do this, the multinational enterprise needs its employees and, above all, the bodies representing the workers (such as trade unions), the only subjects who, thanks to their organisation and activities, can propose

⁶ As L. Zoppoli, *Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese*, cit., p. 131, has effectively written, that of the involvement of the workers is "a model that has the pretension to conceive the essential nucleus of the social model represented by the social interest, not only as common interest of the partners, and therefore of the shareholders, but rather as interest of the enterprise itself".

⁷ Thus the Communication from the Commission to the Council and the European Parliament of 21.05.2003, *Modernizzare il diritto delle società e rafforzare il governo delle società nell'Unione Europea. Un piano per progredire*, incorporated in the European Parliament Resolution of 21.04.2004. The aim of promoting responsible business conduct is also promoted, among others, by the Oil Tripartite Declaration on Multinational Enterprises and Social Policy, last revised in 2017, and the UN Guiding Principles on Business and Human Rights promulgated in June 2011 by the United Nations, Guiding Principles on Business and Human Rights in implementation of the UN Framework "Protect, Respect, Remedy", A/HRC/17/31, at <https://www.iriss.cnr.it/irisswp/wp-content/uploads/2016/09/principi-guida-su-imprese-e-diritti-umani-con-commentario.pdf>, which promotes due diligence as the duty of companies to identify, prevent, mitigate and verify the impact of their actions on human rights.

⁸ The case of Ryanair is emblematic, with seven pension funds selling their shares because of doubts about respect for workers' rights and the system of trade union relations. See the news published in La Repubblica, 8.05.2017, https://www.repubblica.it/economia/2017/05/08/news/sette_fondi_vendono_azioni_ryanair_motivi_etici_dubbi_su_rerelazioni_sindacali_-164943150/

⁹ Therefore not only as a "regulatory agent" capable of influencing the national regulatory systems, on this point see V. Brino, in V. Brino, E. Gragnoli, *Le imprese multinazionali e il rapporto di lavoro*, cit., p. 215, o di attore economico, in which G. Rossi, 2008, p. 17, states that "at the beginning of this century, fifty-one multinational corporate groups and only forty-nine States appeared among the one hundred largest world economies".

¹⁰ E. Gragnoli, in V. Brino, E. Gragnoli, *Le imprese multinazionali e il rapporto di lavoro*, cit., p. 210, seem to think in a similar way.

themselves as a tool to correct company distortions and to promote social dialogue in order to pay greater attention to labour rights, as well as to citizenship.

From the statistical data elaborated by Open Corporation (<https://www.opencorporation.org/en/>) we can see, in fact, that the companies that are at the top of the general ranking are the same companies that are at the top of the specific ranking of the social dialogue¹¹.

This confirms that a good social dialogue makes it possible to pay attention to all socially sensitive issues. Therefore, a multinational company that today considers itself socially responsible cannot ignore a mechanism for recognising the rights of workers and their representatives to be involved, not least for the purposes of effective and fruitful social dialogue.

¹¹ See https://www.opencorporation.org/en/ranking?sort=-social_dialog, consulted on 25.03.2019.