

Niforou, Christina

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**The role of trade unions in the implementation of
autonomous framework agreements**

Christina Niforou

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**Industrial Relations Research Unit
University of Warwick
Coventry
CV4 7AL**

Editors Foreword

The Warwick Papers in Industrial Relations series publishes the work of members of the Industrial Relations Research Unit (IRRU) and people associated with it. Papers may be of topical interest or require presentation outside of the normal conventions of a journal article. A formal editorial process ensures that standards of quality and objectivity are maintained.

In this case, the paper highlights early findings from a developing project. Christina Nifourou is a former student on the *Warwick MA European Industrial Relations* and is currently studying for her PhD with us.

The paper engages with an important aspect of European policy making, the development and implementation of autonomous agreements between the social partners. Focusing on the inter-sectoral Framework Agreement on Telework, the paper explores its implementation in two countries (Spain and the United Kingdom) in telecommunications and finance. Differences in the form and extent of teleworking in each case are noted. Particular importance, however, is attached to the institutional context in which agreements are enforced, in terms of the authority of unions within sectors and workplaces and the legal instruments and resources available to them.

Trevor Colling

Abstract

The conclusion of the inter-sectoral Framework Agreement on Telework is a significant innovation in European policy-making reflecting a shift towards greater autonomy of organised management and labour; both sides of industry are invited to proactively engage in the implementation as well as follow-up of European framework agreements at different levels of bargaining. Building on workplace level telework arrangements, the paper discusses the role of trade unions in implementing the Telework Agreement in Spain and the UK and provides a preliminary evaluation of the effectiveness of its autonomous character. Analysis is structured around two sets of factors; institutional (impact of industrial relations traditions) and societal influences (how the topic of the European agreement is situated within different societal contexts). It is argued that differences in the significance attributed to teleworking have shaped unions' perceptions and policies on both the form of implementation and practical application at lower levels, while the impact of institutions seems to be greater on substantive issues. Overall, despite their soft character, autonomous agreements represent agreements with potential. Although not enforceable in court, they can operate as good practice guides while their European origin may act as an informal element of legality when they reach a Tribunal. However, without active local union involvement the protections they offer can be largely symbolic.

Acronyms

CBI	Confederation of British Industry
CC.OO	Confederación de Comisiones Obreras
CEEP	European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest
COMFIA	Comisiones Financiero y Administrativo
CWU	Communication Workers Union
DTI	Department of Trade and Industry
ETUC	European Trade Union Confederation
FCT	Federación de Comunicación y Transporte
TUC	Trades Union Congress
UEAPME	European Association of Craft Small and Medium-sized Enterprises
UNICE	Union of Industrial and Employers' Confederations of Europe

The role of trade unions in the implementation of autonomous framework agreements

Christina Niforou

Introduction

In July 2002, the European social actors concluded the first inter-sectoral ‘autonomous’ agreement. The Framework Agreement on Telework was implemented according to ‘the procedures and practices specific to management and labour and the member states’ as set out in Article 139(a) EC Treaty. Organised management and labour are provided with the impetus to proactively engage in both the implementation and follow-up of framework agreements. For trade unions, this new autonomy may prove to be an opportunity to strengthen their *raison d’être*, especially at a time of union membership decline. And when combined with their enhanced responsibility in implementation processes at every level of bargaining (national, sectoral or company level), it makes them the key players in this ‘voluntaristic’ phase of European social dialogue. Moreover, since autonomous agreements are considered particularly appropriate for ‘new, emerging topics’¹ (Branch, 2005) which entail regulatory difficulties, may create additional challenges for organised labour.

Building on the above rhetoric, the paper presents a preliminary assessment of this form of implementation reflecting on the regulation of telework arrangements at company level. The first section provides for the theoretical frame of the research. Initially, the significance of the autonomous agreements is established via an introduction to the interprofessional social dialogue and the implementation under Article 139 of EC Treaty, while underlining the role of trade unions in European social policy. The following subsection describes the debates on the effectiveness of ‘soft law’ making the links with the legal issues in the case of the telework agreement. The literature further incorporates an illustration of the regulative complexities associated with the very nature of teleworking and emphasises the lack of recent studies on union attitudes to the telework phenomenon. The detailed research aims form the last part of this section. The second one accounts for the approach and the strengths and limitations of the research. The empirical material is categorised according to different levels of implementation (national and workplace) with reference also to sectoral influences, while particular attention is paid to specific substantive issues that proved problematic. The last section explains issues of implementation and effectiveness building on institutional (industrial

¹ Apart from telework, there are two other autonomous framework agreements; on work-related-stress (2004) and on harassment and violence at work (2007).

relations traditions) and societal factors (how the topic regulated by the European agreement is situated within both societal contexts) and illustrating how the above factors interact and shape unions' perceptions and policies.

Inter-sectoral social dialogue and the telework agreement

The Maastricht Social Chapter in 1991 (integrated in the Amsterdam Treaty in 1996) signalled a new era in the history of European social dialogue, since it formed the basis for a pragmatic involvement of the social partners in EU policy-making. Organised labour and management are empowered to conclude legal or contractual framework agreements via consultation and negotiations, as an alternative to the legislative proposals initiated by the Commission and adopted by the Council excluding interference of interests groups (Keller and Sörries, 1999). Once the agreement is concluded, Article 139 of the EC Treaty provides for two methods of implementation. According to the first one, the framework agreement is implemented 'in accordance with the procedures and practices specific to management and labour and the member states' as set out in Article 139(a) (the so-called 'voluntary route'). The second method entails transposition into a Council Directive therefore creating legal obligations for the Member States. While the majority of the framework agreements have been implemented through the second route and despite Euro-pessimistic views (for example see Keller, 2003 and also Streeck, 1995) about the difficulties involved in the voluntaristic form of implementation, in July 2002 the peak European social partners (ETUC, UNICE, CEEP and UEAPME) concluded the first 'autonomous' Framework Agreement on Telework.

The difference between this framework agreement and its predecessors lies in the responsibility of the social partners to both implement as well as monitor the agreement. As emphasised by the 2004 Communication of the Commission, under Article 139 (which states that agreements concluded at Community level *shall* be implemented) 'there is an *obligation* to implement these agreements and for the signatory parties to exercise *influence* on their member states in order to implement the European agreement' (emphasis added) (COM, 2004: 16). The deadline for the implementation of the Telework Agreement was July 2005 (three years after the date of the signature of the agreement) while the member organisations would report on the implementation to an ad hoc group set up by the signatory parties. A joint report concerning the implementation procedures and practices in each Member State was prepared by this ad hoc group and released within 2006 (European Commission, 2002). In 2004, the Commission announced its intention to undertake its own monitoring of the follow-up of the agreement after the expiry of the implementation and monitoring period in order to

assess the extent and effectiveness of effectuation at national level (COM, 2004). Moreover, it emphasised its right to proceed with legislative action if the monitoring results indicate that the ‘Community’s objectives’ are not met (ibid: 10).

The aim of the Telework Agreement is to provide a general framework involving eight areas of employment conditions. Article four dictates that teleworkers will enjoy the same rights as comparable workers at the employers’ premises. Apart from a telework definition and clauses concerning data protection issues, the privacy of teleworkers, occupational health and safety, the organisation of work, training issues and the collective rights of teleworkers, the agreement highlights the voluntary character of teleworking for the employee and the employer concerned. Moreover, telework may form part of the initial job description or occur during the course of employment; in the latter case, it is reversible at the worker’s or at the employer’s request. A significant clause is the one regarding the provision, installation and maintenance of the equipment by the employer who also has to cover the costs directly caused by the regular performance of telework, especially those relating to communication².

Trade unions and European policy-making

As emphasised by Barnard (2002: 80), ‘by far the most constitutionally significant function of the social partners at European Union level is to engage in the (bipartite) social dialogue’. The outcome of this procedure constitutes the so-called ‘negotiated legislation’ (Directives and framework agreements). It has been advocated that the increased involvement of organised management and labour and the ‘delegation of responsibility to representatives at lower levels for detailed implementation’ enhance legitimacy in EU policy-making (Marginson and Sisson, 2004: 87-88; see also Majone, 1998). However, issues of representativity, accountability, transparency and output raise concerns about the questionable capacity of the social partners to use their authority in order to ensure the legality of decisions (Barnard, 2002). Moreover, de Boer et al (2005) elaborating on what they term ‘new style’ social dialogue (i.e. greater emphasis on non-legally binding agreements), further acknowledge legitimacy issues which are fostered by cross-national differences. In cases of implementation through collective negotiations at national level, ‘problems of the level of bargaining authority and representative structures’ become more prominent (ibid: 66). Nonetheless, they

² A copy of the European Agreement is provided in the Appendix.

underline the significance of the European social dialogue as an alternative lobbying channel through which interest organisations are able to ‘voice their opinion’ (ibid: 67).

Dølvik and Visser (2001: 37-39) highlight the role of the European social dialogue in restoring ‘the legitimacy and credibility of trade unions as societal actors, not least in the national arena and against the trend of neoliberalism and union weakening’. A review of the relevant literature reveals a shift from procedural towards more substantive union approaches to European social regulation. One of the main goals of ETUC has been to strengthen the social dimension of the internal market via far-reaching regulation (Keller and Sörries, 1999). Past experience has demonstrated that compromises from the labour side have been a common practice. According to Falkner (2003: 19), “in several cases, sacrifices in substantive standards were accepted by labour in exchange for greater involvement of the ‘social partners’ in all layers of the European multi-level system of governance”. However, now that the mechanisms of social partnership are considered well established (Dølvik and Visser, 2001), unions’ self-interest translates in a pursuit to broaden the range of issues over which they can negotiate (Compston and Greenwood, 2001). Moreover, Dølvik and Visser (2001: 29) detected a change in the policy orientations of ETUC arguing that it is ‘no longer willing to negotiate at any price’, while its affiliates are increasingly interested in the content rather than the form of European social regulation. The latter ‘should be of a framework, minimum character’, since the replacement of national by European regulations does not constitute an ETUC objective; ideally, EU-level policy should have a protective role leaving adjustments to national actors (ibid: 36). Indeed, the mobilisation and the establishment of closer links with trade unions at national (and especially sectoral) level appear to have gained momentum in the ETUC agenda (ibid: 33). In this sense, Clarke (2003) views the telework agreement as a ‘test’ of the relationship between the two levels.

Autonomous agreements: ‘weak’ legal tools or ‘happy alternatives’?

The conclusion of the Framework Agreement on Telework constitutes a ‘new landmark’ in the EU social dialogue (Clauwaert, 2002) reflecting not only a shift towards greater autonomy of organised management and labour (Branch, 2005), but also what Jenkins et al (2002:5) term a ‘voluntaristic turn in labour regulation’. This is in line with Streeck’s (1995: 45) ‘neo-voluntarism’, which refers to the ‘low capacity’ of the European social policy to ‘impose binding obligations on market participants’. The telework agreement falls into the category of ‘soft law’ and in particular, it is classified as ‘autonomous’. Despite its characterisation as ‘voluntary’ (worded in the first page of the

document), in the 2004 Communication, the Commission introduced the term ‘autonomous’ for all the agreements implemented via Article 139(2) so as to eliminate the controversies created by the previous wording (discussed below; see also Branch, 2005). According to Collins (2004), autonomous agreements at international level provide the answer to the dilemma between market integration and legal diversity. Their autonomous character is demonstrated by the absence of public authorities and legal mechanisms in the process of endorsement and compliance (ibid). Building on the same rhetoric, Schiek (2005) situates such regulatory techniques within society’s capacity for internal governance. “Social entities are perfectly well able to provide regulatory devices and norms for their own ordering and ‘living’”; and whether these devices and norms are legally binding is left at the discretion of the parties involved (ibid: 3).

In the case of framework agreements, effectuation through the ‘voluntary route’ means that they are ‘binding in honour only’ (Marginson and Sisson, 2004: 87). Indeed, Franssen’s (2002a) analysis of the legal aspects of European social dialogue reveals gaps and contradictions. Framework agreements not adopted by a Council Directive provide for a minimum basis for the national social partners on which they are able to start collective negotiations. However, this is questionable in the case of the telework agreement, since a specific provision allows for the conclusion, at any level, of adaptive and/or complementary agreements³ (ibid). Nonetheless, the use of minimum standards is not always associated with effective implementation; according to Barnard and Deakin (2000: 344), ‘it provides a floor of rights but does not do much as an input into growth’. Moreover, although the word ‘shall’ of Article 139(2) of EC Treaty implies a legal obligation (for a different opinion see Bercusson, 1992) ‘the right to collective bargaining cannot be turned into an obligation’ since that would impact upon the freedom to negotiate collectively (Franssen, 2002a: 130).

In addition, Clauwaert (2002) argues that the reference to Article 139 in the last part of the telework agreement ‘clarifies’ its binding nature. Nevertheless, preliminary research revealed that the term ‘voluntary’ generated misconceptions (unintentional or not) on whether the agreement should be implemented at all, while in some member states, it resulted in ‘softer’ tools such as ‘codes of conducts’ and recommendations (ETUC, 2004). This is a manifestation of Franssen’s (2002b) argument on the lack of enforcement procedures from the European social partners towards their affiliates at lower levels. For Thibault Aranda and Jurado Segovia (2003) the links between the two levels are rather ‘weak’. As they emphasise (ibid: 8), the very conclusion of the European Agreement

³ Last paragraph of the ‘General Considerations’ clause (see Appendix).

does not generate ‘even a minimum obligational effect’ that could be legally enforced. However, even if such procedures were applicable, divergence in objectives and policies between the management and the labour side could influence the essence of national implementation. For UNICE, engaging in the social dialogue has never been a priority among its aims, while its function as a social partner is pursued more as an obligation rather than a strategic decision (Arcq et al, 2003). Moreover, UNICE’s hostility towards legally binding regulation is demonstrated by a ‘wait-and-see’ approach (ibid). In the case of teleworking, the term ‘voluntary’ was perceived as implying a ‘non-legally binding agreement’ (UNICE, 2001), whereas ETUC argued that ‘in all cases the agreement should have a binding character’ (ETUC, 2003). Such misinterpretations can prove detrimental, especially at company level, due to the absence of ‘a legal basis for the presumption that European collective agreements have direct legal effects on individuals’ (Franssen, 2002a: 139).

The above legal issues become more prominent when the heterogeneity of national industrial relations traditions combined with differences in collective bargaining coverage are taken into consideration. As Keller (2003: 416) emphasises, ‘the complete coverage of the workforce is a [...] highly unrealistic goal; the existence of a regulatory patch-work at national level is the most likely scenario’. In addition, the absence of an *erga omnes* extension effect that would make the autonomous agreements legally binding does not ensure even implementation (Branch, 2005). Nonetheless, this is not always viewed as a drawback. Deinert (2003) argues that autonomous implementation is rather advantageous in that it respects the differences between national institutions; ‘Member States that do not know direct effects of collective agreements are not obliged to regulate such effects for European collective agreements’ (ibid: 48-49). Indeed, if the architects of the Treaty were seeking to impose a *uniform legal capacity* across the Community, they would not regard both ways of implementation as equivalents (ibid). However, this is strongly contradicted by Lo Faro (2000a) who differentiates between “strong” agreements (transposed into Directives) and “weak” agreements (implemented via the voluntary route) in terms of their normative relevance. As he advocates, ‘it seems rather *superfluous* that the social partners are granted “authorisation” to implement an agreement concluded at Community level “in accordance with the procedures and practices specific to management and labour and the Member States”’ (emphasis added) (Lo Faro, 2000b: 70). In this sense, autonomous agreements can only have a ‘recommendatory character’ (Thibault Aranda and Jurado Segovia, 2003).

However, the legally binding nature of an agreement does not always lead to (effective) implementation (Marginson and Sisson, 2001). This is also reinforced by Dorssemont (2003: 12) who questions the binding capacity of the previous European agreements arguing that they lack ‘an explicit hard obligatory core’. In a similar line, Lo Faro (2000a: 120) notes that the national transposition of a Directive ‘does not guarantee the inviolability’ of its content. Problems related to effectuation of detailed Directives at national level were revealed by research conducted by Falkner et al (2005: 363) who further acknowledge that ‘soft law may indeed have an impact’. Moreover, in the case of autonomous agreements, even an ‘optimum level of effectuation’ in every national legal order would not guarantee the equal effectiveness of their contents across the Member States (Thibault Aranda and Jurado Segovia, 2003: 13). Additionally, non-binding EU regulation constitutes a more pragmatic approach towards increasing social and economic complexity (Marginson and Sisson, 2001). According to Scharpf (2002), ‘uniform European social policy is not politically feasible or even desirable’ and therefore, European law must allow for sufficient differentiation in order to ‘accommodate existing diversity’. Finally, ‘softer’ regulative mechanisms have facilitated the negotiation of topics that were absent from the national bargaining agenda (Marginson and Sisson, 2001), not only due to the unfamiliarity surrounding them but also because of the complexity of their nature, which in turn renders traditional legislative approaches impractical and unfeasible (Branch, 2005). Telework is one of them.

The regulation of telework

A common feature of past research on teleworking is the emphasis on the lack of a uniform definition either in legislation or in collective agreements. Baruch and Smith (2002) have identified a great inconsistency even in the terms that are used to describe it (such as ‘telecommuting’, ‘homeworking’, ‘working at a distance’ and more recently ‘virtual work’) which in turn acts as a hindrance to the practice of benchmarking and the execution of effective comparative analysis. For instance, a number of studies include only home-based teleworking data, while others analyse telework in any location (eWork, 2000; EIRO, 1998). Additionally, differences in classifications impede a coherent legal approach ‘so that, for example, precedents based on one type of teleworking may not be relevant to a different type of teleworking’ (Baruch and Smith, 2002: 62). As Blanpain (1997) advocates, telework is not a legal category in any European country; its definition is rather ‘functional’ incorporating the co-existence of two-elements: the place of work and the technology used. Moreover, it is characterised by very different and complex forms of work including home-

based telework, alternating telework, remote work on sites controlled by the employer, work in telecottages and local telework centres as well as mobile work (Weißbach, 2000).

Teleworking constitutes a multifaceted phenomenon and as a result, opinions on the issue of definition are diverging. On the one hand, Di Martino and Wirth (1990: 530) acknowledge the need for a common definition in order to ‘cover the wide spectrum of situations encompassed by telework (from the individual working at home with a computer and a telephone, to extensive decentralisation within entire enterprises)’. And as Baruch and Smith (2002:62) point out, ‘differences in definitions may have implications for legal aspects’. Nonetheless, a clear-cut definition unavoidably draws boundaries around a phenomenon which by its very nature tends to be ‘arbitrary’ (eWork, 2000). The above issues prompted the social partners at European level to reach a definition broad enough to embrace the complexities of teleworking. According to the Agreement, telework is identified as ‘*a form of organising and/or performing work, using information technology, in the context of an employment/contract relationship, where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis*’ (European Commission, 2002: 2).

However, a universally accepted definition by itself cannot dissolve any legal ambiguities surrounding the status of teleworkers. The widespread application of ICTs has resulted in a significant rise in non-standard employment in terms of space and time; as Baruch and Smith (2002: 63) underline, “what used to be rather dismissively referred to as ‘atypical employment’ [...] has in many areas become the norm”. Especially in small and rapidly growing industries (such as consultancies and IT), ‘detailed *ex ante* regulation’ is increasingly viewed as impractical since it impedes economic development (Weißbach, 2000: 6). Moreover, due to a tendency towards greater individualisation concerning the employment contract, more and more workers within the labour market are characterised by unstable legal status; ‘employees often feel that they are strong enough to negotiate their issues individually or at a workplace level’ (ibid). In many cases, they end up performing their job tasks on a self-employed basis therefore serving employer prerogatives of reduced costs and increased freedom in the establishment of working conditions (EIRO, 1998; see also eWork, 2000).

In the case of teleworking, it is increasingly difficult to distinguish between regular employees and self-employed. ‘When a business relationship is deemed to exist in teleworking, this may often in

reality be an employment relationship [...]. However, this is difficult to prove' since the criterion of subordination can be easily challenged (EIRO, 1998: 4). However, apart from increased autonomy in the performance of work and the lack of a technical or functional dependence on the employer (ibid), there are other issues that blur the boundaries between wage employment and self-employment. Some teleworkers are exclusively dependent on one employer, while others work on a temporary basis consequently demonstrating the deficiency of conventional legislation in covering every single aspect of a particularly complex form of work (Weißbach, 2000). This is also fostered by the absence of specific norms regarding telework in the labour law of the Member States (Blanpain, 1997). Even in the countries where there are provisions related to the 'ancestor' of modern teleworking, that is, homeworking (Baruch and Smith, 2002), these are inappropriate for a type of work which is not always exercised on a home basis, while the definitions they incorporate are not suitable (EIRO, 1998). Moreover, the partial and patchy application of employment legislation to homeworkers combined with the differences in their legal status between countries, constitute a further manifestation of the problematic nature of the homeworking category as a source of regulation for teleworkers (ibid).

Although teleworkers 'enjoy freedom of association and the related collective rights', they nonetheless constitute 'only a marginal factor in the shaping of collective labour relations' (Blanpain, 1997: 34). Apart from increased atomisation of the employment contract, there are other factors reinforcing the above trend. The technological advent has altered the way work is organised and the subsequent emergence of new business activities has blurred the boundaries between industries and sectors; 'ICTs pervade all sectors horizontally, and increasingly link them reciprocally' (Weißbach, 2000: 6), therefore rendering the standardised application of norms unfeasible. As a result, 'collective agreements on telework are in the process of ongoing decentralisation' with sectoral bargaining being rather rare (ibid: 10). In many European countries, there is no collective regulation of teleworking (for example, Belgium, Finland, Greece and Portugal) while in others, collective arrangements are increasingly met at company level (such as Germany, France and Ireland); and even in the countries where there are sector agreements, these usually establish guidelines for lower-level negotiations (like Sweden and Denmark) (EIRO, 1998).

Moreover, differences in objectives between employers and trade unions regarding the exercise of telework impact upon the form of collective regulation. Employers, who tend to view work organisation as 'a question which is the exclusive concern of companies', generally see specific

telework regulations as unnecessary favour individual agreements (EIRO, 1998: 9). On the other hand, unions demonstrate a common preference for more extensive regulation (ibid), while regarding company agreements appropriate only in the case of collective forms of telework, such as telecentres and alternating work between the domicile and the office; ‘this implies that the teleworker is more likely to retain employee status and corresponding pay and benefits’ (Di Martino and Wirth, 1990: 547). The above unions’ position originates in their initial suspicion of homeworking which they associated with low pay and ‘substandard’ working conditions (ibid; also Blanpain, 1997). In addition, the fragmentation of the workforce combined with the dispersion and isolation of teleworkers has contributed to a low level of unionisation (EIRO, 1998); in many cases, there are fears that this new form of work threatens traditional trade unionism (Blanpain, 1997). However, Di Martino and Wirth (1990: 549) suggest that there has been a shift towards more pragmatic union approaches due to the spread of teleworking amongst different categories of workers - ‘from highly qualified and highly paid to semi-skilled and poorly paid’. Nonetheless, the absence of recent studies on union attitudes towards teleworking is striking.

The focus of research

The notable shift of European social policy towards voluntaristic approaches combined with debates related to the challenges of ‘soft’ regulative mechanisms form the basis for the construction of the main research question; *does the autonomous nature of the telework agreement hinder or facilitate effective implementation?*⁴

The enhanced role of organised labour at EU level in terms of policy-making accompanied by increased delegation of responsibility to national associations for detailed implementation subdivide the question into the following issue; *what is the role of trade unions in the implementation of the agreement in both countries?*

The above is examined following a reflective approach to union attitudes towards the telework phenomenon, therefore leading to the underlying empirical research objective: *How proactive is organised labour towards the regulative challenges associated with teleworking?*

⁴For the purposes of this paper, ‘effectiveness’ basically accounts for the level of employee protection (in terms of coverage and terms and conditions of employment) achieved through the implementation of the respective agreement. The use of the term in the context of policy theory and its relationship with implementation, enforcement and compliance fall outside of the scope of this paper.

Approach and methods

Research was carried out in Spain and the UK. Interestingly, neither UK nor Spain resorted to legislative measures for the national implementation of the telework agreement. The divergences in industrial relations traditions between the two countries allow for a useful comparative perspective. The function of organised labour in Britain is situated within the voluntaristic tradition of its industrial relations system. On the other hand, Spain is characterised by a relative degree of institutionalisation. However, during the last decade, there have been shifts in the attitudes of organised management and the state towards labour market deregulation, accompanied by a more favourable approach of the peak trade union confederation, Confederación de Comisiones Obreras (CC.OO), towards decentralised bargaining (Martinez Lucio, 1998).

The communications and finance sectors account for the empirical focus of the research. The main reasons for this are the widespread use of ICTs and the low level of union density in both sectors combined with the fact that they are particularly receptive to atypical forms of work. Data was collected through face-to-face and telephone interviews with trade union representatives in both countries while in the case of Spain, a telework conference attended in Seville in June 2006 constitutes an additional source. The conference was promoted by Comisiones Financiero y Administrativo (COMFIA) and its primary purpose was to inform union members about the introduction and regulation of telework arrangements in a multinational insurance company (henceforth Fs). Telework practices were also examined in two telecommunications companies (henceforth Ts for Spain and Tu for the UK) and in a big UK bank (Fu).

Interview data (from five interviews in total) was supplemented by data from primary documents, such as telework company agreements and guidelines and internal documentation. Moreover, case law was used in order to reflect on the actual practice of telework at workplace level but most importantly, to underline the impact of differences in legal traditions. Finally, a part of the findings is supported by official statistical data concerning the extent and character of teleworking in each country so as to enlighten the examination of the impact of societal factors on regulative issues. For that reason, SIBIS data of the Empirica Survey are used in combination with statistics from the UK Labour Force Survey.

It should be noted that some of the telework agreements of the companies examined were concluded before the 2002 framework agreement (from the UK side) and, as a result, its specific impact cannot

be fully explored. Nonetheless, it constitutes a test of whether the European agreement is innovative or rather a culmination and extension of previous teleworking arrangements. Moreover, the lack of an employer perspective limits the comprehensiveness of the research, since the ‘autonomous’ implementation dictates the equal involvement of the employers associations. However, the particular objective of the research is secured; to present a trade union perspective through a preliminary and indicative exploration of the implementation of a significant European initiative at national and company levels.

National implementation: Choice of instruments and rationale

Spain was one of the few countries to provide a translation of the EU Agreement which in turn was annexed in the 2003 National ‘Interconfederal’ Agreement. Chapter VII of the latter entails a specific reference to the Framework Agreement having a primarily informative purpose while highlighting a number of priority issues for the national social partners, namely the telework definition, the clauses regarding its voluntary and reversible character, the contractual status and equal treatment of teleworkers. The above are followed by a declaration of the signatory parties *“to instigate the adaptation and development of its content in the Spanish reality”* (CC.OO, 2003: 41).

In the UK, the European agreement was transposed in the form of a ‘Telework Guidance’ agreed by the Department of Trade and Industry (DTI), Confederation of British Industry (CBI), Trades Union Congress (TUC) and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) in 2003. The Guidance has integrated the exact wording of the EU agreement followed by explanatory clauses, which adapt it to the UK reality. According to TUC website information⁵, the EU agreement *“is not enforceable in law, and has not been implemented in the UK. Instead it currently acts as a good practice guide for employer and employees”*. As worded in the document, it *“is intended to provide a useful checklist of issues to consider when implementing teleworking and explain how the text of the European agreement might best operate in the context of the UK labour market”* (DTI, 2003: 6).

There was no uniformity of views on the form national implementation has taken. According to a CC.OO collaborator⁶, the implementation of the Framework Agreement has been influenced by *“the tardiness with which collective bargaining in Spain receives the European indications; it is a problem of inertia of the collective bargaining to accommodate change”*. And he went on to

⁵ ‘Teleworking’ in *Working life and Family-Friendly Policies* accessed at www.worksmart.org.uk/rights/viewsubsection.php?sun=62

⁶ His legal expertise provided for a valuable insight especially regarding the legal constraints to the applicability of the European Agreement.

highlight that “a Directive would oblige the State to replace the law on homeworking with a law on teleworking”. However, during the conference it was emphasised that the Interconfederal Agreement was “the best” possible tool for implementation, while union respondents stressed its utility in setting a minimum floor of rights. Nonetheless, there were calls for more extensive regulation:

“The European agreement has permitted an initial assistance ...it does not oblige, it only recommends ... it has facilitated the negotiation providing a general line and leaving to us the practical part of the application; but the reality is different ... there is a need for new laws” (FCT).

In the UK views were also contradictory. For the Communication Workers Union (CWU), the Guidance is “probably a good starting point” for companies that wish to introduce teleworking “as it sets minimum requirements”. Nevertheless, it was criticised of having a rather “minimalist” character, since “it does not provide sufficient in terms of detail ... it may be used to an Employment Tribunal as to how an employer should behave, but if you go to an Employment Tribunal by definition you’ve lost your job”. As argued, the Guidance is unlikely to provide substantial protection; in the words of an official, “it is so general and would not fit the issues we face in Tu. I’m not so sure if we would have used it to any great extent”. However, an examination of the Tu agreement (concluded in 1999) and the DTI Guidance reveals striking similarities (especially concerning the clauses on reversibility and taxation issues). Surprisingly, the Tu agreement was also used as a model for the formulation of the 2001 EU sectoral telework guidelines in telecommunications⁷. Indeed, the Framework Agreement seems to lack a groundbreaking character. Even in Spain where the extent of teleworking is limited, unions acknowledged that it “is not very innovative and its provisions are similar to those of former teleworking agreements”⁸.

Moreover, the existence of a regulative context which is unfavourable to trade unions combined with negative state policy towards European initiatives constitute serious impediments to their effective implementation in the UK; “Trade unions are disappointed by the response of the Government to regulation from Brussels ... UK’s governments, including Blair’s government, have tried to water down Directives. They listen very much to the employers and often with more sympathy than they have to the unions. They won’t go as far as we would want them to go in terms of trade union

⁷ One of the CWU interviewees, had been involved in the negotiations of the telework guidelines in the telecoms sector. Although the EU sectoral level falls outside the scope of this paper, the fact that it is also a soft European initiative negotiated in the same sector concerning the same topic sheds some light to the examination of implementation issues.

⁸ A view expressed widely during the conference. Although in Spain telework is rather immature, unions draw from their experiences in regional telework initiatives (such as the operation of telecentres in Andalusia).

legislation, so we have to fight for what we have". This has repercussions for the regulation of teleworking and also differentiates the role of trade unions from those in other EU countries; *"unless we recruit people we will not survive ... there are no 'no-go' areas for us, we have to look everywhere for members. That particular approach is not the same elsewhere in Europe, we have to do more in the UK"*. Interestingly, the legal regulation of teleworking was considered inappropriate; instead it requires *"the application of existing laws on consultation with employees, industrial relations, health and safety, and also on the tax regime"*. Respondents argued that company regulation is more advantageous because it allows for greater flexibility: *"we simply want the basis of what can be practically done and we can do that by reference to an agreement which is flexible. Laws are often inflexible"*.

Implementation at lower levels

A. The role of the sector

As noted by Weißbach (2000:2), 'teleworking plays an important part not only in the rapidly growing segment of ICT enterprises in particular, where there is little union organisation, but also in financial services, where the same is true in many European countries'. In the countries examined, there are differences in the extent of teleworking between the two sectors. As a COMFIA official argued, *"we don't have concrete telework experiences apart from the one in Fs ... it is unique in our sectors and very recent...it is the only one known to and negotiated by us"*. The telecommunications sector is more receptive to teleworking; *"official telework is mostly implemented in companies involving advanced technology and also in communications"* (CC.OO). On the other hand, in the UK, the finance sector demonstrates a higher proportion of teleworkers than the transport and communications sector (15% and 7% respectively) (Ruiz and Walling, 2005).

The Spanish 'Criteria for the 2004 Collective Bargaining'⁹ emphasise the devolution of responsibility for detailed implementation to lower levels; *"the sectoral collective agreements should establish that any intention to introduce telework in a company or to transform normal working into teleworking will entail, as a minimum, an integral and adapted application of the European agreement"* (CC.OO, 2004: 40). Nonetheless, there is a notable absence of centralised arrangements in the sectors examined. For COMFIA, there are two main reasons. Firstly, *"not all the*

⁹ These preceded the conclusion of the 2004 National Interconfederal Agreement.

sectors are very well defined, sometimes they overlap". Moreover, *"in Spain, there is an increasing emphasis on the processes of decentralisation of production and the transformation of the employment relationship into a business relationship. And in the finance sector, this is fundamentally the case with the insurance companies"*. The latter usually externalise their services collaborating with self-employed insurance agents who establish a direct contact with the clients. *"You are connected with a company, you have access to the internal networks of the company, you are provided with the equipment ... [but] you have a pure business relationship. In the case of insurances, this is the element responsible for the lack of more centralised situations"*.

Furthermore, FCT underlined the absence of a management counterpart at sectoral level; *"an employers' organisation that would coordinate the criteria for sector negotiations does not exist in telecommunications ... and bargaining has to take place at company level"*. UK respondents also identified sector-specific issues that could impede the regulation of teleworking and further hamper the effect of the Guidance. It was argued that unions have to be particularly proactive *"in one industry, sector which is difficult to organise ... the telecoms industry doesn't have a high union density. A lot of the companies are new companies, a lot of them have American backers with American cultures and they don't welcome trade unions. Even companies which are European in nature, adopt some very anti-trade union policies"*.

Moreover, both sectors are very receptive to atypical forms of work and trade unions face additional challenges. In Spain, the existence of self-employed teleworkers is a significant hindrance. In this sense, telework constitutes *"an excuse to avoid the employment contract ... there is a great tendency to use the so-called 'falso autonomo'"* (i.e. 'false self-employment'). This is more prevalent among low-qualified employees who *"are convinced by the employer"* to work under a 'semi-employment' relationship (CC.OO). British unions stressed the impact of a different aspect of the employment relationship; *"a lot of people are not employed on a permanent contract ... and organising people on short-term contracts is very difficult"*. In the case of teleworkers, isolation is an additional obstacle; *"the difficulty is access for recruitment, most people join trade unions because they are asked to do so and because their colleagues are also members"* (CWU). Spanish respondents expressed similar fears: *"today there is no problem because [teleworkers] are very few. My preoccupation is for the future. How are we going to organise workers who directly enter the company as teleworkers? We don't have a direct relationship with the teleworker and this complicates the classic union culture"* (FCT). However, for the UK the view that telework endangers traditional trade union organisation is *"outdated and backward"*.

B. Workplace regulation: some substantive issues

In the Spanish companies, teleworking is introduced or exercised on an experimental basis and it concerns home-based arrangements. However, Ts demonstrates a greater degree of familiarisation with this form of work organisation while for Fs it is relatively new, partly reflecting sectoral trends (discussed above). In Britain, telework in Fu is restricted to home-based practices, whereas in Tu, apart from “*predominantly home-based teleworking*” (usually non-managerial staff), there is “*a huge range of mobile working*” (for example, salesmen and engineers) (CWU).

In three out of the four companies examined, management’s objective to introduce telework has resulted in company agreements with trade unions. They cover the same areas as the European Agreement, while aspects of employment such as health and safety and occupational accidents usually fall within companies’ policies. Conversely, in Fu there is no agreement in place and the regulation of telework is at management’s discretion; the latter has established telework guidelines, which are “*designed to provide some basic background information to staff and managers*”. The Fu guidelines refer only to who is eligible to telework, under which circumstances and also to the issue of costs.

According to respondents from both countries, an agreement can be beneficial for the employees only when the employer sees gains in its conclusion. Since the introduction of teleworking is a company initiative, the management has to consult the unions on its regulation; “*it is difficult to introduce a transformation of work into telework without the existence of a certain transparency; you expose the organisation to the unions*” (COMFIA). In turn, unions are in a more advantageous position to negotiate higher standards; as a FCT official put it, “*Ts needed to agree*” in order to ensure the smooth operation of a “*strategic instrument*” (worded in the Ts agreement). In Britain, negotiations of the Tu agreement were conducted within a similar climate; “*Tu wanted to reduce its property costs and needed to move very quickly. There was a commercial imperative ... so, because they were -let’s say- desperate to reach an agreement with us, we had an advantage in the negotiations*”. In turn, unions have “*a strong argument when the employer breaks a part of [the agreement]. It’s because employers feel ownership; they do not feel ownership to laws*”.

Strong union presence is considered a prerequisite for high levels of employee protection. For FCT, “*the regulation of teleworking depends on the size of the company and the union capacity to exercise*

pressure”. Similarly, in Tu “because there’s a high membership density, it’s more likely that an individual will come first to the union and say: ‘I d like to telework, how do I go about it’”. Indeed, union absence in Fu has lead to substandard employment conditions. Nonetheless, even in Tu where there is a solid company agreement, complete coverage is more likely to be ensured when the teleworker belongs to CWU;

“If a manager knows that an individual has the support of the union, most likely he won’t be obstructive to teleworking. But if they know that this individual is not a union member, they might say ‘sorry, I’ll think about that but it’s not something suitable’ ... so, if an individual is not a union member, we will not assist him”.

i. Telework definition

The extent and character of teleworking in each country has shaped unions’ perceptions on the issue of definition. As secondary data reveal, the state of telework in Spain is rather immature when compared to the UK accounting for 5% and 17% of the employed population respectively (including home-based, mobile and home-based self-employed teleworkers)¹⁰. For COMFIA, “it is still too early to define what is the ideal, the typical telework post”. However, as it was emphasised during the conference, the existence of a definition “is more important than it appears”. This was also reinforced by the CC.OO collaborator who acknowledged the need for a definition based on legal criteria, underlying the unsuitability of the one which is included in the European agreement due to its incorporation of mainly technological parameters. On the other hand, for British unions the expectation that a specific definition would facilitate the regulation of teleworking is highly unrealistic; “a separate law talking about teleworking would be problematic: ‘what do you mean by telework? People working at home? Partly at home? Partly in an office? How do you measure it?’ And that’s why I think minimum standards are fine”.

Both Ts and Fs agreements¹¹ include a definition of telework based on the same criteria as the ones used in the European definition: the place of work and the use of ICTs. On the contrary, there is a notable absence of a telework definition from the Fu guidelines, while the one used in the Tu agreement primarily serves taxation purposes dictating that home-based workers have to work “on

¹⁰ SIBIS 2002

¹¹ The Fs agreement had not been signed at the time research was conducted, but its provisions were presented during the conference.

average 40% of their contracted hours". Teleworkers should *"at all times maintain a diary of their working time so that, if required, they can satisfy the Inland Revenue that they are homebased workers ... and are entitled to receive Business Travel Expenses tax-free"*. For CWU, the above definition *"is very vague ... it is notorious because it does not give automatic rights to employees"*.

Homeworking traditions in the two countries have had a significant impact on the issue of definition. UK unions build on its widespread operation and long tradition to stress the unsuitability of any legal measures specific to telework. In Spain, other forms of telework are *"usually ignored"* (CC.OO) because teleworking is mainly perceived as homeworking. The latter is well embedded in the Spanish reality while there is a specific law for homeworkers. Nevertheless, as case law revealed, homeworking legislation has generated scope for opportunistic employer behaviour mainly due to the lack of a uniform telework definition. Management's decision to introduce teleworking arrangements¹² was met with union opposition stemming from fears that they would result in substandard employment conditions. However, the first sentence¹³ rejected unions' claim building on article 13 of ET¹⁴, which defines homeworking as *"the work done by the worker at his/her own home or any other place freely chosen by him/her, without the direct supervision of his/her employer"*. According to the decision, teleworkers' rights were covered by national law and were the same with those of homeworkers. FCT raised the issue to the Supreme Tribunal and also resorted to the text of the European agreement. Interestingly, although the Tribunal rejected the agreement as a source of regulation¹⁵, it nonetheless used the European definition so as to eliminate pre-existing ambiguities and concluded that teleworking does not fit into the homeworking category, since it is not always exercised from the domicile or from a place chosen by the teleworker while, in many cases, the use of ICTs allows for a direct supervision.

ii. Voluntary nature and reversibility

The provision of the European agreement on the voluntary character of teleworking generated concerns about its effective application. The CC.OO collaborator questioned the existence of *"a real guarantee of the 'voluntaribility' of telework"* further arguing that the latter *"has been protected only because of the Tribunals"*. According to the decision of the Supreme Tribunal (case discussed above), the Framework Agreement lacks normative relevance; *"it is not yet applicable in our legal*

¹² It was a company also in the communications sector and unionised by FCT.

¹³ Audiencia Nacional, Sala de lo Social, 207/03, 30/05/2004

¹⁴ Estatuto de los Trabajadores (Workers' Statute)

¹⁵ Tribunal Supremo, Sala de lo Social, CASACION 143/2004, 11/04/2005. Details are provided in the next section.

order and its publication as an Annex in the '2003 Interconfederal Agreement' does not equate to a reception by the internal Law via collective bargaining". Therefore, although FCT resorted to the clause dictating the performance of teleworking on a voluntary basis in an attempt to ensure the non-obligatory operation of home-based telework, their claim was satisfied on different grounds. Instead, 'voluntaribility' was derived from the Civil Code and the "regulative limits applicable to the collective autonomy which cannot regulate those issues that affect the personal sphere of the workers".

In the UK, although teleworking operates on a voluntary basis, a request to telework is not always successfully met. In Fu, *"many different circumstances can give rise to a request to work from home. In the majority of these cases managers will be expected to exercise their general discretion ... In principle any member of staff could request it - but they would need to demonstrate that there were some efficiency benefits from doing so, [which] would also include set-up costs. For example, the bank would not normally supply desks, chairs etc unless the individual were to be home-based"*. Fu has a separate policy regarding requests from employees with children under six falling within the scope of UK legislation on flexible working. Nonetheless, according to the DTI Guidance, although *"parents with [...] children under six will have the right to request flexible working, including teleworking if they so wish, [...] teleworking cannot be guaranteed under the right"*.

During the conference in Spain, the majority of the participants emphasised that the voluntary character of teleworking could be guaranteed only when reversibility was ensured; and the latter constitutes a sensitive regulatory issue. The EU Agreement is far from specific regarding the regulation of reversibility, leaving its modalities to be established via *"individual and/or collective agreement"*¹⁶. An examination of the Ts agreement reveals the impact of the respective provision; the right to return to the company premises can be exercised only during the first two months or at the end of the first year¹⁷ following the conclusion of the individual telework agreement between the employee and the employer, unless *"exceptional circumstances"* occur. However, although a 'real guarantee' is lacking from the above provision, the agreement foresees the active involvement of the workers' representatives, which have to be informed about every single case of reversibility.

In both Tu and Fu, teleworking occurs during the course of employment. For CWU, it is a way to ensure reversibility; *"We are extremely sensitive providing someone with a contract of employment*

¹⁶ 5th paragraph of the 'Voluntary Character' clause.

¹⁷ It is the normal duration of the agreement and it can be *"tacitly"* prolonged with the consent of both parties

which says that they have to work from home ... because if for some reason the telework was unsuitable to the individual ... then we would want them to have the opportunity to work in office". And the issue of reversibility is rather complex. According to the Tu agreement, *"Tu realises that this may not always be possible and all reasonable steps will be taken to accommodate change"*. Nonetheless, as a CWU official put it, *"the employer is trying to save money. There is always a danger that the employer will try to find the way of preventing someone from returning to normal workplace"* and *"[reversibility] is becoming more difficult because the number of buildings which Tu now occupies is reducing"*. Moreover, teleworking in Fu is reversible only when the employee has submitted the request to telework in writing, while the company guidelines do not cover reversibility at employee's request; *"The arrangement must always be at the discretion of management and could be terminated at any time (unless established following a formal request for flexible working)"*. And the UK Guidance does not allow for a pragmatic employee protection. Regarding the provision on reversibility, it foresees that *"there may ... be circumstances where both sides are unable to consent to changes and it may therefore not be possible to reverse the decision to telework"* (DTI, 2003: 10).

iii. Contractual status

The operation of teleworking in all the cases examined is regulated on an individual basis. According to the Ts agreement, *"[telework] will always have a voluntary character for the employee which will be established through an individual teleworking agreement"*. Spanish union respondents did not express any concerns about changes in the contractual status of the teleworker. The words of a FCT official are indicative of the general union stance: *"The teleworker is not a new professional category. The professional category of the employee and the salary remain the same. The contractual relation between the company and the worker does not change; it only regulates the new aspects of the activity"*. The teleworkers enjoy the same rights with the rest of the employees; these rights *"are established in the collective agreements"*. However, UK agreements do not offer the same protections; as CWU emphasised, *"the agreement which we have with Tu sets the basis on which telework should be introduced"*. In this sense, *"it can necessarily only be a framework agreement, with the expectation that both individual employees and their managers will comply"*. Therefore, unions *"resist the idea of employing people on a teleworking basis"*. Similarly, for Spanish unions, a contractual status equal to that of the employees in the company's premises is more likely to be guaranteed when teleworking occurs during the course of employment.

iv. The provision of equipment

For FCT, the autonomous character of the European agreement can have detrimental effects on the application of the provision which refers to the equipment:

“It may establish an obligation for the employer to provide the equipment ... but a small company is not very likely to do it. It is a matter of costs ... Logically, agreements of this type will be implemented only in big companies”.

However, in the case of Fu there is a clear derogation from the spirit of the agreement. The bank may pay for the installation and rental of broadband only when the employee *is required* to telework (emphasis added). But when the employee opts to telework following the formal procedure and making a written request, the bank will not compensate for the expenditure; *“Staff who have requested to work from home and have their managers’ agreement, whether occasionally or regularly, will be required to pay for their Broadband installation and rental. A manager may feel that the additional costs associated with providing suitable equipment to enable someone to work from home outweigh any potential benefits”.*

Discussion

Societal influences

The countries examined demonstrate more similarities than differences regarding implementation of the European Agreement at national level and regulatory arrangements at lower levels. In Spain, as far as telework regulation is concerned, ‘the situation seems rather to be more similar to what happens in the UK’ (Weißbach, 2000: 39). In both countries, there is a striking preference for company-level regulation and individualisation of the telework contract. The tradition of voluntarism is not the only explanation for the function of the UK unions; the latter seem to embrace the notion that it is the complexity of teleworking which renders more centralised regulation unfeasible. In Spain, apart from the blurring boundaries between sectors, the absence of a management counterpart at sectoral level and the phenomenon of false-self employment, it is also the policy orientations of the CC.OO which result to lower-level arrangements. Both COMFIA and FCT are affiliated to CC.OO, and the latter ‘has always been less hostile to decentralised bargaining, which it sees as enhancing the participation of workers, and as providing an impetus to union activity during workplace elections’ (Martinez Lucio, 1998: 445).

The extent and character of teleworking in each country has shaped union perceptions on what should be the ideal regulative mechanism for this ‘new’ form of work organisation. Differences in the technological progress of the communications network in the countries concerned have resulted in the familiarisation with different types of teleworking. For example, mobile telework incorporating the use of ICTs is still at an embryonic stage in Spain whereas telecentres emerged in order to fill the gap of communications’ infrastructure. However, UK is the only European country where ‘pure telework careers’ exist (Weißbach, 2000: 38). These differences appear to be representative of a European pattern. Past experience of the negotiation of the telework guidelines at European sectoral level provided a valuable comparative insight; *“the problem we had was getting people to understand just what the sensitivities were, cultural or otherwise ... Mainly Northern European countries were okay with the concept; it was the Southern European countries that didn’t seem to understand this. The secondary issue was that Northern EU countries are very good in their communications network, but in some parts of Greece and Spain, the communications network is not particularly efficient. And how do you then enable someone to work from home if there’s no broadband”*.

Spain’s cautious attitude translates into a notable reluctance to encourage employment on a telework basis and seems to be symptomatic of a Southern European trend whereby countries perceive teleworking as a threat to traditional trade unionism; *“[teleworking] removes people from the workplace which is the core part of trade union organisation. Therefore, unions encouraging people to telework are viewed as encouraging them to lose contact with trade unions”*¹⁸. In the case of Britain, it is the difficulty to ensure reversibility that prompts unions to introduce telework only during the course of employment. And the European agreement is not particularly protective when telework forms part of the initial job description. The same (and even lower) levels of protection are reflected in the transposition of the respective clause (on the voluntary and reversible character of telework) into the Spanish company agreements but also in the UK Guidance; regarding the latter, ‘this question of reversion is where the best practice guidance and the hard law are furthest apart’ (Smith 2003: 3).

Industrial Relations Traditions

Spain and the UK have demonstrated a remarkable punctuality transposing the framework agreement only one year after its dissemination. Nonetheless, this punctuality did not translate into a decisive

¹⁸ Words of the CWU official, from his involvement in European sectoral social dialogue.

approach regarding the form of implementation. Convergence in terms of deregulation tendencies is manifest in the adoption of ‘softer’ methods for the transposition of the telework agreement from the European to the national level. Whereas a soft approach was expected in the case of Britain, it is ‘particular worrying’ if soft instruments are not the ‘normal or traditional outcome’ of implementation processes in the country concerned (ETUC, 2004: 3). Arguably, state policies towards European initiatives play a significant role when it comes to implementation; nevertheless, in the case of autonomous agreements they do not constitute the determining factor. Spain’s rejection of any legislative measures for the national implementation of the telework agreement seems to support the above argument. But also in Britain, ‘social partners explicitly welcomed the possibility to mirror at national level the bipartite commitment achieved at EU level’ (ETUC, 2006:7), while DTI’s involvement in the negotiations of the Guidance can be seen as a ‘novel’ form of implementation unusual for the UK tradition (see Larsen and Andersen, 2007).

However, the impact of the UK voluntarism should not be undermined. For CWU, the New Labour’s commitment to comply with EU social regulation has not resulted into a more proactive course of action in the case of teleworking;

“even with the current government’s approach, the Guidance which came out, takes the issue forward a little bit, but it’s so heavily influenced by the employer, that it may give you a right to force the employer to think about doing something, but doesn’t actually force the employer to do it”.

In this sense, the transposition of the EU agreement by means of a Guidance ‘can be seen as so much well-intended hot air which is not directly keyed into any legal cause of action, particularly as it is not even in the form of an approved code of practice’ (Smith, 2003: 1).

Moreover, there seems to be a continuity of the hostility towards trade unions initiated by the Conservatives. The experience of case law presented above manifest the impact of the legal resources available to trade unions in each country. The ability of trade unions in Spain to raise issues collectively, which is absent from UK law, constitutes a noteworthy difference in terms of employment legislation between the two countries; As Dickens and Hall (2003: 134) put it,

‘although legal regulation of the employment relationship has increased, the individualized, private law model characteristic of the UK leaves individual workers to enforce their legal

rights against employers. The legislation does not provide any enforcement role for trade unions’.

In turn, this can have repercussions for the regulation of teleworking. In the case of Spain, it was FCT who opposed to management’s initiative to impose the exercise of teleworking and raised the issue as a collective dispute, further indicating the significance of labour courts in resolving conflicts over the application or interpretation of collective agreements (Martinez Lucio, 1998). However, the weakness of a soft tool in terms of enforceability outweighs the benefits associated with the trade union right to proceed with legal action. Indeed, the failure of the European agreement to be used as a source of regulation due to its ‘autonomous’ character reinforces the argument of Falkner et al (2005: 364) that ‘soft law, by definition cannot be invoked in court’. Nevertheless, the fact that the Framework Agreement is not characterised by ‘strong’ normative relevance (Lo Faro, 2000a) does not impede the Tribunals to take it into consideration when deciding on a telework issue. Although in the Spanish case the EU agreement proved insufficient as a regulatory instrument, it nonetheless assisted the clarification of a controversial issue: the definition of teleworking. Smith’s (2003: 5) argumentation on the applicability of the DTI Guidance is in a similar line;

‘it is not a Code of Practice as such but it should be recognised that it is the outcome of a Europe-wide agreement between the social partners. Arguably, this should be taken into by a tribunal or court hearing a case concerning a teleworker if relevant’.

In addition, the two factors were found to interact. Differences in trade union legislation between the two countries in conjunction with the complexities of telework has shaped unions’ perceptions and policies on regulatory issues and explain (albeit on different grounds) the reactive approach of organised labour in both countries. In Spain, the statutory support for workplace union branches combined with the consolidation of the *erga omnes* extension effects of collective agreements integrated into the Workers’ Statute provide a stable institutional framework, which ensures complete coverage and favourable standards in places where telework is regulated by a collective agreement. Moreover, the fact that Spanish unions are ‘very strongly represented on the *comités*¹⁹ and among workers’ delegates’ (Martinez Lucio, 1998: 439) has played an important part in the regulation of teleworking; in both companies examined the telework arrangements were negotiated by members of workplace representation who had a significant position in the trade union hierarchy. Conversely, as the words of a CWU official indicate, the UK government “*won’t go as far*” as

¹⁹ A type of workplace representation.

unions “*would want them to go in terms of trade union legislation*”; the Labour Government’s law on statutory trade union recognition is likely to be more effective when unions feel secure in the level of membership while it does not avert individualisation of the employment relationship (Dickens and Hall, 2003). Therefore, UK unions have to be more proactive in terms of recruitment otherwise they “*will not survive*”, while the difficulties involved in the organisation of teleworkers seem to be particularly damaging for the union culture of a country where ‘the law provides no right to trade unions to organise’ (ibid: 140). Nevertheless, even in Spain where legal traditions are more favourable to unionisation than those of the UK, the fact that ‘the benefits of bargaining extend to unionised and non-unionised workers alike’ diminishes the incentives for membership (Martinez Lucio, 1998: 435). And a guarded approach to new forms of work organisation may cost Spanish unions members from new areas.

Conclusions

Several years after the conclusion of the first inter-sector autonomous agreement ‘the question still remains whether the so-called “voluntary route” provides the most effective and direct way to guarantee the protection of workers’ (EIRO 2006). Preliminary insights from trade unions’ responses as well as workplace regulatory arrangements indicate that industrial relations traditions do not determine the form of autonomous implementation; instead, the impact of institutions appears to be greater on the degree of effectiveness of practical application at lower levels. In essence, although the telework agreement paved the way for implementation strategies which were foreign to national traditions (Larsen and Andersen 2007), substantial employee protection at workplace level is highly contingent on the institutional setting of each country. So far, the effectiveness of this soft regulatory tool seems to be partly dependent on the active involvement of local actors (in this case, trade unions) and most importantly, on the resources (mainly in legal terms) available to them. A solid institutional framework that provides for high coverage rates of collective agreements and also high union density combined with the right to undertake collective legal action is more likely to guarantee favourable employment conditions, even when autonomous agreements are not particularly protective (as in the cases of ‘voluntaribility’ and reversibility).

However, the above applies to implementation via company agreements. Questions arise when these are absent or when softer forms of regulation (i.e. guidelines) occur. A significant issue of concern is the impact of these agreements on countries with weak or non-existent centralised bargaining structures (as in most CEE countries) where organised labour is not ‘equipped’ in order to face soft

European initiatives. In such cases, the underdeveloped (or absent) bipartite dialogue at sectoral level and especially the lack of (efficient) mechanisms for the resolution of labour disputes which stem from the bargaining procedure might constitute serious hindrances to the effectiveness of autonomous implementation.

Regarding the second factor, the degree of significance allied to the topic of the European agreement in different societal contexts seems to affect both the form of implementation as well as substantive issues. Unfamiliarity with or long established traditions and/or pre-existing legislation on a certain topic have proved extremely influential (for example, the impact of homeworking legislation in Spain, the law on flexible work and the widespread operation of modern forms of telework in the UK). Moreover, the sensitivity of the topic along with sectoral influences should not be ignored. The prevalence of non-standard forms of employment and the low unionisation rates in certain sectors may enhance decentralised and/or individualised implementation practices even in countries where traditions of sectoral bargaining are rather strong. Common sectoral challenges have led to common (or similar) approaches in the two countries concerned. Whether this is accidental or symptomatic necessitates further examination. However, the question is not whether autonomous agreements can pave the way for the emergence of sector-specific (or multi-sector) implementation patterns; there is a greater need to develop a holistic understanding of the driving forces behind actors' use of autonomy.

In the case of the telework agreement, the topic reflects part of the rationale for the increasing preference for non-binding regulation; the technological advancement with the subsequent emergence of new forms of work organisation is integral to the internationalisation of the economic environment where 'detailed *ex ante* regulation' (Weißbach, 2000: 6) is considered detrimental for competitiveness and opposing to the process of market integration. And as case law revealed, the glass is half full as well as half empty. Although not enforceable in court, autonomous agreements can operate as good practice guides while their European origin may act as an informal element of legality when they reach a Tribunal. Nevertheless, the latter is indispensable to a proactive union policy at every level of bargaining. To put it simply, an autonomous agreement is unlikely to reach a national court if employees and their representatives are not aware of its existence. Undeniably, soft law is here to stay and since differences in objectives between the two sides of industry will never cease to exist, it may prove to be the vehicle for the furtherance of the European social dialogue; however, if not accompanied by the active involvement of organised labour there is a great danger that the outcomes will have a symbolic character.

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APPENDIX

FRAMEWORK AGREEMENT ON TELEWORK

1. GENERAL CONSIDERATIONS

I N THE CONTEXT of the European employment strategy, the European Council invited the social partners to negotiate agreements modernising the organisation of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the necessary balance between flexibility and security.

The European Commission, in its second stage consultation of social partners on modernising and improving employment relations, invited the social partners to start negotiations on telework. On 20 September 2001, ETUC (and the liaison committee EUROCADRES/CEC), UNICE/UEAPME and CEEP announced their intention to start negotiations aimed at an agreement to be implemented by the members of the signatory parties in the Member States and in the countries of the European Economic Area. Through them, they wished to contribute to preparing the transition to a knowledge-based economy and society as agreed by the European Council in Lisbon.

Telework covers a wide and fast evolving spectrum of circumstances and practices. For that reason, social partners have chosen a definition of telework that permits to cover various forms of regular telework.

The social partners see telework both as a way for companies and public service organisations to modernise work organisation, and as a way for workers to reconcile work and social life and giving them greater autonomy in the accomplishment of their tasks. If Europe wants to make the most out of the information society, it must encourage this new form of work organisation in such a way, that flexibility and security go together and the quality of jobs is enhanced, and that the chances of disabled people on the labour market are increased.

This voluntary agreement aims at establishing a general framework at the European level to be implemented by the members of the signatory parties in accordance with the national procedures and practices specific to management and labour. The signatory parties also invite their member organisations in candidate countries to implement this agreement.

Implementation of this agreement does not constitute valid grounds to reduce the general level of protection afforded to workers in the field of this agreement. When implementing this agreement, the members of the signatory parties avoid unnecessary burdens on SMEs.

This agreement does not prejudice the right of social partners to conclude, at the appropriate level, including European level, agreements adapting and/or complementing this agreement in a manner which will take note of the specific needs of the social partners concerned.

2. DEFINITION AND SCOPE

TELEWORK is a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis.

This agreement covers teleworkers. A teleworker is any person carrying out telework as defined above.

3. VOLUNTARY CHARACTER

TELEWORK is voluntary for the worker and the employer concerned. Teleworking may be required as part of a worker's initial job description or it may be engaged in as a voluntary arrangement subsequently.

In both cases, the employer provides the teleworker with relevant written information in accordance with directive 91/533/EEC, including information on applicable collective agreements, description of the work to be performed, etc. The specificities of telework normally require additional written information on matters such as the department of the undertaking to which the teleworker is attached, his/her immediate superior or other persons to whom she or he can address questions of professional or personal nature, reporting arrangements, etc.

If telework is not part of the initial job description, and the employer makes an offer of telework, the worker may accept or refuse this offer. If a worker expresses the wish to opt for telework, the employer may accept or refuse this request.

The passage to telework as such, because it only modifies the way in which work is performed, does not affect the teleworker's employment status. A worker refusal to opt for telework is not, as such, a reason for terminating the employment relationship or changing the terms and conditions of employment of that worker.

If telework is not part of the initial job description, the decision to pass to telework is reversible by individual and/or collective agreement. The reversibility could imply returning to work at the employer's premises at the worker's or at the employer's request. The modalities of this reversibility are established by individual and/or collective agreement.

4. EMPLOYMENT CONDITIONS

REGARDING employment conditions, teleworkers benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employers premises. However, in order to take into account the particularities of telework, specific complementary collective and/or individual agreements may be necessary.

5. DATA PROTECTION

THE EMPLOYER is responsible for taking the appropriate measures, notably with regard to software, to ensure the protection of data used and processed by the teleworker for professional purposes.

The employer informs the teleworker of all relevant legislation and company rules concerning data protection.

It is the teleworker's responsibility to comply with these rules.

The employer informs the teleworker in particular of: any restrictions on the use of IT equipment or tools such as the internet and sanctions in the case of non-compliance.

6. PRIVACY

THE EMPLOYER respects the privacy of the teleworker.

If any kind of monitoring system is put in place, it needs to be proportionate to the objective and introduced in accordance with Directive 90/270 on visual display units.

7. EQUIPMENT

ALL QUESTIONS concerning work equipment, liability and costs are clearly defined before starting telework.

As a general rule, the employer is responsible for providing, installing and maintaining the equipment necessary for regular telework unless the teleworker uses his/her own equipment.

If telework is performed on a regular basis, the employer compensates or covers the costs directly caused by the work, in particular those relating to communication.

The employer provides the teleworker with an appropriate technical support facility.

The employer has the liability, in accordance with national legislation and collective agreements, regarding costs for loss and damage to the equipment and data used by the teleworker.

The teleworker takes good care of the equipment provided to him/her and does not collect or distribute illegal material via the internet.

8. HEALTH AND SAFETY

THE EMPLOYER is responsible for the protection of the occupational health and safety of the teleworker in accordance with Directive 89/391 and relevant daughter directives, national legislation and collective agreements.

The employer informs the teleworker of the company's policy on occupational health and safety, in particular requirements on visual display units. The teleworker applies these safety policies correctly.

In order to verify that the applicable health and safety provisions are correctly applied, the employer, workers' representatives and/or relevant authorities have access to the telework place, within the limits of national legislation and collective agreements. If the teleworker is working at home, such access is subject to prior notification and his/her agreement.

The teleworker is entitled to request inspection visits.

9. ORGANISATION OF WORK

WITHIN the framework of applicable legislation, collective agreements and company rules, the teleworker manages the organisation of his/her working time.

The workload and performance standards of the teleworker are equivalent to those of comparable workers at the employers premises.

The employer ensures that measures are taken preventing the teleworker from being isolated from the rest of the working community in the company, such as giving him/her the opportunity to meet with colleagues on a regular basis and access to company information.

10. TRAINING

TELEWORKERS have the same access to training and career development opportunities as comparable workers at the employer's premises and are subject to the same appraisal policies as these other workers.

Teleworkers receive appropriate training targeted at the technical equipment at their disposal and at the characteristics of this form of work organisation. The teleworker's supervisor and his/her direct colleagues may also need training for this form of work and its management.

11. COLLECTIVE RIGHTS ISSUES

TELEWORKERS have the same collective rights as workers at the employers premises. No obstacles are put to communicating with workers representatives.

The same conditions for participating in and standing for elections to bodies representing workers or providing worker representation apply to them.

Teleworkers are included in calculations for determining thresholds for bodies with worker representation in accordance with European and national law, collective agreements or practices. The establishment to which the teleworker will be attached for the purpose of exercising his/her collective rights is specified from the outset.

Worker representatives are informed and consulted on the introduction of telework in accordance with European and national legislations, collective agreements and practices.

12. IMPLEMENTATION AND FOLLOW-UP

I N THE CONTEXT of article 139 of the Treaty, this

European framework agreement shall be implemented by the members of UNICE/UEAPME, CEEP and ETUC (and the liaison committee EUROCADRES/ CEC) in accordance with the procedures and practices specific to management and labour in the Member States.

This implementation will be carried out within three years after the date of signature of this agreement.

Member organisations will report on the implementation of this agreement to an ad hoc group set up by the signatory parties, under the responsibility of the social dialogue committee. This ad hoc group

will prepare a joint report on the actions of implementation taken. This report will be prepared within four years after the date of signature of this agreement.

In case of questions on the content of this agreement, member organisations involved can separately or jointly refer to the signatory parties.

The signatory parties shall review the agreement five years after the date of signature if requested by one of the signatory parties.