

# **Transnational collective bargaining at company level**

## **A new component of European industrial relations?**

—

Isabelle Schömann, Romuald Jagodzinski, Guido Boni, Stefan Clauwaert,  
Vera Glassner and Teun Jaspers

**etui.**

Transnational collective bargaining at company level  
A new component of European industrial relations?



# **Transnational collective bargaining at company level**

**A new component of European industrial relations?**

—

Isabelle Schömann, Romuald Jagodzinski, Guido Boni, Stefan Clauwaert,  
Vera Glassner and Teun Jaspers

This book has benefited from the editing work of Richard Lomax.

Brussels, 2012

© Publisher: ETUI aisbl, Brussels

All rights reserved

Print: ETUI Printshop, Brussels

D/2012/10.574/41

ISBN: 978-2-87452-277-2

Price: 20 €

The ETUI is financially supported by the European Union.

The European Union is not responsible for any use made of the information contained in this publication.

# Table of contents

Guido Boni	
<b>Introduction</b> .....	7
Romuald Jagodzinski	
<b>Chapter 1</b>	
<b>Transnational collective bargaining: a literature review</b> .....	19
Vera Glassner	
<b>Chapter 2</b>	
<b>Transnational collective bargaining in national systems of industrial relations</b> .....	77
Stefan Clauwaert	
<b>Chapter 3</b>	
<b>European framework agreements: 'nomina nuda tenemus' or what's in a name? Experiences of the European social dialogue</b> .....	117
Romuald Jagodzinski	
<b>Chapter 4</b>	
<b>European Works Councils and transnational company agreements – balancing on the thin line between effective consultation and overstepping competences</b> ....	157
Isabelle Schömann	
<b>Chapter 5</b>	
<b>Transnational company agreements: towards an internationalisation of industrial relations</b> .....	197
Isabelle Schömann	
<b>Chapter 6</b>	
<b>Transnational collective bargaining: in search of a legal framework</b> .....	219

Teun Jaspers

**Chapter 7**

**Effective transnational collective bargaining**

**Binding transnational company agreements: a challenging perspective** ..... 233

Isabelle Schömann

**Conclusions** ..... 267

**Abbreviations** ..... 271

**List of contributors** ..... 273

# Introduction

**Guido Boni**

‘The economy is becoming increasingly global, while social and political institutions remain largely local, national and regional. None of the existing institutions provide adequate democratic oversight of global markets, or redress basic inequalities between countries. The imbalances point to the need for better institutional frameworks and policies if the promise of globalisation is to be realised.’ (ILO 2004: 3)

Increasing market internationalisation and mobility of capital have become great challenges for the labour movement, particularly over the last two decades. The consequences for trade unions have been multifarious and it is not always possible to differentiate between causes directly related to globalisation and those dependent to a certain extent on other national and local developments. Whatever the case, there is no question that the organisation of labour is currently in difficulties due, first of all, to a constant decline in trade union membership, but also – and this is particularly relevant for the present analysis – to trade unions’ lack of willingness and possibly capacity to mobilise resources to act transnationally. There is therefore a need for greater international solidarity among workers on issues that, although perceived as too far from the shopfloor, can be seen to have a deep and dramatic impact on many workplaces throughout Europe.

The extraordinary growth in their numbers since the 1980s and the increase in foreign direct investment have allowed multinational companies (MNCs) to reduce the power of employees and, consequently of trade unions, to act across borders. But this is also the result of a lack of trade union willingness, possibly even fear, to develop the transnational level as this threatens to undermine their traditional national bargaining power. Whatever the ultimate reason(s) behind this may be, there is indeed a lack of institutions, instruments and initiatives allowing employees to pursue transnational strategies matching the globalised approaches of management.



In the face of such a complex scenario, it is neither the intention of this introduction nor of this book to answer all these questions on the origins and causes of the present situation. Instead our focus is – against this background of an extraordinary growth in corporate globalisation and widespread resistance to unions, and within a climate of declining union membership and therefore power – to analyse the instruments and results of what is currently taking place at the level of transnational collective bargaining (TCB).

For the purpose of this book, TCB is defined as encompassing two different levels (see Jagodzinski, Ch. 1.2):

- 1) *largo sensu*: encompassing all developments in this area, i.e. social dialogue, the coordination of national collective bargaining, European Works Councils;
- 2) *stricto sensu*: limited to transnational company-level agreements, at both EU and international level.

The first level covers those instruments which have now become familiar in trade union action and which can thus be regarded as well-established. The second level is a new phenomenon, and the one currently underdeveloped in European industrial relations, despite growing acknowledgement that in the current globalised situation the only possible response to supranational MNC strategies – which might leave workers' voices and needs unheard – is for employees and trade unions to intensify and upgrade cross-border cooperation for the purpose of collective bargaining with MNCs, through practical and strategic inter-union partnerships aimed at building a new and enduring transnational solidarity across the labour movement worldwide.

For globalisation – and its wide range of accompanying inequalities – to be checked, or at least slowed down, in order to take social needs into account, union federations need to more than ever foster their capacity to engage in cross-border consultation in order to regain adequate countervailing power.

Though certainly not a totally new concern for them, unions still have not yet acquired sufficient transnational leverage to start out on this new path, effectively negotiating with MNCs on the core global issues of

MNC strategies and, most importantly, coming to grips with the shift of work-related decision-making away from trade unions' traditional national playing fields.

The reason for falling so far behind lies first and foremost in trade union scepticism about the real benefit of transnational collective bargaining. For sure, there is no trade union consensus on whether TCB is the right way forward, or a not-to-be-missed opportunity. On the contrary, there seems to be more general agreement that TCB is some sort of necessary evil to be used in crisis management, as a last resort.

The conceptual resistance of trade unions – among both European Trade Union Federations and, to an even greater extent, national unions – to a supranational level of negotiation, perceived as a dimension which could seriously encroach on the power of action at local level is, so far, one of the main obstacles preventing transnational negotiation from developing properly.

The development of 'transnationality' (see Sciarra 2009, *passim*) in industrial relations and social dialogue is thus being slowed down by cultural resistance on the part of national trade unions, for decades deeply rooted in local realities and with a strong desire to maintain their autonomy vis-à-vis negotiation centres located far from their day-to-day playing fields, and afraid of being (further) deprived of power.

But there are clearly other obstacles of a more concrete nature also hampering trade union capacity to develop transnationally. First and foremost – and possibly one of main reasons for the scepticism mentioned above – there are the very different development patterns of trade unions throughout Europe and the world, giving rise to a variety of both historical trajectories and trade union and industrial relations traditions, even more varied than the parallel 'varieties of capitalism'. But there are also other more concrete obstacles, such as language barriers, the lack of sufficient preparation and training of national trade unions and European Work Councils officials' to match the bargaining capabilities of highly educated international managers, and the economic constraints and budgetary demands that any supranational action requires.

However, the main obstacle seems to be that trade unions remain indecisive, still not having made up their minds about TCB. They still

do not know whether they want to get involved in it, doubting whether they can make a success out of it and unsure whether the opportunities outweigh the risks or vice-versa. This Gordian knot must first be cut through before they become able to decide how much effort and action they need to put into learning new skills, devising new strategies, and investing in the necessary human and financial resources to coordinate supranational negotiations with MNCs.

Though there are some noteworthy exceptions, the consequence to date is that transnational cooperation among trade unions has generally remained limited to specific coordinated activities. These certainly do not represent a sufficiently robust set of tools for adequately reacting to the globalisation strategies of multinational corporations. Indeed, some national unions are not even aware of TCB and transnational agreements, let alone the tools needed to develop it.

In this complex scenario of doubts, cultural resistance and lack of awareness among trade unions, there is a growing debate on the need for concrete measures developing social and industrial relations at international level, restoring the transnational social balance through coordinated trade union responses at transnational, sector and company level. The main focus of this book is on this debate and the opportunities possibly arising from further development of TCB.

As far as the EU level is concerned, the issue of transnational collective bargaining has indeed come to the forefront of the debate in the last 15 years or so, as a consequence of the decline of the European social dialogue process, with the last – of a total of just three – European Framework Agreement transposed into a Directive adopted in 1999.

Despite this, one must acknowledge that the social partners have continued to pursue their supranational objectives through a variety of other means. Indeed, significant recourse has been made to the second route of implementation provided for in the Treaty, i.e. ‘in accordance with the practices and procedures specific to management and labour and the Member States’ (Art. 155 TFEU), leading to the adoption of four European Framework Agreements emerging from the cross-industry social dialogue and covering a quite diverse range of topics: teleworking, work-related stress, harassment and violence at work, and most recently (25 March 2010) inclusive labour markets.

Other important results can be found also at sectoral and company level where a number of joint texts, encompassing a variety of instruments, have already been signed.

The EU Commission has fostered the development of a general framework of action based on a clear set of rules for the benefit of both workers and companies. Despite considerable discussion, no result has however yet been achieved. The most advanced example of the dynamic action sought by the Commission – which basically foresees an institutional role for trade union action at supranational level, but is not willing to actually dictate the rules of the game, respecting the traditional voluntaristic approach to industrial relations – is probably to be found in the ‘Transnational Collective Bargaining’ Report (Ales *et al.* 2006). This was compiled by a group of experts to whom the Commission entrusted the duty of conducting an inquiry into TCB developments and coming up with an opinion on a possible EU regulation in this area. Despite the fact that the Report authoritatively came out in favour of an (optional) legal framework to be adopted at EU level and then used by the social partners to guarantee legal certainty, no final decision has yet been taken in respect of transposing its findings into EU legislation.

As mentioned earlier, the topics covered by the term TCB transcend EU borders to embrace another set of very important outcomes referred to under the term International Framework Agreements (IFAs). They differ from European Framework Agreements (EFAs) insofar as they are global in scope and, as such, negotiated between transnational enterprises and global union federations, with the main aim of ensuring application of and compliance with international labour standards in all MNC locations. In contrast to EFAs, which tend to have a broader subject scope, IFAs are mainly based on ILO Core Labour Standards, dealing most often with freedom of association and the right to collective bargaining (ILO Conventions No. 87 and 98). However various agreements go far beyond the minimum platform of rights normally contained in the ILO Conventions, and in some cases they are even used as tools to extend human resource management policies and cooperative industrial relations to the various locations where an MNC operates. Of course, similarly to EFAs, IFAs also present considerable difficulties regarding their actual implementation and compliance, since ‘they cannot be relied upon before national courts’ and do not lead to ‘enforceable decisions or the adoption of legal sanctions in the case of

non-implementation', being solely binding in honour among the parties that have subscribed to them in good faith (see Papadakis 2011:282).

These considerations point to TCB presenting a number of different perspectives needing to be investigated from a variety of angles. Indeed, TCB is a fairly new phenomenon, only recently emerging in the labour discourse. However, as the literature review provided in the first chapter of the book shows, the amount of studies focusing on it is extensive. Nonetheless, despite its transversal relevance for all national social partners throughout the European Union – and, for IFAs, everywhere in the world –, the asymmetry between global companies and local workforces and workers' representatives is still such that management is able to gain a considerable comparative advantage over labour when setting working conditions at international level. Generally speaking, the more globalisation takes hold, the more this is happening, with a constant stream of fresh examples of companies going global and workers remaining local.

In such a context, there is a need for trade unions to acquire every scrap of knowledge on every possible instrument able to strengthen their power of (re)action. The challenge trade unions have been pursuing since their birth, that of redressing the imbalance of power between labour and capital, must be thoroughly reconsidered in the light of the transnational scenario in which they are now called upon to act. And collective bargaining, as the traditional function of unions at national level, could most probably develop at its best at transnational level, equipping workers with the necessary, or at least a *decent* (to use an ILO term) set of protective instruments and, at least to a certain extent, rebalancing the respective powers of the parties. The well-known Viking and Laval cases, to mention just one example, have clearly shown how the call to rethink labour law in a transnational context cannot be put off any longer.

It is against this very complex and demanding background that ETUI's research department – encouraged and supported by its Director, Maria Jepsen and spurred by its various researchers and in particular Wiebke Warneck in its earlier stages – decided to devote a comprehensive study to the issue of TCB. The result is this book.

It was the realization of the need to develop an understanding of the topic and boost trade unionists' knowledge thereof that drove its compi-

lation. Primarily addressing ETUC affiliates throughout Europe, the book would also like to trigger a dialogue with the academic community, and to act as a source of stimulus and contribute to the political debate, addressing as wide an audience as possible. Though not containing any definitive answer or solution to the numerous challenges posed by transnational bargaining, it is nevertheless intended to serve as a platform for future thinking and reflection. The objective, hopefully achieved, is to critically present the current status of TCB, in a way palatable to both academics and those professionally involved in trade union activities. Despite its theoretical roots and wealth of opportunities for further reflection, the book is also designed to provide detailed references to concrete cases and the agreements signed so far. As such, it presents a privileged standpoint for looking at TCB reality and the involvement of the ETUC and the European Commission in this process, as well as that of the ILO.

The process leading to this book has been long and designed around a fairly innovative procedure. Despite being almost entirely conceived and written by ETUI researchers – with the exception of one contribution, written by Em. Prof. Teun Jaspers – the book has benefitted from the advice and comments of a number of external academic advisers, thereby providing greater depth to the more theoretical aspects and achieving a more thorough result. Though quite an unusual way of working, it has proved to be very interesting and indeed thought-provoking, although complete agreement was not always reached between the academics and the ETUI researchers – proof, if needed, of the fact that the topic is still very controversial. Such disagreements, far from constituting a problem, instead often contributed to a collective re-thinking and re-discussion of various aspects in the process of finalising the book, something in our view benefitting the final outcome.

The three external experts asked to collaborate on this project, and to whom we extend our gratitude, are Prof. Edoardo Ales from the University of Cassino (Italy), an expert on TCB and a key member of the above-mentioned ‘Transnational Collective Bargaining’ Report to the Commission; Prof. Antonio Lo Faro, from the University of Catania, author of numerous publications on European collective bargaining; and Dr. Isabel Da Costa from the Ecole Normale Supérieure of Cachan, also an expert on TCB and related issues. They all received preliminary drafts of the papers now composing the book, and were asked to prepare

their comments and act as discussants after the presentation given by the authors of this book in an *ad hoc* seminar held in Brussels in the ETUI building in July 2011.

As news of the meeting spread, other academics asked to participate in the seminar. Among others, we would like to mention, and thank, Prof. Filip Dorssement (Catholic University of Louvain), who took part together with his assistants; Prof. Niklas Bruun (University of Helsinki), a renowned expert in the field of collective labour law and a member of the ETUI Expert Group; and Em. Prof. T. Jaspers (University of Utrecht), also a co-author of the 2006 Report on Transnational Collective Bargaining (Ales *et al.* 2006).

As far as the structure of the book is concerned, it has 8 chapters including the conclusions. It starts with a chapter by Romuald Jagodzinski containing a thorough and comprehensive review of the literature published so far on TCB. Far from being a mere list of authors and of more or less obscure journals and publications, it is instead a repository of essential information serving the purpose of being a general introduction to the different topics discussed in the following chapters. The main theories are also presented and contrasting views summarised in order to provide both a source of reference for further learning and a basic theoretical framework within which to position any study of TCB.

The subsequent chapters address some of the most relevant topics addressed in this introduction, expanding on a number of crucial issues. First of all, in Chapter 2, we deemed it useful to provide an overview – written by Vera Glassner – of the main characteristics and specific features of national systems of industrial relations within Europe, thus using a bottom-up approach to gain an understanding of how collective bargaining is shaped at national level and how this influences the emergence of a transnational level, and, vice-versa, whether (and if so, how) the emergence of TCB has had an impact on national collective bargaining. It also provides useful data on union density and collective bargaining coverage in the EU Member States together with a reflection on the role of MNCs in the development of TCB, with supporting empirical evidence on the presence of trade union representative bodies at the workplace.

Chapter 3, by Stefan Clauwaert, provides an analytical review of the main experiences of European social dialogue as a form of transnational

collective bargaining *sensu largo*. The contribution is rich in examples and references to the concrete results achieved by cross-industry and sectoral social dialogue. Here one can see how varied the output of European collective bargaining is. Quite interestingly the chapter also provides a very instructive 20-year review of Communications of the Commission relating to social dialogue, together with the positions taken by the social partners at EU level, thus providing the reader with a policy perspective on the different positions that have developed over the years on this complex issue.

Stepping down from the general level of social dialogue to the shop floor (i.e. company level), Chapter 4 sees the analysis moving to the role of European Work Councils. In the *acquis communautaire* for the internationalization of industrial relations they represent an important factor. Indeed, they have gained a crucial role by for a long time being de facto the only form of employee representation at transnational company level, thus making them predestined for a role in TCB. As such, their role is of utmost importance and Romuald Jagodzinski describes the achievements of European-level collective bargaining from the point of view of EWCs. In this context – quoting from his introduction – ‘EWC mandates and capacities to engage in European-level TCB are discussed, followed by a short presentation of the positions of the European social partners’. The chapter deals also with the question of the legality of EWCs’ involvement in the signing of transnational company agreements and conducts, to this end, an analysis of legal sources dealing with consultation and co-determination rights.

Chapter 5 continues the analysis of transnational company agreements from a broader perspective. The focus of the analysis is on the international level, with Isabelle Schömann taking readers through the main features and developments of International Framework Agreements. Their differences in scope, functions and contents are all illustrated with comprehensive reference to and analysis of both the conceptual issues and the most important features of the current agreements.

Finally, the most crucial elements of the debate on TCB, namely, the legal nature of TCB and the discussion over its possible consequences, are tackled in Chapters 6 and 7. Because of the relevance of the topic it was decided to deal with this question in more than one contribution: in Chapter 4, which focused on the legality of EWC involvement in TCB,



and in Chapters 6 and 7 which propose two different analyses of the same issue. Chapter 6 and 7 were written respectively by Isabelle Schömann and Teun Jaspers. Since it is an extremely delicate matter for which no definitive solution has yet been found, the uncertain legal framework of TCB and TFAs indeed needs thorough investigation. The first contribution, analysing a variety of possible regulatory instruments including Corporate Social Responsibility (CSR) and international private law, comes to the conclusion that the introduction of a legal framework is to be supported. This would make the agreements resulting from TCB more effective, as they would otherwise remain private norms based, at best, on customary rules of adoption and enforcement. The second one takes as its point of departure the fact that over the last two decades a large number of international or transnational collective agreements have been signed, investigating the issue of their effectiveness in term of their actual application. More precisely, Teun Jaspers aims at establishing the conditions under which TCAs can have a binding effect in legal terms. The recommendation resulting from his analysis is similar to that arrived at by Isabelle Schömann in the previous chapter: 'Guaranteeing the effective application of TCA provisions uniformly in all MNC subsidiaries in all Member States through granting direct effect to "subjective" rights and concrete duties laid down in a TCA can obviously only be achieved through EU intervention.' As he indicates in his conclusions, this is particularly true due to the substantive differences in the legal systems governing collective agreements in the Member States which, as they stand, are not able to guarantee uniform application of TCAs.

Both authors support the adoption of a legal framework at EU level as the only viable solution for conferring uniform legal effect on TCAs.

Finally, Isabelle Schömann's short and effective conclusions are aimed at summarising the findings and showing the links and connections among the various studies.

The entire book thus reveals that 'transnationality' in industrial relations has taken shape both conceptually and in practice. Further action on the part of the labour movement, together with additional discussion on the part of academia to provide an adequate theoretical base for the phenomenon, is however absolutely necessary for developing, both in practice and in theory, a European framework in which all existing

initiatives based on transnational collective bargaining can evolve, while acknowledging that ‘transnationality is part of European law in action’ (Sciarra 2009: 20).

Since, as in the case in national collective bargaining, ‘practices precedes law’ (Daugareilh 2005: 65), there is good supporting evidence – such as the EU Commission’s database on TCAs<sup>1</sup> – for the prediction that in coming years TCB will steadily increase, probably supported by a legal framework. For this very reason as well, we hope that this book will provide valuable help for trade unions to prepare, and be prepared for, such a necessary transition. The EU Commission is therefore strongly urged to bring the issue forward, strengthening TCB and fostering workers’ rights in these difficult times.

Florence, 16<sup>th</sup> February 2012

## References

- Ales, E., S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdes Dal-Re (2006) *Transnational collective bargaining: past, present and future. Final report*, Brussels: European Commission.
- Daugareilh, I. (2005) ‘La négociation collective internationale’, *Travail et emploi*, 104, 69–84.
- International Labour Organisation (ILO) (2004) *A fair globalization: the role of the ILO. Report of the Director-General on the World Commission on the social dimension of globalization*, Geneva: ILO.
- Papadakis, K. (2011) ‘Globalizing industrial relations: what role for International Framework Agreements?’, in Hayter, S. (ed.) *The role of collective bargaining in the global economy. Negotiating for social justice*, ILO, Geneva, 277–303.
- Sciarra, S. (2009) ‘Transnational and European ways forward for collective bargaining’, WP C.S.D.L.E. Massimo D’Antona .INT-73.  
[http://www.lex.unict.it/eurolabor/ricerca/wp/int/sciarra\\_n73-2009int.pdf](http://www.lex.unict.it/eurolabor/ricerca/wp/int/sciarra_n73-2009int.pdf)

---

1. <http://ec.europa.eu/social/main.jsp?catId=978&langId=en>.



# Chapter 1

## Transnational collective bargaining: a literature review

**Romuald Jagodzinski**

### Introduction

The present literature review does not claim to be exhaustive and it was not designed as such. Its main purpose is to familiarise the reader with the discussions on transnational collective bargaining and its outcomes. These have been going on for significantly longer than just the last decade, during which the topic has aroused greater interest due to EU initiatives in this area. Consequently, the chapter offers a selective and subjective choice of sources dealing with the topic that could be useful in understanding the analyses undertaken in the rest of the book. Completed in mid-2011, the literature review's focus is not necessarily on the most recent publications, but aims at providing a comprehensive overview, both in content and time scope.

Even though collective bargaining in its transnational or European dimension has been a focus of EU-level industrial relations debate over the last ten years or so, the issue goes back to the 1970s when various European (i.e. introduced by the European Communities) company statutes were being discussed and expected to emerge (e.g. the 'Societas Europaea' or SE). Even back then a number of researchers were forecasting and discussing the emergence of collective bargaining on a truly European level, together with its necessary legal framework (Kravaritou 1970; on this see also Dorssemont and Dufresne 2011). The first International Framework Agreement (IFA) was signed in 1988 (Stevis 2010: 2). The following section aims to present a review of *selected* literature on this subject, with the goal of providing a collection of the most interesting views on Transnational Company Agreements

(TCA), and the process referred to as Transnational Collective Bargaining (TCB)<sup>1</sup>.

Though scarce until the end of 1990s (Platzer 1998: 81), available literature has grown within the last decade and especially over the last 5 years, and now seems to have identified quite extensively and aptly the main questions of the debate. On the other hand, though the subject of a growing number of publications in recent years, concrete theoretical and well-reasoned concepts of organising and structuring TCB still need to be developed. The most recent (at the time of writing) attempt to structure and organise knowledge on TCB is the comprehensive study ‘Transnationale Unternehmensvereinbarungen’ (Rüb, Platzer and Müller 2011), combining a theoretical analysis of TCB with contextualisation and case studies on specific companies.

## **1. The emergence of TCB: the next stage in the Europeanisation of industrial relations or a mere CSR ploy?**

The question whether TCB is indeed the next development stage of industrial relations stems from the debate over its categorisation. One body of thought perceives TFAs and other similar agreements as a continuation of developments in the area of corporate social responsibility (Telljohann *et al.* 2009: 11; Schoemann *et al.* 2008). Alternatively, the former conceptual approach is challenged by views linking TCB to the functional expansion of industrial relations to a transnational dimension, in other words with the Europeanisation or internationalisation of industrial relations (Telljohann *et al.* 2009: 11).

---

1. As a term referring to a variety of developments at transnational level, such as the conclusion of International or European Framework Agreements (IFA/EFAs), or Transnational Company Agreements negotiated or signed by European Works Councils, the term Transnational Collective Bargaining (TCB) is progressively losing its popularity due to criticism over its similarity with national-level collective bargaining. The criticism refers mainly to the fact that these transnational developments are in many aspects (content, binding character, legal framework, procedures, etc.) still far from what is known under national collective bargaining. Preference is thus given to the term of Transnational Company Agreements. For further debate see the section ‘The origin and content of the term ‘transnational collective bargaining’ below and Dorssemont and Dufresne 2011: 239.

In the context of this debate a ‘common implicit hypothesis (...) is that economic changes – such as the European Single Market or increased globalisation – have an (almost direct) impact on labour relations, industrial relations systems, or the governance of employment and working conditions. The extent and nature of the impact of economic changes on unemployment relations, however, is neither obvious nor easy to quantify.’ (ibid). As is being pointed out, the implicit convergence hypothesis is not necessarily borne out either by the human resource (HR) strategies of MNCs, or by labour strategies which remain diversified both at national, regional and global levels (ibid.; Traxler and Woitech 2000). Nevertheless, the Europeanisation of industrial relations is often analysed from the point of view of a growing Europeanisation of industrial relations actors, the development and strengthening of European social dialogue, European coordination of collective bargaining, the introduction of European Works Councils and the European company (SE) statute, or European policy and macroeconomic dialogue (Telljohann *et al.* 2009: 13). Hoffmann *et al.* (2002: 45) define ‘Europeanisation’ explicitly as ‘the development of a complementary layer of actors, structures and processes at the European level (of a governmental and non-governmental nature) which are interacting with national institutions and actors’, thereby giving justification to viewing the emergence of TCB as a stage in the Europeanisation of IR. Adopting this perspective leaves one confronted with the pertinent question of whether the new European level of CB should be complementary to the national level or rather an autonomous, supranational layer, with all its consequences (Telljohann *et al.* 2009: 13; Hoffmann *et al.* 2002).

Attempts to launch cross-border negotiations between workforces represented by trade unions and employers are not a specifically European phenomenon, though admittedly a rather recent one. Its origins can be traced back to the 1970s when the ILO and OECD undertook initiatives which produced important though non-binding codes (Stevis 2010: 1). However, trade union strategies in the early years (1990s) of this development differed from the current approach, unsuccessfully seeking to insert labour clauses into WTO regulations (Stevis 2010; Roozendaal 2002; Stevis and Boswell; 2007a). This was followed by growing MNC interest in CSR, understood as unilateral initiatives adopting Codes of Conduct (Stevis 2010:2). The obvious shortcomings of such a unilateral approach subsequently focused attention and efforts on a multi-stakeholder approach increasingly involving more

complex and ambitious civil society initiatives (referred to as ‘civil regulation’; *ibid*; Ütting 2002; Ruggie 2004; Crook 2005; Rondinelli 2007, Franklin 2008; ISO 2008). One of the trends within this *civil regulation* was the trade union strategy of ‘redirecting the proliferating private codes of conduct away from discretionary forms of CSR and towards global social dialogue and industrial relations’ (Stevis 2010: 2).

## 1.1 Europeanisation of industrial relations

The general context for TCB is provided by an array of developments often referred to as the Europeanisation of industrial relations. This process is closely linked to other more global developments, such as Europe’s increasing economic and political integration, as witnessed by the establishment of the Economic and Monetary Union (EMU). The Europeanisation of industrial relations can, consequently, be observed on many levels: intersectoral, sectoral and company levels, both in national and transnational dimensions (Carley 2001: 2+). With regard to the more specific issue of the Europeanisation of collective bargaining an important study was published by Marginson and Schulten (1999). This pointed to an increase in the use of cross-border comparisons of pay, working conditions and employment practice in established bargaining procedures at sectoral and company levels within each country. Furthermore, Marginson and Schulten (*ibid.*) observed a development of forms of bargaining coordination across European borders. The study argued for a change of paradigm, moving away from an emphasis on ‘implicit’ forms of coordination (the use of international comparisons or developments in other countries as benchmarks in sectoral and company-level bargaining) towards more ‘explicit’ forms of coordination (formal coordination of bargaining agendas across borders and/or collective agreements whose terms are expressly contingent on developments in other countries). Even though the study concludes that the development of any pan-European collective bargaining structures to determine pay and major employment conditions at inter-sectoral, sectoral and/or multinational company levels remains a distant prospect, it highlights the probable direction of the changes.

Similarly, Traxler and Schmitter (1995) note that industrial relations belong to the domains that ‘have, as yet, been least caught up in the wake of European integration’. This deficit occurred in spite of a number

of studies arguing in favour of developing a 'European industrial relations area' which would be an 'important institutional component of a new productive system' (Teague and Grahl 1992: 77). The latter, even though necessary, was not considered a straightforward process (ibid: 78). As Platzer notes (Platzer 1998: 82), 'despite the progressing EU integration and the broadening of the scope for action in the social policy field together with a strengthened social dialogue, academic research continues to be dominated by scepticism as far as the emergence of supranational structures of industrial relations are concerned'. Not long afterwards, the Dublin Foundation for Improvement of Living and Working Conditions published a report (Carley 2001) looking into transnational texts negotiated by EWCs, which opens with the words:

'the negotiation of joint texts by EWCs is a very restricted, if growing, phenomenon. Although the issues raised are of considerable importance and it can be said to constitute a form of European-level bargaining (albeit limited), the activity is largely concerned with principles and policies rather than substantive issues, and with providing a framework for future action rather than having a direct effect in itself. (Carley 2001: v).

It thus becomes clear that the fast progressing economic integration of Europe combined with the impacts of globalisation has been changing the conditions under which multinational companies operate, forcing them to adapt. Their new business strategies are focused on creating European-level management structures for the purpose of integrating production, distribution and marketing across borders (Carley 2001: 3). It is argued that in the area of HR management, transnational coordination in big MNCs is well developed and includes corporate HR functions collecting data on labour-related performance aspects (using such indicators as workforce numbers, labour productivity, labour turnover and absenteeism, pay settlements, the incidence of industrial disputes, overall labour costs) (ibid). These real-life developments seem to challenge stakeholders (e.g. EWCs) to engage in bargaining over supranational responses to cross-border challenges on a voluntary basis. At the same time they also reveal an incompatibility between real-life developments and requirements on the one hand, and present structures, traditional tools and available solutions on the other.



## **2. The origin and scope of the term 'transnational collective bargaining'**

### 2.1 Origin and scope

When studying the available literature one comes across various definitions of what TCB actually is. It is often seen as the Europeanisation of collective bargaining, even though in terms of content and scope the European version falls short of national collective bargaining. Alternatively Transnational Company Agreements (TCAs) are understood, limiting TCB to a company level.

In general, mainstream research supports the view that TCB was born together with and derives from the European Social Dialogue (ESD). What differentiates these views, however, is the dissent about how far back ESD roots can be traced. According to Ales (Ales *et al.* 2006: 9) the initial signs of a transnationalisation of collective bargaining date back to the period 1952-1974, during which the Commission established 'comités paritaires' for sectoral social dialogue (SSD) in six sectors of common European economic policy: mining (1952), road transport (1965), inland waterways (1967), railways (1972), and agriculture and fisheries (1974). Even though these committees did not conclude transnational agreements (often considered a requirement for discussing TCB), they did operate as consultative bodies for the Commission with a view to developing a socio-economic policy for 'the EEC of the six' (*ibid.*). Despite the fact that the committees remained primarily consultative bodies until the 1990s, their operation was seen as 'aiming at a certain harmonisation of the employment conditions and at a strengthening of the economic position and of the competitiveness of the sector concerned' (European Commission 1998: 10). The growing interest in the sectoral level 'can be partly motivated by the progressive shift of SSD Committees from a mere consultative into an also negotiating function' (Ales *et al.* 2006: 12). It is also emphasized that within TCB, understood as negotiations and consultation within sectoral social dialogue, the scope of issues has gradually developed beyond the traditional ones (such as forced or compulsory labour, child labour, non-discrimination, health and safety) (*ibid.*). Arguably, Ales claims that, even though the SSD outcomes or tools are common positions, joint opinions, declarations and recommendations, these still

represent a certain form of agreements between the SSD partners and can thus be seen as an outcome of European-scale bargaining.

As Schulten (2002: 3) points out, mainstream research is indeed ‘focused almost exclusively on the issue of “European Social Dialogue” (..) initiated by the Val Duchesse process, and further reinforced by the Social Protocol of the Maastricht Treaty’. Schulten notes that this ‘emergence of more systematic and institutionalised relations between trade unions and employers’ associations at European level became widely regarded as an embryonic form of supranational European collective bargaining system’ (ibid). The belief that European Social Dialogue<sup>2</sup> represented a ‘changed institutional framework’ triggering the emergence of TCB, was supported by the so-called ‘Euro-optimists’ (Platzer 1998: 84). This view seems also to be quite commonly supported by others (Blank 1998; Blasco 2004), pointing out that the term TCB emerged in the late 1980s with the political debate on the Social Charter of the European Communities (Blank 1998: 157) and the Val Duchesse process (Blasco 2004). At the same time, the approach linking social dialogue, and especially the Val Duchesse process, with the emergence of TCB is not unchallenged ‘as neither agreements on working hours in agriculture nor the opinions on specific aspects from the Val Duchesse meetings can be considered as the origins of what we know as European collective agreements’ (Ojeda Aviles 2004: 430<sup>3</sup>). The argument in favour of this conclusion is the fact that, even though the social partners might have had the will to regulate working conditions, the ‘employers had no organisation with bargaining power, nor were they willing to authorise the UNICE or the CEEP to sign collective agreements’ (ibid). The agreement on parental leave of 1995 and the CBI’s refusal to confer UNICE with the mandate to sign it can be seen as examples of this. Conversely, the legislative outcomes (EU directives) of agreements between European social partners on working

- 
2. Along with such other factors as: a) the changed political constellation within the Council of Ministers as a result of the accession rounds in the 1990s; b) the ‘strategic exigencies confronting the employers’ side; c) the assumption that under certain circumstances negotiations as an alternative to legislation constitute a non-zero sum game for the European social partners (Platzer 1998: 85; Bookmann 1995: 197).
  3. Ojeda Aviles does not however question the role of the Social Policy Agreement annexed to the Maastricht Treaty (see: ibid: 430).

time (93/104/EC) and on European Works Councils (94/45/EC) are often seen as the beginning of TCB in Europe (Ojeda Aviles 2004: 432).

According to some researchers (Schulten 2002: 3; Keller 2001: 123-284) the link between European social dialogue and collective bargaining might be misleading for yet another reason. The scope of TCB in its European form reveals considerable differences vis-à-vis that of national collective bargaining ('soft issues' vs. 'hard issues' such as pay (explicitly excluded from the EU Social Protocol), working time, the right to strike, lock-outs, etc.; Schulten 2002: 3). This finding leads some authors to conclude that 'the European social dialogue does not represent an emerging European collective bargaining system, but might be better characterised as a new form of symbolic 'Euro-Corporatism' which has, at least for trade unions, rather ambiguous effects' (ibid; Bieling and Schulten 2001:23-26).

Yet another approach was promoted in the 1990s, arguing that social dialogue within the Social Protocol could not be interpreted as offering a path towards European collective bargaining in its classical sense (Platzer 1998: 85). Neither could it be regarded as a suitable legal basis for the emerging TCB in its true supranational sense at EU level (Blank 1998: 164). Nevertheless, according to this point of view European social dialogue can be viewed as a 'practice ground' (Lecher 1996: 36) for the construction of a legal framework for collective agreements.

On the other hand, as an alternative to linking TCB to European social dialogue, it is pointed out that TCB originates not only in the will of the social partners (agreements), but to a much more decisive extent in the legal texts adopted by the European Community/EU. For instance, the 1989 Social Charter in its version proposed by the European Commission (COM (89) 248 final) contained the 'Right to Freedom of Association and Collective Bargaining' which 'shall imply that relations based on agreements may be established by the two sides of industry at European level if they consider it desirable'. In a similar way, Ojeda Aviles (2004) argued that the European Commission at that time was the motor of developments and the source of impulses for the emergence of TCB:

'It was only in 1987 that the Single European Act, with its incorporation of article 118B and its support via the Commission of European social dialogue and collective agreements on this level, did the necessary

phases for the emergence of European collective agreements start to appear. This was followed by the Community Charter of Fundamental Social Rights, pushed along by a powerful personality, Commissioner V. Papandreou, Article 14 of which clearly states that the right to bargain and sign collective agreements implies that “relations based on agreements may be established between the two sides of industry at European level if they consider it desirable,” and that these agreements can cover employment and working conditions and the corresponding social benefits’. (Ojeda Aviles 2004: 430)

Blank (1998: 164) seems to share the view that the debate on TCB dates back to 1987 when social dialogue was granted a place in the EEC treaty through the Single European Act (Art. 118b allowing the social partners to conclude ‘relations based on agreement’ within the context of dialogue between labour and management at European level). According to Blank, since the SEA did not specify what this agreement might be, the social partners were allowed to also participate in collective agreements or collective bargaining.

Blank reports however (Blank 1998: 157) that the European Commission, in its Action Programme for the said Charter, adhered to the view that the Community had no role to play in this area, as all EU Member States recognised the principle of free collective bargaining. Indeed, reference has also been made by other researchers (e.g. Platzer 1998: 83) to the possible obstacle represented by the lack of EU-level institutions capable of aggregating interests at supranational level and the absence of a ‘(quasi-) official supranational actor’ which could structure and politically shape transnational industrial relations (*ibid.*). All in all, the European Commission’s above-mentioned retreat from involvement in a structured TCB framework might have been the reason for the Commission’s relatively late intervention (*vide* the commissioning of a study on a legal framework for TCB by the expert group led by E. Ales in 2006).

Lastly, it is pointed out that the emergence of TCB in its various forms (be it collective bargaining coordination or the conclusion of numerous transnational agreements) does not have its origins ‘by design’ in the formal institution-building through which the EU has sought to give market and economic integration a social dimension (Marginson 2008: 12), but seems instead to be a response of stakeholders to the lack of necessary tools for shaping industrial relations that remain national in a global environment.

## 2.2 Terminology and its choice dependent on social partner positions

The above-quoted statements on TCB mirror a quite characteristic ambiguity on the application of a term used sometimes to refer to European social dialogue, or to the coordination of national collective agreements (against a background of profound differences between the national systems of collective negotiations in the EU Member States), and, on other occasions, understood as a truly supranational layer of collective industrial relations. In this regard Blank (1998) alludes to the term's varying conceptual scope, sometimes covering not only collective agreements *sensu stricto*, but also the right to strike (industrial action), freedom of association and even the right to co-determination, information and consultation (e.g. Cooke 2001: 285).

Clearly, the perception and understanding of the term TCB differ dependent on the (mainly political) interests and traditional positions held by the stakeholders most affected, i.e. unions and employers: 'While trade unions usually seek supranational protection against competitive deregulation of social and labour standards, for the employers European market integration is an opportunity to bypass national social regulation and to take advantage of increased regime competition' (Schulten 2002: 3; see also: Streeck 1999). Therefore 'the European employers' associations were only prepared to negotiate a European agreement under the Social Dialogue when they might have been able to avoid what in their eyes was a "less favourable" EU directive' (Bieling and Schulten 2001: 25). For trade unions, on the other hand, the progress of European social dialogue, especially since the Social Protocol of the Maastricht Treaty, helped to realise the 'structural superiority of capital at transnational level' (Streeck 1999), implying that 'labour can seek its class interest only through supranational protection against competitive deregulation while capital can seek its class interest by simply rejecting and blocking a European-wide social regulation' (Bieling and Schulten 2001: 25)

For trade unions TCB can be an option to re-establish their positions at national level since 'from the point of view of union membership many of the recent forms of social concentration and corporatist involvement seem to be exhausted. Since management and investors make use of their capacities to play off the employees of different plants, on the firm level

concentration is often associated with deteriorating work and employment conditions, while on the national and European level there are only few signs of social progress. Without a macro-economic dimension, national corporatism – i.e. wage bargaining, labour market policies and social reform – is strongly determined by competitive issues, and the European social agenda contains hardly any issues of substantial regulation, but mostly issues of procedural co-ordination (Falkner 2000). How such weak, often only symbolic forms of concentration will create sufficient consent on the part of union membership, remains therefore rather unclear and uncertain' (Bieling and Schulten 2001: 29). This will probably hold true, unless the European social agenda can incorporate substantial and meaningful regulation, allowing for instance TCB to create responses to supranational challenges.

The lines delimiting varying concepts and ideas on the scope of TCB do not, however, run exclusively along the divide between labour and employers. There have also been differing conceptions of what European collective bargaining is and should be within the trade union movement. As Blank points out (Blank 1998), the ETUC has seen TCB to be a new supranational layer, whereas the European Metalworkers Federation considers its purpose to be coordination. This approach of understanding TCB as the coordination of national collective bargaining has its critics, with Schulten (2002:5) arguing that the so-called 'coordination approach' does not in fact target the European dimension of collective bargaining, but instead assumes and supports the existence of different national systems which, even though interconnected, aim at limiting cross-border competition on wages and labour costs developments. Taking into account this diversity of views and the complexity of such questions as the origin, scope and outcomes of the emerging TCB, Marginson and Sisson (1998: 13) proposed differentiating between three levels of TCB (the EU multi-sector level; the EU sector level; and the Euro-company level) and their integration into a single definition *sensu largo*<sup>4</sup>.

---

4. It is the author's view that, according to this differentiation and with regard to collective bargaining at Euro-company level, it would seem reasonable to use the term 'Transnational Company Agreements'. The company level is often referred to as the core layer of TCB and thus the author is in support of referring to transnational company-level collective negotiations as TCB *sensu stricto* (even if only in nascent forms).

### **3. The transnationalisation of collective bargaining**

Almost all research on the emergence of TCB points to the globalisation of the economy and MNC activities as the triggering factor. Opinions start to differ, however, when looking at additional factors, circumstances or developments.

The most straightforward explanation is that the growing globalisation of the economy led to increased competition. This in turn led to massive restructuring measures in MNCs, following a strategy of ‘centrally controlled decentralisation’ (Telljohann *et al.* 2009: 5). In response to MNCs’ growing flexibility and production shifts between countries, trade unions adapted their activities to the new globalised circumstances, developing networks capable of dealing with challenges transcending national borders. With the capacity for global-level political regulation limited, what turned out to be a viable response involved pushing for greater self-regulation through the conclusion of transnational company agreements and international framework agreements (*ibid.*).

In contrast to the above explanation highlighting a limited capacity for political regulation, certain researchers see the emergence of TCB as a political process arising for instance from the development of European social dialogue (e.g. Moreau 2011: 237). An alternative view explaining the transnationalisation of collective bargaining sees it as a process of seeking the most effective way of giving collective bargaining the framework conditions it lacks in a transnational context (no regulatory framework), emphasising the voluntary character of such negotiations, changing views on the role and place of MNCs in society, and evolving trade union and business strategies. According to this approach (Stevis 2010), TCB (or rather IFAs) dates back to the 1970s when the ILO and OECD undertook initiatives producing important but non-binding codes (*ibid.*: 1). However, trade union strategies at the beginning of this development (1990s) differed from the current approach, unsuccessfully seeking to insert labour clauses into WTO regulations (Stevis 2010; Roozendaal 2002; Stevis and Boswell; 2007a). This was followed by growing MNC interest in CSR, understood as unilateral initiatives adopting Codes of Conduct (Stevis 2010:2). It is argued that the obvious shortcomings of such a unilateral approach subsequently focused attention and efforts on a multi-stakeholder approach involving increasingly complex and ambitious civil society initiatives (referred to as ‘civil

regulation'; *ibid*; Ütting 2002; Ruggie 2004; Crook 2005; Rondinelli 2007, Franklin 2008; ISO 2008). This point is not however unequivocally shared, as for others (Telljohann *et al.* 2009: 5) the 'development of dialogue between trade unions and the management has been facilitated by the fact that the issue of 'social responsibility' became more important for the TNCs [Transnational Companies] themselves'. Contrary to this opinion, one of the trends within the civil regulation was the a strategy of the unions to 'redirect the proliferating private codes of conduct away from discretionary forms of CSR and towards global social dialogue and industrial relations' (Stevis 2010: 2). With views on the role of CSR and the social reporting of companies diverging, a question-mark remains over whether the growing interest in CSR was a facilitator for developing TCB, or whether it should be seen as a technique feigning social responsibility and boosting companies' PR, thereby acting as a TCB inhibitor and thus needing to be abandoned by the unions as a strategy.

Correct as this approach might be, it does not however explain the origins of the need (the motivation) for developing transnational collective industrial relations.

One explanation points to the paradigm shift that occurred in the 1990s. Collective bargaining (CB) had previously been considered as a democratic institution promoting economic growth by redressing the power imbalance between labour and management (Mahnkopf and Altvater 1995: 101). However, deregulation has now supplanted CB since the latter is thought to interfere with the free market. This phenomenon has two aspects, deregulation by national legislators and the decentralization of CB by employers, both in the name of flexibilisation and underlining the will to hand over control of wages, working time, etc. to individual companies. In this regard the emergence of TCB appears a natural consequence of the transnationalisation of economies (Mahnkopf and Altvater 1995: 102). The reasons are twofold. The first lies in the shift of corporate strategies from a national to an international level, removing the ability of national governments to resist deregulatory pressure from transnational markets. Secondly, at the same time, even though strategies are determined at a transnational level, responsibility for achieving managerial, business and employment targets are determined at the level of a single MNC or even its subsidiaries, which by consequence requires decentralisation. Due to these factors CB is challenged by other forms of employee interest



representation and participation, with wages becoming de-coupled from the physical productivity of labour and increasingly dependent on a company's 'financial performance'. Consequently, trade unions are exposed to new pressures, with their role becoming transformed from labour representatives to mediators (ibid). In this context a brief explanation provided by Marginson (2008: 1) seems very instructive:

'The internationalisation of economic activity is embracing ever more national economies as rapid industrialisation proceeds amongst the emergent economies (...), emergence of global supply chains in a growing number of sectors, reaching into services as well as manufacturing, in which the division of labour between operations in different parts of the international economy is continually under review according to the imperatives of cost, flexibility and productivity. (...) In addition to considerations of costs, flexibilities, skills provision, productivity and labour standards as shaped by national institutions and regulations, the performance of individual sites and the localities in which they are situated is under continuous scrutiny. The social and industrial relations consequences of these internationalised economic dynamics increasingly call for cross-border, coordinated responses and initiatives by trade unions, and other institutions of employee representation, at transnational sector and company levels. These include the emergence of forms of transnational collective bargaining'.

Even in the 1990s, certain researchers were already quite aptly predicting that European integration as such, especially after Maastricht, and its economic and monetary logic would have major consequences for collective bargaining. The belief was that a number of CB elements, conducted until the mid-1990s on a national level, would gradually shift to the supranational level (Mahnkopf and Altvater 1995: 102).

At the same time it is pointed out that a further strengthening of EU competencies, for instance in the area of competition regulations, even though not formally involving the issue of national collective bargaining, will gradually exert greater influence on national-level collective negotiations (e.g. the European Court of Justice's ruling in the 'Albany' case; see Blasco 2004: 18). Given the ever-widening global scope of collective bargaining and the increasing shift of relative power to MNCs, there appears to be a growing interest among union leaders across borders to forge more effective and enduring alliances for conducting

transnational negotiations with MNCs. Though this interest increasingly transcends national boundaries, unions have not (yet) reconfigured their collective bargaining structures beyond national boundaries. An obvious question is: why not? What dilemmas did unions face that made this reconfiguration so difficult? Alternatively, one can ask about the conditions and incentives needed for increased support. Further important questions are what would be the response of MNCs and what topics would such transnational negotiations between employers and labour cover (Cooke 2001)? In search of replies to these questions Cooke formulates several theoretical conditions, for use in designing union strategies towards TCB. He also takes into account the necessity to create mechanisms for the case of certain unions withdrawing from collective agreements/partnerships. Unfortunately, in designing his model solutions, Cooke (2001) devotes no attention to the implementation and enforceability of collective agreements concluded on a transnational basis.

Against the background of globalising economies, corporate governance and company strategies, is the development of TCB and the devotion of union resources to creating transnational partnerships to this aim the rational response to these challenges? An affirmative answer to this question can only be given when these efforts yield a net added value (Cooke 2001: 289 and 296). But when is a net added value achieved? For trade unions, the answer is not self-evident. As Streeck (Streeck 1999: 121) argues, for European union organisations all harmonisation or supranational alignment processes are treated with uncertainty or mistrust with regard to their impact not only on the balance of power between capital and labour, but also on the respective position of union-represented employees in different countries. The result of such a trade union approach is what Streeck (*ibid*) terms as *institutional nationalism*, rationing union support for any advanced form of transnational integration to the extent that the stability and autonomy of national institutions remain intact and the status quo remains preserved. A direct corollary of such union perceptions is their preference for subsidiarity rather than harmonisation or centralisation, even though the former is sub-optimal in terms of pursuing transnational class interests (*ibid*).

Departing from a single-actor oriented explanation of the reasons for TCB, Arrowsmith and Marginson propose a more holistic view of the possible drivers making the stakeholders engage in TCB (Arrowsmith and Marginson 2006):

- 1) the dismantling of national borders in union activities within the EU;
- 2) the growing extent of internationalization, of companies fuelled by an explosion of cross-border mergers and acquisitions in 1990s;
- 3) the decline of sectoral bargaining within countries, extending the scope for company-level negotiation and variation (Arrowsmith *et al.* 2003; Traxler 1995) as well as pressures from employers to reorient national and local bargaining agendas towards market-led considerations of competitiveness and adaptability (Schulten 2002).

Complementing this fairly general list of possible motives for TCB, there are also more concrete ones driving MNCs to sign transnational agreements. Arrowsmith and Marginson (2006) mention three key drivers:

- 1) management concerns to secure legitimacy for pan-European, company HR policies (advantages deriving from the additional legitimacy that can arise through securing employee representatives' consent or approval via a formal agreement);
- 2) minimising the transactions costs potentially entailed through a series of parallel local negotiations (see also Telljohann *et al.* 2009: 5);
- 3) management responses to being pressured into European-level negotiations by a demonstrable employee-side capacity to coordinate local negotiations and if necessary cross-border forms of action.

Against the background of the possible incentives for employers to engage in TCB or to support the emergence of a structured legal framework, Schulten (2002) emphasizes that these actor-specific drivers are not sufficiently strong to produce a legal framework:

'In fact, there is a far-reaching consensus among industrial relations researchers that without political initiatives for social regulation coming from the European Commission the employers would have only little interest in concluding so called "European social partners' agreements" (Schulten 2002: 3).

Similarly Blank (1998: 165) finds that, despite the clear conclusion that European-level TCB is a missing link in the current industrial relations

set-up, social partners alone will not be able to work out a legal framework. Hence the European Commission must take a pro-active role. Collective bargaining is frequently not a question leading to dialogue, but instead one often culminating in conflict (ibid). Therefore a legal framework imposed from above by the legislator would seem to be the best solution.

#### **4. TCB as a challenge for trade unions**

Apart from looking at internal differences in understanding the notion of TCB (Blank 1998; see above), the available literature also devotes a certain amount of attention to trade union reservations with regard to TCB (Mahnkopf and Altvater 1995). In this respect trade unions are sometimes seen to be trapped in a dilemma visible especially in regard to European social dialogue, but arguably also applying to the emerging TCB:

‘On the one hand EU institutions strengthen the role and capacity of trade union organisations at European level and formally involve them in various areas of EU policy making. In exchange for such an involvement, however, the European trade unions are expected to support those integration projects, which further undermine social regulation in Europe’ (Schulten 2002: 4; Martin and Ross 1999).

Schulten (2002: 5) sees the dilemma within unions on TCB becoming quite fundamental (if not dramatic, as one may see it nowadays), arguing on the one hand that European economic integration is undermining the basic functions of collective bargaining (a transition from *productivity-oriented* to *competition-oriented* collective bargaining; Schulten 2001a, 2002), while at the same time stating that the emergence of a supranational European collective bargaining system seems a very likely prospect (Schulten 2002: 5).

According to Blank (Blank 1998) there are further conflicts over TCB amongst trade unions. Even though the emerging question of a Europeanization of collective bargaining was identified by the unions some two decades ago, it did not gain prominence on their agenda. As pointed out by Blank, in many cases trade unions have, if at all willing and capable of taking a stance on TCB, applied national concepts to a phenomenon which naturally needs to be a compromise between or a

reconciliation of the various systems in place in the EU Member States (for differences between the Member States refer to Chapter 2). The fact that (national) unions have tended to focus on national collective bargaining rather than its transnational dimension can be attributed to each national union considering the prospective European bargaining model from their own national point of view (*ibid*)<sup>5</sup>. By this token national systems, even though efficient and often quoted as template solutions (such as the German one), cannot be simply cut out of their national context and transposed to a European level. Without the complex system of national institutions and their interdependencies they would be doomed to failure (*ibid*: 160). In this context Bridgford and Stirling (1994) found that collective bargaining in Europe ‘forms a multi-form mosaic reflecting the different social, economic and political conditions existing in each country... At the European level there has been a reluctance to match the process of collective bargaining to the forces at play in the broader economy, and the Europeanization of the economy has not yet been accompanied by the Europeanization of the process of collective bargaining.’ (Bridgford and Stirling 1994: 161). The belief that differences in the organisation, ideology and interests of Europe’s national trade unions are the main obstacle to the emergence of a European CB system is thus not uncommon in the literature (e.g. ‘Euro-pessimists’ see: Platzer 1998: 86), with Blasco (2004) even considering the differences to be ‘insurmountable’. At the same time the ‘empirical diversity of national systems’ (Platzer 1998: 88), seen by some as indispensable for the emergence of TCB, may become a structural barrier to any form of transnationalisation (*ibid*). Consequently, when discussing supranational institutions, some researchers emphasize that, when designing any future genuinely supranational collective bargaining, one must remember that it will function differently - and needs to be designed accordingly - from its national counterparts from which it might originate (Streeck 1999: 121; for contrary views see Chapter 6 and 7).

---

5. This, on the other hand stems probably from the nature of independent unions that have typically deep-rooted desires for maintaining autonomy and national identity (Cooke 2001: 285). Further reasons are obviously differences in national industrial relations (IR) systems and social welfare policies (*ibidem*).

The traditional positions of trade unions are also challenged in another respect. The majority of trade unions fear that the introduction, development and expected gradual strengthening of a supranational level of collective bargaining will take place at their cost. Marginson and Sisson (1998: 19) argue that 'virtual' collective bargaining (as a possible scenario for the development or emergence of TCB) is perceived by unions as threatening to undermine, rather than build on, past collective bargaining achievements:

'Understandably, too, such worries are likely to be especially pronounced in countries which have a long tradition of detailed normative contracts. Notable among these will be colleagues from Austria, Germany and the Nordic countries. The possibility of collective bargaining becoming 'virtual' is likely to confirm their worst fears. They might conclude that greater EU integration is likely to mean, at best, calling a halt to the use of collective bargaining as an instrument of social progress: it may even mean, far worse, the undermining of the position that has already been established.' (ibid).

However, Marginson and Sisson emphasize that such argumentation often fails to reflect the fact that 'the terms of sector-wide collective agreements have relatively little impact in many workplaces' (ibid).

These reservations are not a recent characteristic of trade union positions (Keller 1995; Turner 1993) and have led to 'the reluctance of national trade union organisations, both peak federations and individual affiliates, to yield the necessary authority and resources to European-level organisations, thereby limiting trade union capacity to organise and pressurise employers on a supranational basis' (Marginson and Sisson 1998: 11). It seems that this observation, made in the 1990's, remains at least partially true today as cross-national collaboration between unions within the EU 'remains minimal principally because of the preoccupation of national actors with specific national problems' (Turner 1993: 203). It seems however that, by focusing on the national level and their sustained reluctance to actively move to the supranational one, trade unions miss one key feature of the entire emerging structure, namely that the key characteristic of IFAs (as one of main recent TCB developments) is not that they are negotiated (as admittedly a number of other multi-stakeholder agreements are, too), but that MNCs recognise a global institution representing workers

(whether a Global Union Federation or a global employee organisation; Stevis 2010). This lack of understanding for this key opportunity seems to be, however, linked to the limited resources at the disposal of unions. In such an environment, 'allocating (the resources) appropriately between co-ordination and the struggle to maintain the coverage and depth of existing national systems is going to be especially difficult.' (Marginson and Sisson 1998: 19). This might be the reason why unions have continued to focus predominantly on the national level, in turn not paying sufficient attention to the transnational dimension of company-level bargaining. The challenge is definitely significant as the risk of focusing solely on the national level is that 'collective bargaining could become an empty shell to which employers and policy makers pay lip service but little else. Trade unions in particular will have to be on their guard.' (ibid).

Other authors see the central problem for unions arising from the fact that, while Europeanization requires the harmonisation of bargaining policies (alignment of negotiating procedures and objectives), regional and sectoral wage differentiation has played a major role in compensating for differences in productivity and financial performance. This makes EU trade union unity both necessary and impossible (Mahnkopf and Altvater 1995: 102), and might be an explanation for those senior management executives, who were reportedly (Walsh et al 1995: 94) surprised by the failure or refusal of trade unions to push for transnational pay comparisons.

It is being pointed out that yet another, more technical challenge for trade unions seems to have contributed to the relative underdevelopment of TCB strategies compared to MNC activities:

'Trade union efforts at cross-border networking and benchmarking within MNCs are generally less developed than those of management, and EU enlargement has correspondingly enhanced the challenges unions face. Arrowsmith and Marginson (2006) found that this was a product of resource constraints, lack of a central 'authority', divisions wrought by multi-unionism and the effects of inter-plant competition.' (Marginson 2008; 7).

These seemingly serious or even insurmountable predicaments faced by European trade unions contrast somewhat with their often pioneering support in the early days of TCB. Ales (Ales *et al.* 2006: 10) reports that

in the late 1990s the unions had the expectation of European social dialogue becoming a tool bridging the interests of employees and employers and aiding the development of a ‘set of fair standards to be applied all over the EU in the spirit of “co-operation and negotiations to the benefit of all associated organisations and their members’ (Pochet *et al.* 2003). Nonetheless, ‘The ambitions of some Trade Unions went even further. At its collective bargaining conference in 1998, in a long term perspective, the European Metalworkers’ Federation adopted a resolution stating that “European minimum standards (as to wages, maximum working time) should be introduced which should be raised progressively” (Ales *et al.* 2006: 10). To achieve this goal European framework agreements within the context of the relevant SSD committee were considered a useful instrument (EIRO 1998). Though regulation by means of collective agreement was seen as a certain constraint for individual employees, it was also felt that any standardisation of employment conditions helped secure the overall status of employees (Streeck 1992: ch.2).

Yet another challenge of a more general nature that unions face is the availability of representative supranational structures with the requisite negotiating competence (a problem also applying to employer organizations). Short of representative organizations able to negotiate at European level, it is pointed out that unions need to develop the kind of transnational networks long possessed by companies in order to reduce uncertainty and manage their interdependence (Mahnkopf and Altvater 1995: 114). ‘It’s not a matter of simply replicating national structures at transnational level, or of aggregating existing national organisations – which is the current focus of European unions -, but rather of cooperation in new kinds of structure (...)’ (*ibid.*).

Finally, some authors claim that EWC Directive 94/45/EC provided trade unions with an ‘exceptional opportunity’ (Cooke 2001: 285), which has not as yet been fully taken up. Despite the opportunities EWCs are believed to offer, only ‘few unions appear to have used this unique opportunity to overcome transnational barriers and, in turn, to build even minimal alliances’ (Cooke 2001: 285; Beaupain *et al.* 2003; Martin and Ross, 2000).

Cooke (2001) argues that ‘to optimise net payoffs, unions need to minimise the costs to forging and sustaining partnerships by effectively



accommodating differences across unions and minimising the transaction costs of day-to-day activities of partnerships'. This will require them to develop collective bargaining structures explicitly tailored to their transnational activities without compromising existing national structures (ibid: 296). Cooke argues that EWCs and their global counterparts, World Works Councils<sup>6</sup>, do correspond to these requirements and thus represent suitable forms of partnerships to accommodate TCB functions. Such 'transnational councils' would have to first formulate their overall transnational collective demands. These would need to go beyond those that any one member union would otherwise pursue and attain on its own (one could see this as a form of a principle of subsidiarity characterising the entire EU integration process).

## **5. Incentives for parties to become involved in TCB**

The above mentioned challenges, forcing trade unions in particular to upgrade their collective bargaining to a supranational level, require major effort and adaptation and generate certain costs. These costs can be justified if one finds commensurate incentives and arguments in favour of such a shift. Incentives are clearly needed also on the part of employers whose decision to involve in TCB might be even more dependent on a strict cost-benefit analysis.

Firstly, certain researchers point to the fact that TCB has a broader societal dimension, transcending union and employer interests: proposals for increased flexibility (*de facto* uncoordinated wage cuts and other means of reducing labour costs) challenge citizenship rights within the European common market. If trade unions can prove themselves capable of countering such deregulation and flexibilisation via TCB they will be defending not only workers' interests but also more general societal interests against short-sighted economic policies (Mahnkopf and Altvater 1995: 114).

Secondly, it needs to be pointed out that the beginnings of the debate on TCB and the motives for it date back to the 1970s. As Eurofound

---

6. For the list of World Works Councils (and their various types depending on the legal basis for their creation), see [www.ewcdb.eu](http://www.ewcdb.eu)

research points out (Telljohann *et al.* 2009: 17) the goal and motive of world works councils in fact was involvement in TCB, understood not as genuine collective bargaining as it is known on national level, but the more modest cross-border coordination of trade union activities (Gumbrell and McCormick 2000a and 2000b). A different understanding of TCB was presented by Levinson (Levinson 1972: 111), who refers to TCB as a strategy for coordinating wages and working conditions trans-nationally. As pointed out by Telljohan (Telljohann *et al.* 2009: 17), despite marked differences and delays, at the end of the day it is Levinson's vision that is eventually starting to emerge at European level, although in a form different from the original ideas.

One can argue therefore that TCB is in the unions' vital interest. It seems it can contribute to the overall revival of unions, though this is dependent on their increased effectiveness, e.g. via the creation of European networks (see e.g. Mahnkopf and Altvater 1995: 114). Other sources argue that for 'the employee side, IFAs are an interesting regulatory instrument for three main reasons: first, IFAs can be used to ensure a floor of minimum social standards that apply to all the TNC's operations worldwide; second IFAs may represent a stepping stone for the establishment of worldwide networks and representation structures; and third, IFAs can provide a useful organising tool to build up and strengthen national union structures' (Telljohann *et al.* 2009: 8). Furthermore they generate potential spill-over effects, including the promotion of social dialogue and cooperation, the development of mutual trust, and new potential for conflict resolution (*ibid.*). In certain cases, it is argued, IFAs also contribute to the introduction of global information and dialogue structures between central management and global union federations (GUFs; Müller and Rüb 2004). Furthermore, they can also help strengthen employee representation structures, whether on a global level (Telljohann *et al.* 2009: 8) or a European level.

Platzer (1998: 95) stresses that living up to the above challenges and taking advantage of the opportunities require unions to resort to non-union sources of strength, cooperating with social movements, influencing public opinion, and putting pressure on political parties. To sustain and perhaps enlarge the scope for collective bargaining, union strategies must transcend the field of collective bargaining, 're-politicising' themselves. Platzer (*ibid.*) similarly argues that 'it is vital that trade unions can respond to the growing mobility of capital by extending their own

organisational scope' as this will enable them to gain a relative advantage over employers on the labour market.

At the same time, 'it is in the interest of employers to regulate the employment relationship on an individual basis' (ibid; Platzer 1992: 779 ff). However, under certain conditions and circumstances in a product market (the establishment of 'productivity coalitions' with their employees leading to competitive advantages over other companies) employers may have a preference for collective regulations (Platzer 1998: 96). Traxler (1995) argues in this regard that employers will be interested in European collective bargaining on the micro and, in certain circumstances, on the meso levels, but not at the macro level. Just recently, employer organisations analysed the advantages and disadvantages of TCB as a managerial tool potentially serving company goals. One of the pros was that companies 'that have engaged often claim that these agreements are good vehicles for deepening social dialogue, because they provide an additional platform for communication and cooperation with trade unions or workers' representatives.' (ITC 2010). This is consistent with Eurofound's assessment (2009: 85), arguing that from a management perspective IFAs are 'mainly a tool to deepen dialogue with employees and trade unions and to define and communicate a set of shared norms and values, rather than as an industrial relations exercise'. The ITC working paper also points out that 'Perhaps not surprisingly, a majority of these agreements are entered into by companies with a long and strong culture of social dialogue' and that 'some agreements are a reaction or counter-measure to high-profile cases of labour conflict (often in far-away locations) or are the result of trade union requests or pressure.' (ITC 2010: 10). Despite this trend of being to a certain extent responsive to the employee and trade union driven struggle for TCAs, there are 'a number of examples of companies seeing their situation, at local level, improve significantly with the signing of such agreements' (ibid). One participant spoke of TCAs as a way of "buying stability and peace". A number of companies also point out how these agreements provide early-warning systems or act as tools for avoiding trade union campaigns. Yet another incentive for management is the shortening of communication channels, which in crisis situations can 'help control a situation before it becomes public' (ibid). Furthermore, the efficiency gains of handling contacts with multiple trade unions and workers' representatives collectively rather than on an individual basis (union by union or strike by strike) was

identified as an incentive. Interestingly, MNCs found themselves inclined to sign TCAs through other types of pressure (non IR-related) coming from NGOs and consumer groups within the context of the CSR debate:

‘TCAs are instruments that, like CSR codes of conduct, communicate externally what companies see as their strategy and policy in the social field. They are seen from a public relations perspective, and have the potential to enhance a company’s reputation and image. This is particularly relevant to access to public procurement markets and the role of social rating agencies. For those companies supplying the European and other public markets, these agreements seem to help with fulfilling governmental procurement stipulations and criteria. Social rating agencies’ procedures and requirements are also increasingly driving companies to sign. A good ‘social score’ influences how a company performs in financial markets, accesses capital, etc.’ (ITC 2010: 10).

## **6. Company-level TCB and EWCs**

A prominent thread in the debate is occupied by TCB on a company level, with a link being made between TCB and EWCs. Although an issue of considerable speculation, the involvement of EWCs in negotiating trans-border collective agreements has in the past (at least in the 1990s) received relatively little attention (Carley 2001: 1).

### **6.1 EWC involvement as a form of TCB**

The range of assessments of EWCs’ competence or eligibility to sign transnational agreements has obviously grown in line with the increasing incidence of such agreements. By late 2007, estimates suggested that EWCs were party to some 62<sup>7</sup> agreements concluded with around 40 MNCs, compared to virtually none in the 1990s (Papadakis 2008: V).

---

7. Marginson (2008: 8) reports over 70 such agreements.

It is now universally recognised that TCB is not limited to one specific type of trans-border collective negotiations, but that it can take the form of either sectoral or company level bargaining (Ales et. al. 2006: 9; Marginson and Sisson 1998). These two paths of TCB development seem well grasped by Marginson (Marginson 2008: 2):

‘On the one hand, it takes the form of cross-border information exchange of bargaining-relevant data, by either employers or trade unions, with the aim of setting the context for the national and local negotiations which take place in sectors and companies. At its most developed, such activity can result in coordination of bargaining agendas and outcomes in different local and national negotiations. On the other, it takes the form of transnational negotiations resulting in the adoption of joint texts and framework agreements of varying degrees of regulatory “hardness” or “softness”.’

Interestingly Marginson points out that the development of TCB up to now has been characterised by the differing focuses of the social partners: for trade unions the primary focus has been on the sectoral level, whereas employers have concentrated on the MNC level (ibid). It would be unfair to claim that unions do not respond to the articulation of local negotiations in MNCs, but ‘such response is far from widespread’ (ibid). On the other hand, due to the twofold nature of TCB, and especially the ‘cross-border information exchange of bargaining-relevant data’ mentioned above, EWC’s, in their capacity as the primary company-level transnational information and consultation bodies, could assume this new task, thus filling the gap (Marginson 2008: 2; Marginson and Schulten 1999). Carley (2001) takes this up, stating that:

‘Contact, liaison and cooperation between trade unions organising in the various European operations of a multinational is developing, both through direct contacts between unions and in the context of EWCs. It is in this area that EWCs appear to have developed a role in the Europeanisation of bargaining within multinationals, facilitating an exchange of information on working conditions, working hours, employment practice and sometimes pay between employee representatives from different countries. This information is relevant to local and national-level negotiations within the enterprise.’

Not long afterwards, it is established that EWCs not only facilitate the flow and exchange of information relevant for collective bargaining, but that they themselves participate in such bargaining:

‘[EWCs] have (...) been mobilised in ways not anticipated by the 1994 EWC Directive. These include context setting activity around local negotiations by management and by trade unions, and the emergence of transnational negotiating activity in a small but growing number of EWCs.’ (Marginson 2008: 2)

Recognising this evolution, a big question remains as to ‘whether they have moved or can move a stage further, to become a forum for negotiations over issues of relevance to all of a multinational’s European operations’ (Carley 2001: 4). In search of an answer to this question, some commentators support the view (Marginson and Sisson 1996; Marginson and Sisson 1998) that, in the light of the above-mentioned trends, EWCs may develop a form of bargaining role at European level.

A further outstanding question involves the form in which EWCs would participate in TCB. It is suggested that ‘EWCs may become the forum for joint opinions or framework agreements on aspects of employment and industrial relations policy... Such framework agreements would establish the broad parameters of policy which negotiations to secure implementation then took place at national or business unit level within the enterprise.’ (Carley 2001: 4).

Reflecting the different characteristics of individual companies and entire sectors of the economy (Arrowsmith and Marginson 2006), it is emphasized that the development of company-level TCB varies according to exposure to international competition (Hollingsworth *et al.* 1994) and the strength of union organisation along with its propensity to negotiate at company level (Dolvik, 2001). This means that TCB is especially prevalent in sectors characterised by high international integration of production<sup>8</sup> (Meardi *et al.* 2008) and reflects company-level considerations such as the degree and nature of operational inter-

---

8. Incidentally, these sectors are also the ones with relatively high ratios of EWCs installed, see Kerckhofs 2006.

nationalisation, and differences in ownership and management structures (Marginson 1992; Marginson et al 2004). These

‘differences between sectors were attributed to relative exposure to international competition and the extent to which production (or service provision) is integrated across borders. Within sectors, differences related to several influences including: the degree and nature of internationalisation of operations (in some banks, for example, back-office operations were centralised across borders); the degree of diversity of the products and production systems across operations; and ownership, where the scale and symbolism of home-based operations served to blunt cross-border comparisons.’(Marginson 2008: 6)

Such distinctive differences combined with increasingly extensive international contacts and the exchange of labour-related data naturally resulted in comparisons. In fact it is believed that the desire of MNC management ‘to bring international comparisons of costs and productivity to bear within local, company-based negotiations, aiming to secure equivalent bargaining outcomes and/or lever workforce concessions at sites in different countries’ was one of the key root causes behind the emergence of TCB (Marginson 2008: 5). MNC support for TCB is believed to be closely linked to the dual function that transnational negotiations have: on the one hand, engaging in such negotiations enables international comparisons and the benchmarking of local-level practices, performance and costs, in turn allowing management to continually enhance competitiveness; and on the other hand, it facilitates the concurrent diffusion of ‘best practices’ in different countries (ibid). It must, however, also be mentioned that such transnational comparisons within MNCs (Mueller and Purcell, 1992) can lead to ‘coercive comparisons’ (Edwards, 2004) and, consequently, to concession bargaining across borders (Hancké 2000; for instance the cross-border round of concession bargaining at General Motors Europe).

Due to the fact that cross-border ‘coercive comparisons’ of labour costs are a tool particularly useful and applied by management, it is believed that it is management that drives the cross-border articulation of local bargaining agendas and outcomes within MNCs (Edwards, 2004; Arrowsmith and Marginson 2006: 246). It is also pointed out that, due to productivity levels in the 12 EU new Member States catching up with those of the ‘old’ EU-15 and the consequently growing gap in pay within

the EU, the pressure for such comparisons and thus for a spontaneous proliferation of transnational company level collective agreements will grow (Marginson 2008: 7).

Last but not least, the increasing involvement of EWCs in cross-border collective negotiations can be seen as the result of increasing company restructuring and the necessity to draw up plans and strategies to alleviate their adverse social effects. Certain observers argue that, given the transnational scale of restructuring and the resulting transnational impacts of such, these problems might become a natural issue for collective negotiations handled by EWCs as the common denominator (Carley 2001: 7). This is probable because, as some authors believe, 'EWCs offer an institutional framework which can potentially underpin cross-border bargaining' (Arrowsmith and Marginson 2006: 255). The company-level dimensions of TCB have 'emerged more recently than at sectoral level, but for several reasons their development is likely to be at least as important since, in many cases, enterprises prefer to negotiate at company rather than at sectoral level, be it national or transnational' (Ales *et al.* 2006: 16). Reportedly, the main interest of MNCs in TCB lies in regulating various corporate responsibility issues, whereby MNCs want to gain a comparative advantage by adopting norms rather than binding rules (*ibid*). Moreover, with regard to company restructuring measures, company-level TCB seems much more effective than similar approaches at national or sectoral level (*ibid*)<sup>9</sup>. Furthermore the spontaneous and voluntary adaptation of EWCs to go beyond information and consultation seems to lie in the fact that one of the main functions of these bodies is to create a forum where employee representatives from different national industrial relations systems can meet and get to know the differences between their national systems. Based on this knowledge representatives can then reach agreement on strategic objectives, issue joint opinions, or even present demands to management especially in situations where company management is ready and willing to go beyond information and consultation and negotiate *joint texts* or even *agreements*. The latter instruments have potential as tools for creating trust and a common company culture and

---

9. Nevertheless, it is also pointed out that so far, agreements on restructuring have been reactive rather than proactive, dealing with specific restructuring situations (Ales *et al.* 2006: 29).



for triggering the development of a pan-European HR policy within the company aimed at harmonising certain social standards such as CSR (Ales *et al.* 2006: 21).

The above factors point to certain advantages to be gained from involving EWCs in company-level TCB:

- ‘(a) the concrete definition of a transnational dimension of collective negotiation which leads to the establishment of a transnational contractual relationship between management and SNB<sup>10</sup>;
- (b) the conclusion of agreements of a transnational dimension whose personal scope of application is supposed to go even beyond the signatory parties;
- (c) the establishment of transnational representative bodies on employees’ side.’ (Ales *et al.* 2006: 20)

Parallel to the discussion on EWC involvement in TCB and its mostly positive outcomes for both the multinational companies and employees, a fair share of attention has been paid to the EWC contribution to fostering European industrial relations at large. Initiatives at both workplace and pan-sectoral European level were judged to have the potential for shaping and further developing emerging pan-European structures (Platzer 1991). Other researchers were however foretelling that:

‘European level relations between capital and labour, instead of constituting the core of the European political economy, will for the foreseeable future remain compartmentalized in the private sphere of large multinational enterprises and will thus be essentially non-political and voluntaristic in character. Where labour-capital relations enter the political area, they will mainly take the form of a set of discrete “labour” and “social policy issues”.’ (Streeck and Schmitter 1991: 158)

---

**10.** A Special Negotiating Body, in line with the EWC directives (94/45/EC and 2009/38/EC), consists of a group of employee representatives (s)electd at national level to negotiate an agreement regulating the functioning of an EWC, its competences, relationship with management, etc.

## 6.2 Criticism of EWC involvement in TCB

Despite the largely positive assessment of EWC involvement in TCB some critical views on the (facilitating) role of EWCs in the development of TCB have been raised in the debate. Hancké (2000) sees EWCs as having proven ineffective as a mechanism facilitating the cross-border coordination of union bargaining positions. This is, however, seen as the result of local site egoism undermining trade unions; determined by their ability and willingness to counter benchmarking by management (ibid). Others point to concerns over the mandate of EWCs to engage in collective negotiations, suggesting that such voluntary activity of these originally information and consultation bodies raises concerns in terms of insufficient authority to enter into such contractual obligations on behalf of employees (Jagodzinski 2007). Further downsides of EWC involvement in TCB are similarly linked to their original design as information and consultation bodies (Ales *et al.* 2006: 20):

‘a) the fact that such a negotiation process, transnational agreements included, is limited in its ends to the establishment of an employees’ representative body;

(b) the fact that the highly differentiated composition of EWCs is likely to produce relevant consequences on:

- (b1) their legitimacy to go beyond information and consultation, negotiating with management
- (b2) Trade Unions aptitude towards the recognition of negotiating powers to EWC without a simultaneous formal recognition of Trade Unions role within them.’

Apart from such specific problems about EWC involvement in TCB there is another, more general criticism of linking these information and consultation bodies with European-level developments in collective bargaining. The view that transnational collective agreements signed at the level of multinational companies represent a form of TCB is not universally shared among the research community. Even (Even 2008), the author of an impressive discourse on TCB, argues that such

‘transnational collective labour agreements (...). must be considered “national” transnational collective labour agreements as referred to in chapter 1, section 2.1. They are nothing more and nothing less than

agreements governed by national law or laws, having effect in different countries. They have no Community relevance and do not qualify as European transnational collective labour agreements which are the research subject of this thesis' (Even 2008: 231).

Even goes on to list serious disadvantages and difficulties in the application and implementation of these agreements, which can differ from country to country (Even 2008: 238). In his view such differing national regimes regulating the same 'collective (national) transnational agreement' may lead to 'a situation that to one and the same employment agreement two sets of law apply: the law of the country in which the employee is working, and the law of the country applicable to the collective labour agreement' (ibid). The outcome is a system with no added value ('nothing new'), with little additional Community relevance, and weighed down by legal uncertainty and possible complications:

- (i) an unclear binding effect of the agreement reached,
- (ii) insufficient rules concerning the requirements that the European social partners have to meet,
- (iii) potential difficulties with regard to the implementation of the agreement,
- (iv) difficulties concerning the effects, follow-up and enforcement of the agreement. (Even 2008: 233-234).

International Framework Agreements (IFAs, see below), considered as an even more formal approach, are not seen as a solution here. As their implementation is dependent on national legislation, they are deprived of their transnational character and can no longer be referred to as 'transnational collective labour agreements' *sensu stricto* (ibid).

## **7. International Framework Agreements – a further TCB dimension**

Alongside agreements signed by EWCs, International Framework Agreements (IFAs) represent another emerging form of TCB. IFAs, addressing core labour standards within the MNCs concerned (usually including their supply chains), had been concluded by Global Union Federations (GUFs) in some 65 companies by mid-2007 (Marginson 2008: 8), with

most having been signed after 2000. One important input to the research was a study by Schömann (Schömann *et al.* 2008) which *inter alia* proposed a definition of an IFA and what differentiates it from a code of conduct (see: *ibid.*: 85-86):

‘These agreements are concluded between global or European trade union federations and the management of individual multinational companies to define labour standards and joint principles of industrial relations. They are normally based on fundamental social rights as defined by the core conventions of the International Labour Organization (ILO).’ (Schömann *et al.* 2008: 1)

Comparing IFAs with codes of conduct, Schömann (Schömann *et al.* 2008) also found that IFAs are more efficient in terms of promoting fundamental social rights amongst multinational companies and, thus ‘tend to correspond to an emerging form of social dialogue at international level, whereas codes of conduct are mainly used as guidelines for behaviour and instruments of legal risk management for companies’ (*ibid.*: 2).

Although global in their reach, the vast majority (58 out of 65) of IFAs have been concluded with European-based companies. It is reported however that the few IFAs actually existing have only been concluded in a small group of front-running MNCs (30 of them have been signed in 10 companies; Marginson 2008: 8). Marginson sees IFAs as differing from agreements signed by EWCs in one significant aspect: the agent. In the case of an IFA, the agent signing the agreement on behalf of labour is a trade union, whereas EWC agreements are signed by employee representatives not necessarily appointed by the unions<sup>11</sup>.

It is interesting to consider whether the reasons for signing IFAs could not be applied on a more general basis to the entirety of the emerging TCB. Stevis (2010: 11 ff) suggests a differentiation between the internal and external factors behind IFAs. Looking first at external factors he argues that the geographical distribution of IFAs suggests ‘that corporations from countries characterized by some form of coordinated capitalism are more

---

11. In fact these signatories often intersect, with an EWC co-signing alongside trade unions. Béthoux (2008) however points out that agreements signed solely with EWCs prevail in US-based multinationals.

likely to consider an IFA than corporations from countries with more liberal and thus conflictual traditions'. This is also corroborated by the analysis done by Marginson and his collaborators (Marginson *et al.* 2008). Looking at the countries of origin and the degrees of institutionalisation of labour voice, they found it to be best articulated in continental European companies accounting for the vast majority of IFAs signed. However, such external factors explicitly linked to specific industrial systems only suggest certain causal relationships, but cannot serve as sufficient explanation, given the fact that a number of IFAs were refused in Europe as well (Stevis 2010: 12). At this juncture attention is turned toward internal factors and the hypothesis that 'high union density (e.g. in automobile sector), or other political or social resources that unions often possess, may lead the corporation to negotiate an agreement in order to prevent labour unrest as well as legitimate its internationalisation strategy' (*ibid.*). Furthermore, public scrutiny and the possibility of public regulation are also possible incentives (ORSE 2006). Finally, 'some MNEs may see agreements as part of a strategy to bring some order to their human resource management' (Stevis 2010: 12).

## **8. The legal nature of TCB**

With regard to the legal anchoring of transnational agreements the lack of clarity over their binding force and enforcement is often pointed out. Some researchers see them as nothing more than 'agreements', arguing that they are little different in character to other texts titled 'joint declarations' or 'charters' (Béthoux, 2008).

Based on the content and relative 'hardness' or 'softness' of an agreement, certain researchers are proposing a classification of transnational agreements into four categories (Carley 2001):

- 1) general principles of a company's personnel policy not envisaging or not requiring any specific actions (the softest);
- 2) agreements committing the signatory parties to specific actions (e.g. establishment of a health and safety observatory), but not calling for action by local management and employee representatives;
- 3) framework agreements establishing a set of general principles on a specific issue, and inciting – but not requiring – follow-up action by MNC management and employee representatives at lower levels;

- 4) obligatory frameworks requiring action by the parties at lower levels within the company, but where national and local-level implementation practice can vary (the hardest).

One of the major problems pointed to when discussing TCB in the form of agreements is their enforceability and binding effect (see for instance Ales *et al.* 2006: 23). This is due to a) the lack of a specific international legal framework for such agreements (see for instance Jagodzinski 2007), and b) to legal concerns about the mandate and acceptance of any binding results of TCB by national organisations affiliated to the negotiating parties (e.g. trade unions) (Ales *et al.* 2006: 24).

In view of these challenges only a limited number of solutions have been proposed. As the solution the Ales' report (Ales *et al.* 2006) proposes to consider the following three options:

- 1) negotiations between the management and the EWC (status quo);
- 2) negotiations with international sectoral unions and the conclusion of so-called *framework agreements*;
- 3) Association of national unions to the negotiations with the management of the transnational company.

## **9. Obstacles to the emergence of TCB**

Looking at the probability of and possible obstacles to the emergence of an institutionalised European collective bargaining system, different and often contradictory views have been presented. Certain authors (e.g. Platzer 1998) view the emergence of a transnational layer of CB as being unlikely, due to:

- a) the 'European and transnational weakness' of trade unions resulting from the heterogeneity of their material and ideological interests;
- b) the 'transnational organisational weakness' of employers and their strategic lack of interest in a supranational organisation of collective bargaining;
- c) the 'supranational weakness of the state', i.e. of the EU (Ebbinghaus and Visser 1994: 223).

In contrast to this approach highlighting the weakness of the actors, another approach sees their being wedded to national systems of collective bargaining as being the crucial factor. Marginson and Sisson (1998: 5) find that ‘much comparative industrial relations analysis has privileged the enduring specific features of different national systems as the principal factor underpinning continued diversity.’ and that ‘in analysing the counter play between these two sets of forces [homogenous national systems vs. supranational actors and institutions] commentators have tended to underline both the durability of existing national systems of industrial relations and the imperative of establishing transnational actors with the authority, resources and capabilities to deliver European-level sectoral bargaining mirroring those characteristic of many national systems (Jacobi 1995: 50).’

Even (2008: 194 ff) points to further shortcomings in the current set-up (being at the same time in fact partly critical remarks on the system of European social dialogue), mentioning:

- the absence from the institutionalised framework of European social dialogue framework (as defined by the TFEU) of important constitutional rights (freedom of association, right to collective bargaining and the right to strike)<sup>12</sup>;
- concerns regarding the status of the participants in European social dialogue (who are “management and labour”, are they representative and do they have full autonomy?);
- the lack of any direct normative effect of the European agreements concluded, leading to the lack of uniform applicability of European collective agreements;
- currently signed autonomous agreements have no clear binding effect;
- insufficient rules in the EU Treaties defining requirements the social partners have to meet in order to be granted the Treaty status of social partners.

---

**12.** Even 2008 explains that despite some of these rights (e.g. right to collective bargaining or arguably also the freedom of association) are stipulated in the TFEU, however, they lack the quality of constitutional rights.

Arguments characterising a Euro-pessimist approach to the possibility of a pan-European industrial relations system emerging (including European collective bargaining) have also been collected by Platzer (Platzer 1998: 86-88). By and large, according to this sceptical group of researchers, ‘the creation of “procedural regulations”, necessary for any system of European industrial relations, is seen as improbable as the “follow-on costs” – at least for those countries which would have to adopt procedures alien to their political context – are largely unknown’ (Platzer 1998: 87; see also Windolf 1992).

When discussing the probability of or obstacles to the development of European collective bargaining the spotlight is often put on the actors. Advocates of a transnational system of industrial relations often assume that such a system ‘at sectoral and supra-national level require[s] capable European transnational actors on both sides of industry’ (Platzer 1998: 99). Kohler-Koch (1992: 81) and Platzer (1998: 100) point out that the 4 levels of transnational societal actors<sup>13</sup> have not however been sufficiently investigated, especially with regard to the development of transnationalisation processes in their organisations, due to an inadequate systematic-comparative perspective on their developments. Referring to the integration theory of institutionalism, Platzer (1998: 100) argues that the development of actors is a corollary to the gradual intensification of European integration processes and the emergence of its specific organisations and frameworks<sup>14</sup>, including in particular the creation of the European Single Market. In the wake of these steps various societal groups, including trade unions and employers, are seen to have developed relevant strategies and institutions allowing them to face the new challenges. Therefore, even though the development of supra-national societal actors (supranational representative organisations of ‘capital’ and ‘labour’) seems the *sine qua non* condition, it is not sufficient for the emergence of TCB (ibid; see also the above section: ‘Roots of transnationalisation of collective

- 
13. The 4 levels are: 1) multi-industry European confederations (ETUC, UNICE, CEEP); 2) European branch and sectoral organisations (EIFs and sectoral employers’ organisations); 3) the interregional level; 4) transnational companies and groups in Europe (see: Platzer 1998: 104). One should also bear in mind that trade union and employer organisations on the various levels differ in terms of degree of advancement (see e.g. ETUC 1996: 2).
  14. In fact, on the employers’ part such institutional forms of supranational representative organisations do not yet exist (Platzer 1998: 105).



bargaining’). Based on the characteristics of European social dialogue which came into existence ‘by a set of specific interactions between “autonomous” transnational-societal, intergovernmental and supranational factors’ (Platzer 1998: 99) it is claimed that with regard to TCB the absence of a ‘supranational state actor’ could rule out the development of supranational industrial relations, including collective bargaining (ibid). This pessimistic view seems however not to take account of the existence and powers of the European Commission which is in a position to adopt the role of the ‘supranational state actor’, and secondly, of the possible changes in the EU Treaties that facilitated the necessary institutional frameworks (e.g. the Maastricht Social Protocol; ibid; Ojeda Aviles 2004: 430).

By analogy to the success factors promoting the development of ESD it is not the European Commission alone but the work of EU institutions at large, combined with the establishment of a structured and representative bipartite body (Ales *et al.* 2006: 15), that seems decisive for establishing an institutional framework for TCB. Should a decision be taken not to develop an institutional framework for TCB transcending the current voluntarism of the actors, there is a chance of long-term inertia setting in:

‘(...) as far as the binding effect of “agreements” reached under such procedure and the impact on working conditions, sectoral social dialogue still depends either on the initiative of EU institutions or on Social Partners’ action at national level. In our opinion, these conditions can hamper the further development of European sectoral social dialogue in the view of: (a) assuming an autonomous relevance from national collective bargaining or EU institutions; (b) guaranteeing a direct and homogeneous impact of “agreements” on working conditions; (c) introducing in SSD Committee bargaining agenda more specific and even “hard” topics’. (Ales *et al.* 2006: 15)

The view that the lack of a European legal framework for TCB is a factor hampering the emergence of full-fledged cross-border bargaining due to missing legal certainty is also supported in one of the conclusions of the Eurofound study (Telljohann *et al.* 2009: 86). In this context the combination of the missing framework and the structural and cultural differences between national systems is pointed out as the main brake to further development of TCB.

Finally there is a set of factors possibly inhibiting the emergence of TCB related to the positions and views held by company management on the prospect of developing this new layer of negotiations. A series of workshops jointly organised by BusinessEurope and the ILO showed that a significant number of companies held the view that TCAs were not useful or not the right option for them (ITC 2010: 11). The main reason reported involved the risks and ambiguities surrounding such agreements, a concern shared among those who already have agreements.

## 10. Prospects for EU-level collective bargaining

The question about the prospects for TCB is probably one of the most important ones, as it takes into account a myriad of factors discussed above (incentives, motives, policies and strategies of the stakeholders) and incites readers to ponder whether the paradigm shift we are considering here is real or rather only an academic debate.

Looking at the future of TCB it seems important to emphasise that, 'since the conclusion of IFAs requires the existence and interplay of a whole range of favourable company-specific factors, the prospects for a quantitative spread of IFAs seem to be limited' (Telljohann *et al.* 2009: 86). The question is whether it is going to be the quantity of IFAs, EFAs and/or similar transnational company agreements that will define the moment when one can speak of true TCB. On the other hand, as far as quality is concerned, Marginson and Sisson (1998) present a rather sceptical view, arguing that

'These emerging forms of European-level collective bargaining are unlikely to lead, in the immediate future, to the conclusion of European collective agreements determining pay and other substantive conditions of the kind associated with the normative contracts of sector agreements in most individual countries. Rather they are creating what might best be described as 'virtual collective bargaining'. The term is used to cover two main processes. In one, the conclusion of 'joint opinions' or 'framework agreements' at European multi-sector, sector and Euro-company levels establishes parameters and objectives within which negotiators at subsidiary levels in individual countries (national, sector and enterprise) are expected or required to operate. Certain minimum conditions may also be specified in 'framework agreements'.

In the other, ‘arms length’ bargaining, employers and union representatives do not negotiate face-to-face at European level, but the outcomes of sector and enterprise bargaining are increasingly anticipated and co-ordinated across countries.’

Before providing a reply based on the qualitative determinants, Platzer (1998: 95 ff) posed three questions, considered fundamental to the emergence of supranational collective negotiations:

‘1) Will a trans- or supranational need for regulation arise to complement, harmonise or, in some fields in the longer term, replace national industrial relations regulatory mechanisms? If so, at what stage of integration of factor markets and at what degree of macroeconomic and monetary interdependence?

2) Do the actors have an interest in establishing such regulations? If so, are they organisationally and politically able to agree corresponding substantive regulations at supra- or inter-state level or, in a more difficult process, establish procedural rules?

3) Must a certain degree of ‘political integration’, a ‘positive merging of sovereignty’, exist in the EU, and how must ‘functional scope’ and ‘institutional capacities’ be shaped and developed in order to structure and foster the development of transnational industrial relations (...)?’

Interestingly, even though not directly inspired by the above questions, other researchers came up with answers. Ojeda Aviles (2004) claimed for example that ‘with the SPA [Social Policy Agreement], we already have all the necessary ingredients for European collective agreements to be made’ (ibid: 431).

Platzer (1998: 97) presumed that there would be two processes relevant for developing transnational industrial relations:

1) In the sphere of product market interests, the competitive dynamics of the Single Market (and globalisation) which can promote coincidences of interests between ‘capital’ and ‘labour’ (‘productivity coalitions’) in various formats (workplace, regional, sectoral or national);

- 2) In the sphere of social and employment policy interests there would be a trend towards a common set of trade union problems: ‘identical’ (requiring the cross-border synchronisation of actions) and ‘common’ (requiring supranational solutions).

The above differentiation might indeed explain today’s twofold approach of the unions, with the EMF for instance pursuing the coordination approach and other unions (slowly) becoming convinced of the advantages and necessity of the supranational solution (TCB).

Platzer (1998: 110) points out that the Euro-optimist approach, fuelled by EU developments in the 1990s, provided a more favourable environment for the creation of transnational industrial relations. The initial impulse was provided by the Maastricht Social Protocol (Art. 4) facilitating two options<sup>15</sup> for concluding and implementing EU-level transnational agreements between the social partners. Platzer argues that such agreements could also, in theory, regulate pay arrangements on an EU scale. The second possibility was seen in agreements between the social partners instigating the adoption of new EU legislation by the Council of Ministers resulting in agreements with *erga omnes* effect, i.e. binding also for third parties.

A further interesting analysis looked at the cost the EU would incur through not coming up with a framework for TCB (apart from the above-mentioned institutional inertia; see the previous section). Such an analysis of prospects, the benefits of engagement and the costs of non-engagement for both unions and MNCs from a game-theory point of view was conducted by Cooke (2001).

---

15. “Paragraphs 1 and 2 of Article 4 of the Agreement on Social Policy in the Maastricht Treaty provided two paths through which the employers and trade unions at European level can implement agreements concluded between them. Under Paragraph 1, agreements can be concluded between the European social partners which could, in theory, include pay agreements with Europe-wide validity. (...) By contrast, the procedure under Paragraph 2 has an entirely novel character. This allows for the possibility, on a defined set of issues, for agreements between the two sides to pass into social legislation. The prerequisite is a decision within the Council of Ministers, which then leads to the agreement becoming binding *erga omnes* – i.e. on third parties who are not members of signatory organisations” (Platzer 1998: 110).

Generally speaking, a moderate assessment rating of developments, both in the 1990s as well as in the following decade, seemed to be the most relevant approach: TCB as a process is certainly worthy of note, '[h]owever we should guard against any overly Euro-optimistic extrapolation of current trends' (Platzer 1998: 115). We seem to currently be in a transitory phase with complex dynamics and contradictory developments taking place, such as globalisation and the decentralisation of economic and employment processes on the one hand, and an erosion or supplanting of traditional collective bargaining in some countries and a general exodus from collective organisations (ibid).

Marginson and Sisson (1998: 5) point out that the emergence of TCB does not necessarily have to be the result of any conflict between national and supranational levels, despite the debate being traditionally concentrated around these two camps. It may even become an unavoidable survival strategy for trade unions, forced to adapt to ever-deepening EU integration.<sup>16</sup>

They found this conceptualisation (competence and conflict between national systems and pressures from a supranational, EU level) ill-founded, arguing that IR in Europe would be characterised by increasing diversification (within rather than between national systems) and convergence at the same time (Marginson and Sisson 1998: 5). According to them such convergence will 'stem from the process of "virtual" collective bargaining at European level, in which developments at Euro-company level are likely to be to the fore.'<sup>17</sup> It seems that this

---

**16.** Ibid: 'Much of the debate about developments in European-level collective bargaining posits a diverse set of internally homogenous national systems in potential conflict with convergent pressures deriving from economic and political integration within the EU, and the accompanying growth in the role and influence of supranational actors and institutions (Due et al. 1991). In analysing the counter play between these two sets of forces, commentators have tended to underline both the durability of existing national systems of industrial relations and the imperative of establishing transnational actors with the authority, resources and capabilities to deliver European-level sector agreements mirroring those characteristic of many national systems (Jacobi 1995:50). European Monetary Union (EMU) is seen as a defining moment in this process. In the words of Keller (1995:124), "the development of a related [i.e. European] structure for collective bargaining will become necessary and unavoidable". Otherwise, trade unions face the prospect of "ruinous cross-border wage competition" (Jacobi 1996:243) as employers engage in 'regime shopping' to secure the lowest cost production.'

**17.** Marginson and Sisson further sketched their prognosis: 'Negotiations will continue to take place through existing sector and enterprise structures in individual countries,

prediction, made in the late 1990s, has been corroborated by the practice in the 2000s and continues to be the mainstream approach to TCB in Europe. Marginson and Sisson also predicted that the trends towards diversification and convergence, ‘far from being incompatible, are mutually reinforcing’; leading to a situation where ‘The more the emphasis shifts from national to organisation-based systems, the more demand there is likely to be for some form of regulation at the EU level, and vice versa’ (Marginson and Sisson 1998: 5).

Other researchers go even further, finding that it is not only about a conflict between organisations on different levels, but that the national trade unions will not be able to sustain their positions and influence if they do not move their strategies, interests and actions to the European dimension (Schiek 2008; Waddington 2005).

Despite the mutual influence seen between the shift from national to organisation-based systems and the need for EU regulation, there remains an important question-mark over the future development of TCB. As pointed out by Stevis (2010: 12), the link between the strength and shape of social regulations within ‘coordinated capitalism’ has an impact on the frequency of signing IFAs. Consequently, since signing IFAs is associated with a particular kind of capitalism and industrial relations, a valid question is whether this strategy (and by implication the whole idea of developing supranational collective bargaining systems) ‘can survive the weakening of these national institutional arrangements due to the more liberal attitude of the European Union, or their demise, due to global liberalization?’ (ibid).

## **11. Future legal framework for TCB**

The scope and gathering momentum of TCB makes the question of regulation in this area impossible to ignore.

---

but within the context of (1) ‘joint opinions’ and/or ‘framework agreements’ at EU and Euro-company levels rather than normative contracts and (2) a process of ‘arms-length’ bargaining, where the parties’ positions are increasingly co-ordinated across European borders. As a result some sub-national arrangements will “appear to have more in common with their equivalents in other countries” (Locke 1992: 230)’ (Marginson and Sisson 1998: 5).

The most important questions are:

### 11.1 ... whether there is any legal framework in place now regulating transnational collective negotiations and agreements?

With regard to this first question researchers' views vary. Even (2008: 28) finds that 'At EU level the European social partners have already been given the chance to conclude European collective agreements within the so-called European social dialogue' and considers the latter to be a form of transnational collective bargaining. Moreover, Even argues (2008: 29) that the existing 'Transnational collective labour agreements could be regarded as collective labour agreements that cover (have force in) more than one jurisdiction'. At the same time Even maintains that these agreements are not truly European ones, because they do not have Community, but only national effects. Consequently they are "national" transnational collective labour agreements' which 'satisfy the national requirements that collective labour agreements need to satisfy for the country concerned, having a scope of application covering several jurisdictions.' (ibid). Even argues that this definition of the current situation has only been forged for practical purposes and that from a purely legal stance transnational collective labour agreements do not yet exist<sup>18</sup> as the present agreements do not have the necessary Community-wide effect. Therefore Even argues that a *new* EU legal framework is needed.

### 11.2 Is there a need for a legal framework one? Advantages of TCB

One point of departure for answering this question could be the statement by Even (2008: 231) that current company-level agreements represent a 'national' transnational form of collective bargaining,

---

**18.** Even argues: 'From a comparative law perspective, a "collective labour agreement" is simply not an unambiguous phenomenon'. See A.A.H. van Hoek, *Internationale mobiliteit van werknemers. Een onderzoek naar de interactie tussen arbeidsrecht, EG-recht en IPR aan de hand van de Detacheringsrichtlijn [International mobility of employees. Research into the interaction between employment law, EU law and PIL [private international law] in connection with the Posted Workers Directive]*, SDU, The Hague, 2000, page 487.

implying the lack of a truly supranational system with direct, uniform applicability. Other authors point out that leaving TCB unregulated will not only represent a ‘missed opportunity’, but that it is indeed of crucial importance for the interests of the EU, as further uncertainty regarding cross-border negotiations poses a ‘danger of distortion of competition’ which ‘has been, since the very beginning, a common ground for intervention by the EEC in the social field’ (Ales *et al.* 2006: 34). Further, more specific grounds for the introduction of a legal framework are listed:

- a. the lack of a legal status for transnational collective “agreements”, causing them to exist in a legal void;
- b. the unclear status of legal sources on which transnational tools rely;
- c. a variety of negotiating agents and the consequent ambiguity amplified by the lack of a legally binding and thus effective instrument for concluding transnational ‘agreements’ and/or by their questionable legitimacy to conclude agreements;
- d. the plurality of TCB actors giving rise to unclear relationships among decision-making levels;
- e. the mandate given by the EU Member States in Art. 28 of the Nice Charter of Fundamental Rights to actors on the most appropriate level (establishment of collective bargaining on any appropriate level).

The above arguments by Ales *et al.* can be complemented with those brought up by Even (2008: 260). Even claims that currently agreements are being signed despite the lack of a legal framework, stating that this has numerous drawbacks, since:

- ‘important constitutional rights (freedom of association, right to collective bargaining and the right to strike) are not defined;
- the participants in European social dialogue (who are “management and labour”, are they representative, and do they have full autonomy?) remain unidentified;
- there is a lack of direct normative effect of the European agreements reached, leading to the lack of uniform applicability of European collective labour agreements;
- the binding effect of any agreement reached is unclear;
- there are insufficient rules regarding the requirements the European social partners have to meet;



- potential difficulties exist with regard to the implementation of agreements;
- difficulties concerning the effects, follow-up and enforcement of any agreement (Even 2008 260-261).

The above-mentioned current problems allow the conclusion to be drawn that: ‘a new system enabling genuine transnational collective bargaining is necessary, when such transnational bargaining indeed is pursued.’ (Even 2008: 261)

Ales (Ales *et al.* 2006: 33) concludes that both at the level of sectoral social dialogue and at company level ‘the existing experiences of transnational collective negotiations (...) illustrate that there is a lack of a specific and comprehensive legal framework as far as: (a) the procedure; (b) the negotiating agents; (c) the conditions for the binding effect of concluded agreements’.

Apart from the disadvantageous factors identified by Ales (Ales *et al.* 2006), Even (2008: 238 ff) mentions two sets of clear advantages favouring the adoption of a new framework for TCB: institutional advantages, and advantages for the parties involved and their members. Institutional advantages stem from the fact that TCB may:

- (i) prove useful in cases where Community institutions are unable to come to decisions;
- (ii) help to overcome regulatory shortcomings;
- (iii) help to overcome the democratic deficit;
- (iv) prove to be an important tool for proper European Governance;
- (v) be a proper method for horizontal subsidiarity.

According to Even (*ibid*), advantages for the parties involved are:

- a) providing for a tool to respond to the challenge of the Europeanisation and internationalisation of markets and corporate strategies as well as making better use of European labour resources (e.g. increased employee mobility);
- b) preventing social dumping and maintaining a social Europe;
- c) institutionalised TCB would facilitate coordination of pay, financial and social policies in Europe, which, in the context of delegating fiscal policies to the EU level, would be an important contribution to

- the EU's overall economic stability (in addition to Even 2008, see also Coen 1998: 69-70 and: Lecher and Platzer 1998b: 7-8);
- d) the possibility to tackle “common” problems at the (most) appropriate level;

Prospective advantages for multinational companies (Even 2008: 250 ff):

- ‘creating corporate identity / image;
- tailor-made solutions for problems at company-level
- international familiar structures;
- equal level of health and safety protection;
- simplifying transnational restructuring processes;
- consistent and equal regime [ or framework of rights and obligations resulting from collective agreements];
- introducing binding European Manuals;
- confidence-building / motivating employees.’

Similarly, ‘the lack of a *structured transnational response* by EC Law represents a missed opportunity in view of developing a reliable and uniform regulation of relevant social issues at the *appropriate* level (transnational in our case)’ and could be more effectively dealt with if supported by respective EC directives (Ales *et al.* 2006: 32). Furthermore, it is rightly argued (Even 2008: 654) that the EU principle of subsidiarity is not only a limitation of the Community’s right to regulate, but can also serve as an argument in favour of legislation in areas that are beyond a single Member State’s power (Even 2008: 654). Therefore this principle of (vertical) subsidiarity (Art. 5 TEU) can be perfectly applied in favour of establishing an EU legal framework for TCB, as the latter has clearly a transnational dimension thus outmatching a single Member State’s power and, consequently, calls for an EU intervention (*ibid.*).

However, problems were seen with regard to vertical subsidiarity. Both Even (Even 2008: 655) and Ales (Ales *et al.* 2006: 35) argue that in this respect it is the EU that needs to introduce legislation on TCB, as – even at EU level – the social partners lack the necessary competence to codify this area and introduce any act that would solve the problem. This view is not shared by Schiek (2005) who suggested that the Social Partners could perform this role.

### 11.3 Disadvantages of a legal framework for TCB

Even sees the introduction of a legal framework for TCB as possibly bringing disadvantages (Even 2008: 252). One of the most important ones is that CB has the intrinsic effect of artificially inflating wages, leading to diminishing demand for labour and higher costs for goods and services. This triggers a vicious circle, dampening consumption and affecting production and its demand for labour. In this way some claim that:

‘Seeing EC-level collective bargaining which will ultimately lead to common conditions throughout the EC as a goal is a dangerous illusion. It will hamper decision-making, remove competition, introduce rigidities and ultimately destroy jobs. It is the success of the market, or rather our success in competing in it, that has provided the living standards we now have in the EC. That has been achieved because of, not despite, diversity.’ (Reid 1998: 125).

Amongst the more sceptical views it is also being mentioned that a series of ‘practical arguments’ against TCB exist (Even 2008: 255; originally raised by Platzer and Keller 2003: 86; Voynett-Fourboul 2001: 346):

- ‘differences in the organization, ideology and interests of Europe’s national trade unions;
- limits of international solidarity of workers if strikes are needed;
- trade union weaknesses in establishing an autonomous transnational system of industrial relations;
- a lack of interest on the part of employers and employer organisations;
- the risks and costs of coming to European collective bargaining; and
- differences in the legal systems of the different countries’(Even 2008: 255).

Another potential objection against collective bargaining in general – a problem which may even be clearer at a transnational rather than a national level - is the declining level social partner representativity (ibid 253).

At the same time researchers argue that, without a transparent framework in place, further developments in this area are not possible to envisage (Ales *et al.* 2006: 33). This in turn may result in legal uncertainty, possibly with serious repercussions for labour (Jagodzinski 2007), especially if the entire system of TCB continues to be based solely on voluntarism. Leaving this domain an unregulated lacuna is likely to hamper further developments of TCB as an autonomous layer of collective negotiations in Europe (as compared to the national level) and will jeopardise the homogeneous impact of “agreements” signed at transnational level (Ales *et al.* 2006: 34).

Alternatively, the Europeanisation of CB, in the sense of the cross-border coordination of CB, is being pointed to as a substitute for TCB (Blank 1998: 166). The main difficulty in establishing TCB and an argument in favour of CB in Europe is that collective negotiations have always been a paramount national matter of trade unions. Thus it would be difficult for them to transfer their powers to European-level confederations. Yet it is not just unions facing such difficulties and unable to decide whether to become involved in and support TCB: UNICE has a similar negative track record on TCB (Blank 1998: 166).

#### 11.4 The shape of a future legal framework for TCB

Even if the necessity of introducing some form of a framework regulating TCB is a view rather commonly shared by experts, opinions on the specific profile of such a framework diverge.

Before presenting concrete concepts, it seems worthwhile quoting one general remark emphasizing the need for a holistic, rather than a case-by-case approach. To influence macroeconomic variables and policies, collective bargaining must encompass monetary, environmental, energy and transport policy (Mahnkopf and Altvater 1995: 114). One can interpret this statement as an argument in favour of a true *system* of European collective bargaining, including links to other policy areas, rather than just a single act regulating specific questions, e.g. the applicability or direct effect of transnational agreements.

In general, two possible scenarios are conceivable: a) no legal framework for TCB and b) adoption of a legal framework (Dorssemont and Dufresne

2011: 267 ff.). As far as the latter is concerned, when discussing the future shape of a framework for TCB two main avenues can be distinguished: a) shaping a new framework for TCB as a supranational system *sui generi*; or b) modelling the future framework for TCB on existing national CB systems.

The most systematic and structured concepts of a future legal framework for TCB up to now have come from *i*) an expert group coordinated by Ales (Ales *et al.* 2006), presenting the ‘supranational solution’, *ii*) from Even (2008), favouring the national CB-based models, and *iii*) from Mathieu Hecquet (2008), the most debatable one<sup>19</sup> supporting the development of autonomous company-based social dialogue in multinational enterprises and groups of enterprises excluding the role of European-level sectoral trade union federations (and including a ready-to-sign draft of a directive consisting of 15 articles).

According to Even (2008: 238) ‘a new system of transnational collective bargaining should not be based on a new form of European social dialogue but instead on “classical” collective bargaining as in place in the Member States’. Accordingly, the future European legal framework for TCB should be based on three classical principles:

- a. freedom of association of employer and employee representative organisations to join the transnational collective agreement;
- b. the right to collective bargaining and autonomy of the social partners guaranteeing the right to shape the contractual arrangements freely;
- c. the right of employee organisations to persuade/threaten the employers into proper arrangements by threatening them with collective action (here a right to European-level collective action would probably be required) (Even 2008: 641).

In this respect it is suggested that what is probably necessary is not just a single piece of legislation on TCB but an entire system of regulations including the above-mentioned classical principles related to national-level collective bargaining (Even 2008: 194 ff). The new framework would also need to be precise about what constitutes a collective agreement and what topics can be covered by it. According to Even

---

**19.** For an overview and evaluation of these three proposals see Dorsemont and Dufresne 2011.

(2008) the aim of the framework would be to ensure that ‘all Member States recognise and apply transnational collective labour agreements on equal footing’ (ibid.: 643).

The expert group led by E. Ales proposes a different concept based on the establishment of joint negotiating bodies within which transnational collective agreements could be concluded (Ales *et al.* 2006: 36). Such agreements ‘would not themselves have a legally binding effect, but acquire such an effect indirectly through their implementation by managerial decisions adopted by all national companies in the relevant sector. These managerial decisions should be submitted to a bilateral monitoring system at sectoral level and be recognized as legally binding in each EU Member State according to their law or practices.’ (ibid.). This vision of a future framework for TCB is criticised by Even (2008: 271 ff) due to representativity issues of the existing parties to ESD<sup>20</sup>, risks regarding the implementation of agreements based on managerial discretion<sup>21</sup>, and the lack of uniform binding effects, all being at odds with existing national laws and practices. Even points out that a TCB framework in this form would in fact repeat the mistakes currently evident in ESD.

Other proposals argue in favour of a TCB system resembling the classical national CB regimes. For example Blank (1998: 166-167) calls for a system based on the classical rights and procedures in place in Member States (e.g. Germany):

‘If one looks at the more long-term prospect of cross-border European collective bargaining with the aim of cross-border agreements, it is evident that one indispensable precondition is the anchoring of collective

---

**20.** Even (2008 271 ff): ‘the proposals “copy” many of the flaws of institutionalised collective bargaining into the new system of bargaining in joint negotiating bodies. The joint negotiating bodies are comprised of the same European social partners that are active in the European social dialogue. (...) This choice is therefore, in my opinion, unfortunate (...). This is especially the case as all representativity issues that have arisen in the European social dialogue are even more “painfully” present in the proposed system than in the bargaining system within the European social dialogue. (...)’

**21.** Even (2008 271 ff): ‘Implementing collective labour agreements by managerial decision is in itself rather peculiar. Why should management have the sole power to implement a collective agreement which is the fruit of bargaining between two parties? To some extent, it negates the collective element of the agreement reached. The probable reason for this system is to circumvent private international law aspects.’

rights at European level. This includes freedom of association, the right to collective bargaining and the right to strike, along with a legal framework – comparable with the German Collective Agreements Act (Tarifvertragsgesetz) – to establish the way in which collective agreements are to be implemented.’

Bercusson (1999: 164-165) is a further proponent of European collective bargaining in line with Member State traditions. In Bercusson’s view, the European social dialogue was developed as a consequence of the failure of the legislative process to develop EC labour law. Therefore: ‘European labour law cannot afford to abandon national labour law systems, traditionally rooted also in an industrial relations model.’ (ibid).

These two sets of visions for a future TCB framework vary significantly. They are based on different points of departure (national collective bargaining vs. attempts of transnational collective agreements), propose different instruments of codification (regulation vs. directive), and strive for different goals (collective agreements with a direct, uniform applicability in all EU Member States vs. collective agreements implemented separately in each Member State). This last element seems the most significant discrepancy: what the proposal put forward by Ales sees as the final outcome of TCB codification is criticised by Even as a “national” transnational collective bargaining’.

## References

- Ales, E., S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdes Dal-Re (2006) *Transnational collective bargaining: past, present and future. Final report*, Brussels: European Commission.
- Arrowsmith, J. and P. Marginson (2006) ‘The European cross-border dimension to collective bargaining in multinational companies’, *European Journal of Industrial Relations*, 12 (3), 245-266.
- Arrowsmith, J., P. Marginson and K. Sisson (2003) ‘Externalisation and internalisation of collective bargaining in Europe: variation in the role of large companies’, *Industrielle Beziehungen*, 10 (3), 363-392.
- Beaupain, T., S. Jefferys and R. Annand (2003) ‘Early Days: Belgian and UK experiences of European Works Councils’, in W.N. Cooke

- (ed.) *Multinational companies and global human resources strategies*, Westport: Quorum Books, 329-346.
- Bercusson, B. (1999) 'Democratic legitimacy and European labour law', *Industrial Law Journal*, 28 (2), 153-170.
- Béthoux, E. (2008) *Transnational collective bargaining in Europe: development and issues at company level*, working document prepared for the Europe et Société symposium 'Transnational collective bargaining in Europe', Paris, 5-6 February 2008.
- Bieling, H-J. and T. Schulten (2001) 'Competitive restructuring and industrial relations within the European Union corporatist involvement and beyond?', WSI Discussion Paper No 99.
- Blank, M. (1998) 'Collective bargaining in the European Union: the standpoint of IG Metall', in W. E. Lecher and H.-W. Platzer (eds.) *European Union - European industrial relations? Global challenges, national developments and transnational dynamics*, London: Routledge, 157-168.
- Blasco, J.G. and A.L. de Val Tena (2004) 'Collective bargaining in Spain', in Comisión Consultativa Nacional de Convenios Colectivos (ed.) *Collective bargaining in Europe*, Madrid: Ministerio de Trabajo y Asuntos Sociales, 275-300.
- Bockmann, B. (1995) 'Das Verhandlungsverfahren nach dem Maastrichter sozialpolitischen Abkommen', in P. Oberender and M. Streit (eds.) *Europas Arbeitsmärkte im Integrationsprozeß*, Baden-Baden: Nomos.
- Bridgord, J. and J. Stirling (1994) *Employee relations in Europe*, Oxford: Blackwell.
- Carley, M. (2001) *Bargaining at European level? Joint texts negotiated by European Works Councils*, Luxembourg: Office for Official Publications of the European Communities.
- Coen, M. (1998) 'The European dimension to collective bargaining post-Maastricht', in W. E. Lecher and H.-W. Platzer (eds.) *European Union - European industrial relations? Global challenges, national developments and transnational dynamics*, London: Routledge, 65-71.
- Cooke, W. N. (2001) 'Exercising power in a prisoner's dilemma: transnational collective bargaining in an era of corporate globalisation?', *Industrial Relations Journal*, 36 (4), 283-302.
- Crook, C. (2005) 'The good company', *The Economist*, 20 January 2005.
- Due, J., J.S. Madsen and C.S. Jensen (1991) 'The social dimension: convergence or diversification of IR in the Single European Market?', *Industrial Relations Journal*, 22 (2), 85-102.



- EIRO (European Industrial Relations Observatory Online) 1998 'European Metalworkers' Federation adopts European coordination rule for national bargaining', German National Report (ID: DE9812283F), December 1998/De, available at: <http://www.eurofound.europa.eu/eiro/1998/12/feature/de9812283f.htm>
- ETUC (1996) *Bilans des négociations sectorielles au niveau européen*, Brussels: ETUC.
- European Commission (1998) Communication from the Commission, *Adapting and promoting the social dialogue at Community level*, COM(1998) 322 final, 20 May 1998, Brussels.
- Even, J. H. (2008) *Transnational collective bargaining in Europe. A proposal for a European regulation on transnational collective bargaining*, Den Haag: Boom Juridische Uitgevers.
- Franklin, D. (2008) 'Just good business', *The Economist*, 17 January 2008.
- Gumbrell-McCormick, R. (2000a) 'Quel internationalisme syndical? Passé, présent, avenir', *Les Temps Modernes*, 607, 178-206.
- Gumbrell-McCormick, R. (2000b) 'Facing new challenges: the International Confederation of Free Trade Unions (1972-1990s)', in A. Carew, M. Dreyfus, G. Van Goethem, R. Gumbrell-McCormick and M. van der Linden (eds.) *International Confederation of Free Trade Unions*, Bern: Peter Lang, 341ation
- Hancké, B. (2000) 'European Works Councils and industrial restructuring in the European motor industry', *European Journal of Industrial Relations*, 6 (1), 35-59.
- Hecquet, M. (2006) PhD Thesis, *Essai sur le dialogue social européen*, Paris: Université Panthéon-Assas.
- Hoffmann, J. et al. (2002) *The Europeanisation of industrial relations in a global perspective: a literature review*, Luxembourg: Office for Official Publication of the European Communities.
- International Training Centre (ITC) (2010) *Key issues for management to consider with regard to Transnational Company Agreements (TCAs). Lessons learned from a series of workshops with and for management representatives*. December 2010, VP 2009 003, Turin: International Training Centre of the International Labour Organization.
- ISO (International Standardization Organisation) (2008) *ISO and social responsibility*, Geneva: ISO.
- Jacobi, O. (1995) 'Der soziale Dialog in der Europäischen Union', in M. Mesch (ed.) *Sozialpartnerschaft und Arbeitsbeziehungen in Europa*, Wien: Manz, 257-287.

- Jagodzinski, R. (2007) 'Involving European works councils in transnational negotiations - a positive functional advance in their operation or trespassing?', *Industrielle Beziehungen*, 14 (4), 316-333.
- Kerckhofs, P. (2006) *European Works Councils. Facts and figures 2006*, Brussels: ETUI-REHS.
- Kohler-Koch, B. (1992) 'Verbände und europäische Integration', in M. Kreile (ed.) *Die Integration Europas*, Opladen: Westdeutscher Verlag.
- Kravaritou, Y. (1970) 'La Convention collective de la société européenne', *Cahiers de droit européen*, 284-305.
- Lecher, W. (1996) 'Supranationale Tarifpolitik ihre Möglichkeiten und Grenzen in der Europäischen Union', *Internationale Politik und Gesellschaft*, 1, 36-46.
- Lecher, W. and H.-W. Platzer (1998b) 'Global trends and the European context', in W. E. Lecher and H.-W. Platzer (eds.) *European Union - European industrial relations? Global challenges, national developments and transnational dynamics*, London: Routledge, 1-17.
- Marginson, P. (2008) *The transnational dimension to collective bargaining in a European context*, Industrial Relations Research Unit, University of Warwick, UK. [http://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/pm\\_-\\_tnceurope.pdf](http://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/pm_-_tnceurope.pdf)
- Marginson, P. and K. Sisson (1996) 'EWCs - Opening the door to European bargaining?', *European Works Councils Bulletin*, Issue 1, 9-11.
- Marginson, P. and K. Sisson (1998) 'European collective bargaining: a virtual prospect?', *Journal of Common Market Studies*, 36 (4), 505-528.
- Marginson, P. and K. Sisson (1998) 'European collective bargaining: a virtual prospect', *Journal of Common Market Studies*, 36 (4), 505-528.
- Marginson, P. and T. Schulten (1999) 'The "Europeanisation" of collective bargaining', *EIROOnline*, Record TN9907201S. <http://www.eiro.eurofound.ie>.
- Martin, A. and G. Ross (2000) 'European integration and the Europeanization of labor', in M. Gordon and L. Turner (eds.) *Transnational cooperation among labor unions*, Ithaca: Cornell University Press, 120-149.
- Meardi, G., P. Marginson, M. Fichter, M. Frybes, M. Stanojevič and A. Tóth (2009) 'The complexity of relocation and the diversity of trade union responses: efficiency-oriented foreign direct investment in Central Europe', *European Journal of Industrial Relations*, 15 (1), 27- 47.

- Moreau, M.-A. (2011) 'The evolution of European social integration under globalisation: some reflections on recent developments', in A. Blackett and C. Lévesque (eds.) *Social regionalism in the global economy*, New York: Routledge, 225-242.
- Müller, T. and S. Rüb (2004) 'Towards internationalisation of labour relations? Global union networks and international framework agreements: status quo and prospects', report for the FES Global Unions Seminar. Unpublished paper.
- Ojeda Avilés, A. (2004) 'Applicability of European collective agreements', in Comisión Consultativa Nacional de Convenios Colectivos (ed.) *Collective bargaining in Europe*, Madrid: Ministerio de Trabajo y Asuntos Sociales, 427-457.
- ORSE (Observatoire de la Responsabilité Sociétale des Entreprises) (2006) Communiqué de presse, *Réaction de l'ORSE vis-à-vis du nouveau standard de mondial de reporting développement durable des entreprises de la Global Reporting Initiative (GRI)*. [http://www.orse.org/reaction\\_de\\_l\\_orse\\_vis\\_a\\_vis\\_du\\_nouveau\\_standard\\_de\\_mondial\\_de\\_reporting\\_developpement\\_durable\\_des\\_entreprises\\_de\\_la\\_global\\_reporting\\_initiative\\_gri-52-26.html](http://www.orse.org/reaction_de_l_orse_vis_a_vis_du_nouveau_standard_de_mondial_de_reporting_developpement_durable_des_entreprises_de_la_global_reporting_initiative_gri-52-26.html)
- Papadakis, K. (ed.) (2008) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: International Labour Organisation.
- Platzer, H-W. (1991) *Gewerkschaftspolitik ohne Grenzen? Die transnationale Zusammenarbeit der Gewerkschaften im Europa der 90er Jahre*, Bonn: Dietz.
- Platzer, H-W. (1992) 'Die Konstituierung europäischer Arbeitsbeziehungen', *WSI-Mitteilungen*, 45, 779-788.
- Platzer, H-W. (1998) 'Industrial relations and European integration: patterns, dynamics and limits of transnationalisation', in W. E. Lecher and H.-W. Platzer (eds.) *European Union - European industrial relations? Global challenges, national developments and transnational dynamics*, London: Routledge, 81-117.
- Platzer, H-W. and B. Keller (2003) *Industrial relations and European integration. Trans- and supranational developments and prospects*, Aldershot: Ashgate.
- Pochet, P., A. Dufresne, C. Degryse and D. Jadot (2003) *Dialogue social sectoriel. Rapport final*, Bruxelles: Observatoire social européen, Contrat VC/2003/0400-SI2.365647.
- Reid, P. (1998) 'Collective bargaining at European level: a sectoral employer's viewpoint', in W. E. Lecher and H.-W. Platzer (eds.) *European*

- Union - European industrial relations? Global challenges, national developments and transnational dynamics*, London: Routledge, 121-132.
- Rondinelli, D. (2007) 'Globalization of sustainable development: principles and practices in transnational corporations', *Multinational Business Review*, 15 (1), 1-24.
- Rüb, S., H.-W. Platzer and T. Müller (2011) *Transnationale Unternehmensvereinbarungen. Zur Neuordnung der Arbeitsbeziehungen in Europa*, Düsseldorf: Hans Böckler Stiftung.
- Ruggie, J.G. (2004) 'Reconstituting the global public domain - Issues, actors, and practices', *European Journal of International Relations*, 10 (4), 499-531.
- Schiek, D. (2008) 'Transnational collective labour agreements in Europe and at European level: further readings of Article 139 EC', in M. Rönmar (ed.) *EU industrial relations v. national industrial relations comparative and interdisciplinary perspectives*, The Hague: Kluwer Law International, 83-104.
- Schiek, D. (2005) 'Autonomous collective agreements as a regulatory device in European labour law: how to read Article 139 EC', *Industrial Law Journal*, 34 (1), 23-56.
- Schömann, I., A. Sobczak, E. Voss and P. Wilke (2008) *Codes of conduct and international framework agreements: new forms of governance at company level*, Luxembourg: Office for Official Publications of the European Communities.
- Stavis, D. (2010) 'International framework agreements and global social dialogue. Parameters and prospects', Employment Working Paper no 47, Geneva: ILO.
- Stavis, D. and T. Boswell (2007) 'International framework agreements: opportunities and challenges for global unionism', in K. Bronfenbrenner (ed.) *Global unions: challenging transnational capital through cross-border campaigns*, Ithaca: Cornell University Press, 174-194.
- Streeck, W. (1992) *Social institutions and economic performance studies of industrial relations in advanced capitalist economies*, London: Sage.
- Streeck, W. (1999) 'Entscheidung durch Nichtentscheidung zur Logik transnationalen Interessenpolitik', in W. Streeck, *Korporatismus in Deutschland: zwischen Nationalstaat und Europäischer Union*, Frankfurt /Main: Campus, 112-123.

- Teague, J. and P. Grahl (1992) 'Integration theory and European labour markets', *British Journal of Industrial Relations*, 30 (4), 515-527.
- Telljohann, V., I. da Costa, T. Müller, U. Rehfeldt and R. Zimmer (2009) *European and international framework agreements. Practical experiences and strategic approaches*, Luxembourg: Office for Official Publications of the European Communities.
- Traxler, F. (1995) 'Farewell to labour market associations? Organized versus disorganized decentralization as a map for industrial relations', in C. Crouch and F. Traxler (eds.) *Organized industrial relations in Europe: what future*, Aldershot: Avebury, 23-44
- Traxler, F. (1995) 'Entwicklungstendenzen in den Arbeitsbeziehungen Westeuropas. Auf dem Weg zur Konvergenz', in M. Mesch (ed.) *Sozialpartnerschaft und Arbeitsbeziehungen in Europa*, Vienna: Manz.
- Traxler, F. and B. Woitech (2000) 'Transnational investment and national labour market regimes: a case of "Regime Shopping"?', *European Journal of Industrial Relations*, 6 (2), 141-159.
- Turner, L. (1993) 'Beyond national unionism? Cross-national labour collaboration in the European Community', Discussion Paper 93-203, Berlin Wissenschaftszentrum für Sozialforschung.
- Utting, P. (2002) *Regulating business via multistakeholder initiatives: a preliminary assessment*, Geneva: United Nations Research Institute for Social Development.
- van Roozendaal, G. (2002) *Trade unions and global governance: the debate on the social clause*, London: Continuum.
- Voynett-Fourboul, C. (2001) 'European collective bargaining, new prospects or much ado about little', *International Journal of Comparative Labour Law and Industrial Relations*, 17 (3), 345-370.
- Waddington, J. (2005) 'Trade unions and the defence of the European social model', *Industrial Relations Journal*, 36 (6), 518-540.
- Walsh, J., G. Zappala and W. Brown (1995) 'European integration and the pay policies of British multinationals', *Industrial Relations Journal*, 26 (2), 84-96.
- Windolf, P. (1992) 'Mitbestimmung und 'corporate control' in der Europäischen Gemeinschaft', in M. Kreile (ed.) *Die Integration Europas*, Opladen: Westdeutscher Verlag, 120-142.

## Chapter 2

# Transnational collective bargaining in national systems of industrial relations

Vera Glassner

### Introduction

With collective bargaining increasingly being conducted against a background of market internationalisation, the role of collective bargaining as a mechanism for determining wages and working conditions within the scope of a single country has changed. The key function of collective bargaining was to remove inter-company competition from wage-setting, using instead multi-employer bargaining, i.e. bargaining between labour unions and employers' associations at national and/or sectoral level. Market internationalisation and the increased international mobility of (large) companies have however rendered the 'cartellisation function' of wage bargaining obsolete (Traxler 1998: 208). Collective bargaining by national labour-market interest organisations remains largely concerned with a national bargaining agenda despite growing Europeanisation and transnationalisation in the economic sphere in such forms as the Single European Market, the European Monetary Union (EMU), and the globalisation of financial markets. At the same time, observers agree that economic integration has become de-coupled from social integration, with growing tension between market-driven transnationalisation and the development of a social dimension within the EU, conceived as 'asymmetric integration' (Scharpf 1996).

Two main factors account for the growing asymmetry of Europeanisation. First, EU enlargement has not only increased disparities in terms of wages and working standards but has also reconfigured EU industrial and labour relations. A 'polarisation' of industrial relations in Europe has emerged, with multi-employer bargaining systems remaining predominant in the 'old' EU15 (with the exception of the UK), while

single-employer bargaining prevails in the ‘new’ Central and Eastern European Member States (with the exception of Slovenia) (European Commission 2006 and 2008). This is of particular relevance as multi-employer bargaining and the consequent high collective bargaining coverage rates (i.e. the share of workers in the total labour force covered by a collective agreement) are the most important features of an inclusive industrial relations system. This contrasts with an exclusive system in which single-employer bargaining predominates, leaving a large part of the labour force not covered by collective agreements (Traxler 1998, European Commission 2006 and 2011). Second, decisions of the European Court of Justice, including the notorious *Laval* and *Viking* cases, are tilting the balance in favour of market freedoms and against social rights, enhancing the interests of multinational companies and capital owners at the expense of organised labour (Dølvik and Visser 2009). Inter-governmental decision-making processes aiming at ‘positive’, i.e. ‘market-correcting’, integration and the creation of a legal framework for the Internal Market are however most often blocked by majority decision-making rules and diverging national interests (Scharpf 2010).

The Europeanisation of industrial and labour relations has taken the form of an uneven integration process, resulting in the emergence of a multi-level system of various arenas of action for European and national social partners (see for instance Glassner and Pochet 2011). The rise of multinational companies (MNCs) and the establishment of transnational employee representation bodies such as European Works Councils (EWCs) have increased the incidence of negotiations at transnational company level. However, no fully integrated system of European industrial relations with different levels of strongly interlinked actions has yet emerged (Keller and Platzer 2003; Marginson and Sisson 2006).

Leading labour and business organisations engage in ‘European’ social dialogue at cross-industry, multi-sectoral and sectoral levels, coming up with European framework agreements, autonomous agreements or joint recommendations and opinions. Social dialogue at cross-industry level has however lost much of its initial impetus, drawing to a standstill in recent years (Degryse 2011). Sectoral social dialogue, likewise, has developed unevenly, despite the increasing number of social dialogue

committees.<sup>1</sup> Compared to European social dialogue at cross-sectoral level<sup>2</sup>, European sectoral social dialogue is considered as a ‘soft’ regulatory mechanism resulting mainly (with some exceptions<sup>3</sup>) in non-binding agreements, declarations, codes of conduct and guidelines.<sup>4</sup> While more binding agreements have been signed in the second half of the 2000s (Degryse and Pochet 2011), the effectiveness of European social dialogue at both the intersectoral and sectoral levels as an instrument for regulating wages and working conditions is, generally speaking, rather limited (Keller and Platzer 2003; Marginson 2005). More important though is the fact that wage setting is formally excluded from European social dialogue as wage bargaining is an exclusive competence of national social partners.

In the European Monetary Union (EMU), with the possibility to increase national competitiveness by currency devaluations abandoned in the Eurozone and the adoption of the Stability and Growth Pact that puts limits on expansive fiscal and budgetary policies, labour costs became an important parameter for adjusting economic imbalances (De Grauwe 2009). This in turn fuelled trade union fears that competitive pressures on wages and working conditions would intensify. To avoid competitive wage setting and social dumping, trade unions across Europe, both at the intersectoral<sup>5</sup> and sectoral level, have begun to coordinate their bargaining policies transnationally in view of the EMU. The metal sector has been at the forefront of coordinating collective bargaining policies across borders (Gollbach and Schulten 2000).

- 
1. Up till the beginning of 2011, 40 European sectoral dialogue committees has been created since 1998, the year when ‘European’ structures for sectoral social dialogue were formally established.
  2. The framework agreements on parental leave (1996), part-time work (1997) and fixed-term contracts (1999) were adopted as Council directives.
  3. Exceptions are the working time agreements for seafarers and in the railway transport sector (1998) and the civil aviation sector (2000), together with the agreement on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector (2005), all of which were adopted as Council directives.
  4. For an overview of developments in European social dialogue see chapter 3.
  5. Unions in Belgium for instance responded to the introduction of the law on the ‘Promotion of Employment and the Preventive Safeguarding of Competitiveness’ that stipulated that average wage increases in Belgium should not exceed those in the neighbouring countries, by setting up the so-called ‘Doorn Group’, consisting of union confederations from Belgium, the Netherlands, Luxembourg and Germany. In the ‘Doorn Declaration’ (1997) unions agreed to promote wage increases offsetting price increases and ensuring the participation of workers in productivity gains.



Other European Trade Union Federations (ETUFs) have also established structures for the cross-border exchange of information on wages and other issues such as working time and training as well as such wage-setting instruments as ‘wage guidelines’ that stipulate wage growth above price increases and in line with productivity developments (Dufresne 2002; Dufresne and Mermet 2002; Leisink 2002; Schulten 2003; Marginson 2005; Glassner 2009; Glassner and Pochet 2011).

At the level of multinational companies, EU legislation – such as Directive 2002/14/EC establishing a general framework for informing and consulting employees in companies in the EU and the European Works Councils Directive (94/45/EC) for the information and consultation of employees in (groups of) ‘Community-scale undertakings’, including the recast EWC Directive (2009/38/EC) – provides a basic transnational framework for employee participation. However, although not explicitly provided for by law, EWCs were negotiating agreements – often together with European and/or local trade unions – with the management of multinational companies. The importance of such transnational company negotiations between MNC management on the one side and EWCs and/or local and supra-national trade unions on the other has increased (see for instance Marginson and Sisson 1996, European Commission 2008).

Chapter 5 highlights developments in transnational collective bargaining at MNC level.

The emergence of transnational company agreements and their character in terms of the issues covered and their coverage is driven by a multitude of factors. Firstly, national industrial relations structures and practices indirectly affect both the negotiating conditions of micro-level social partners at MNC locations and the implementation of such agreements. Secondly, the emergence of multinational companies as transnational-level bargaining partners impacts the power relations between the bargaining parties, with threats of relocation by MNC management strengthening their bargaining power vis-à-vis labour. In addition, workers’ bargaining power is often hampered by lacking or weak structures for transnational representation, coordination and mobilisation. Thirdly, MNCs as transnational bargaining partners are generally only weakly, if at all, embedded in national legal-institutional industrial relations systems and are thus highly autonomous in their bargaining

strategies. Therefore, company policies are decisive for the incidence and outcomes of transnational company bargaining.

This chapter is structured as follows. In section 1, the concept of ‘collective bargaining’ in terms of its national and transnational dimension will be defined. Section 2 aims at providing a basic categorisation of national bargaining and employee representation systems in order to explain variations in collective bargaining practices and outcomes across Europe. Important features of collective bargaining and employee representation systems such as the collective bargaining coverage rate, workplace representation channels, trade union density at the aggregate level and at the workplace as well as collective bargaining rights of employee representation bodies in companies are of relevance in this respect. The main implications of the rise of MNCs as transnational bargaining actors are presented in section 3. The final section concludes by highlighting the implications of the rise in transnational company negotiations for both national bargaining systems and the development of a European industrial relations system.

## **1. Defining the concept of collective bargaining**

There is no uniform definition of ‘collective bargaining’ applicable at both national and transnational levels. In general, ‘collective bargaining’ implies a high degree of variability and heterogeneity with regard to the actors entitled to negotiate, bargaining levels, whether there is an obligation to bargain, the issues covered, whether collective agreements are legally binding and whether they can be extended. In addition, national differences with regard to the functions and competencies of micro-level social partners further contribute to the ambiguity of the concept of collective bargaining. For instance, in such countries as Germany, Austria, Italy and the Netherlands, works councils are entitled to negotiate works agreements at company level. This so-called co-determination role makes works councils an important bargaining agent at enterprise level in such countries. At the same time, transnational negotiations between supranational actors such as EWCs, European and Global Trade Union Federations and the management of MNCs have gained in importance. It is however important to note that such transnational framework agreements do not address wages or working time, the core issues of national social partner organisations, and should

therefore not be regarded as an equivalent to national level agreements achieved through collective bargaining.

European Works Councils play an active and increasingly important role in negotiations at MNCs, with 71 agreements signed by EWCs<sup>6</sup> registered by March 2011 (ETUI 2011a). However, only a minority of the EWCs established in 914 companies (as of March 2011) actually take part in local negotiations at MNC locations in different European countries. Although EWCs constitute a structure for coordinating collective bargaining between locations in different EU countries, they have not been ‘activated’ for this purpose to any major extent by local trade unions. As Hancké pointed out in his study of the automotive sector, EWCs have been largely ineffective as tools for transnationally coordinating local negotiations (Hancké 2000). The limited role of EWCs becomes even more evident when it is considered that the automotive sector represents a traditional stronghold of union organisation. Other authors arrive at a more positive assessment of the role of EWCs in transnational collective bargaining. Arrowsmith and Marginson (2006), for instance, identified a ‘context-setting’ role of EWCs in local negotiations at MNCs in the car manufacturing sector. Here, EWCs were able to influence the bargaining agenda in negotiations with management due to their ability to collect data on comparative costs and performance at different plants. In general, however, the limited access to comparative information on labour costs and productivity at different locations is one of the main obstacles to an effective mobilisation of EWCs for the transnational coordination of MNCs’ wage and HRM policies.

Despite the limited role of EWCs in supporting negotiations on pay and working conditions in MNCs, their importance as parties in the negotiation of joint texts and framework agreements (summarised under the term ‘transnational company agreements’, see chapter 5) in MNCs has grown considerably (e.g. Marginson and Sisson 1996). Unlike collective agreements, which address such key issues as wages and working time, transnational company agreements focus on ‘soft’ issues. Transnational agreements concluded between management and Global Union Federations (GUFs) – often referred to as ‘International Framework

---

6. We refer to so-called ‘substantive agreements’ concluded between EWCs and management on specific *topics*, omitting agreements establishing EWCs.

Agreements' ('IFAs') – deal with issues of global scope such as the implementation of ILO core labour standards (e.g. Schömann *et al.* 2008). Agreements concluded between MNC management and EWCs and/or ETUFs (also labelled 'European Framework Agreements' – 'EFAs') mainly cover issues of European scope, such as environmental issues as part of corporate social responsibility, transnational guidelines for the company's HRM policies, restructuring and health and safety (e.g. Telljohann *et al.* 2009).<sup>7</sup>

However, varying functions, competencies and the degree of embeddedness of European works councils in national trade union and collective bargaining systems account for differences regarding the substantive and procedural character of such agreements. Whereas the first aspect concerns the bargaining agenda of micro-level social partners, the latter one refers to the implementation of transnational agreements. Despite the acknowledged importance of transnational company negotiations, no concrete action has yet been undertaken by the Commission to establish a legal framework for transnational company negotiations (see chapters 6 and 7). The – as yet 'optional' – 'European framework for transnational collective bargaining' (COM(2005) 33 final), which aims at increasing the social partners' capacity to negotiate voluntary agreements with transnational scope at the sectoral and company level, is strongly shaped by the various national, European and international social partners' actions rather than providing a structure streamlining collective bargaining at MNC level. Conceived as a 'soft law' arrangement with a focus on 'voluntariness', the 'optional framework' strongly depends on the institutional features and social practices of social partners. Since supra-national social partner organisations are made up of national members, their specific – and often nationally bound – notions, traditions and practices influence transnational company negotiations. The following section gives an overview of the national collective bargaining arrangements and traditions and the different notions of company- and (inter)industry-level responsibilities such as information, consultation and co-determination.

---

7. In some cases the distinction between 'European' and 'International' Framework Agreements is blurred because agreements are signed by both GUFs and EWCs.

## **2. Categorising national differences in EU industrial relations**

In the vast majority of EU Member States collective bargaining, i.e. negotiations between trade unions, employers and their organisations, is a multi-level process that takes place at national, sectoral and company level. In general, national-level agreements provide a basic framework for the determination of pay and working conditions at the sectoral and/or company levels. Here these are further defined taking into account the specific situation the sector and/or company. Coordination between different bargaining levels varies between countries, depending on the legal-institutional prerequisites that ensure the compliance of lower-level bargaining agents with provisions negotiated at national or sectoral level (Traxler *et al.* 2001, Traxler 2003). These procedural differences in collective bargaining imply that bargaining agendas are dependent on the bargaining level. For instance, in countries such as the Netherlands, Italy and Germany, works councils are entitled to negotiate on pay and pay-related issues, either in general or – as in the case of Germany – under certain conditions.

The embeddedness of collective bargaining in the national setting of industrial relations makes it necessary to take a closer look at the wide range of different national collective bargaining structures and practices. To reduce complexity and allow the elaboration of commonalities and typical, country-specific characteristics, Member States are categorised on the basis of the labour relations typology initially developed by Ebbinghaus und Visser (1997) and now further developed (in European Commission 2008: 47ff.). This typology includes a range of indicators relating to industrial relations regimes. The most relevant ones are the predominant arrangements for collective bargaining in the private sector, i.e. multi- or single-employer bargaining (See Table 1 in the Annex), union density (see Figure 1, Annex), collective bargaining coverage (see Figure 2, Annex) and the system of employee representation, including the presence of trade unions and similar bodies for employee representation at the workplace (see Figure 3, Annex). Five groups of countries are distinguished, each described in its own sub-section: the Nordic countries (Section 2.1); Central-Western European countries, with the Germanic model of worker participation at the core (Section 2.2); the Southern European countries, with France as a special case (Section 2.3); the Anglo-Saxon model found in the UK,

Ireland, Malta and Cyprus (Section 2.4); and the transition economies in Eastern Europe (Section 2.5).

The sub-sections are structured as follows; First, overall important features of national industrial relations such as the organisational strength of unions, collective bargaining coverage and the prevailing bargaining system (single- vs. multi-employer bargaining) are summarised. Secondly, the functions of national systems of plant-level employee representation with regard to information, consultation and co-determination are presented.

## 2.1 The Nordics: Sweden, Denmark, Finland and Norway

### **National industrial relations and collective bargaining systems**

Nordic corporatism is characterised by strong social partners, a strongly institutionalised participation of organised labour in decision-making, and multi-employer bargaining (see Table 1 in the Annex). Trade union density rates are among the highest in Europe, reaching 70% in Sweden, Denmark and Finland in 2008 (see Figure 1, Annex). In Norway union density is lower, at 55% in 2007 (Visser 2009). Collective bargaining coverage rates, measured as the percentage of workers covered by a collective agreement against the total number of workers, range between around 90% (in Sweden) and above 70% (in Norway) (European Commission 2011, Visser 2009). In all Nordic countries bargaining coverage remained stable over the period from the late 1990s to the late 2000s (*ibid.*).

Nordic countries typically feature two-tier systems of centralised collective bargaining where national and sectoral framework agreements are supplemented by company agreements covering such topics as vocational training, work organisation, company-level social security and employability/workability. In general, the Nordic bargaining systems are characterised by a high degree of efficient inter-level articulation, with legally binding rules set in higher-level agreements for implementation at company level. The flexibilisation and de-centralisation of wage-setting became an important instrument for responding to companies' needs during the economic crisis (Glassner and Keune 2010, Glassner *et al.* 2011).

### **National employee representation bodies**

Although the Nordic systems of organised labour are often classified as highly centralised (e.g. European Commission 2011: 23), enterprise unionism is a typical feature of industrial relations structures in these countries. Contrary to the continental model of dual systems of employees' interest representation, unions play a prominent role in the unitary or 'single-channel' systems of consultation and co-determination in the Nordic countries. The wide-ranging involvement of unions in company-level collective bargaining increases the range of tasks and responsibilities of unions in company negotiations. Thus, highly controversial topics involving distributional conflicts over pay, profits and jobs are to be found on the bargaining agenda of company unions (Dølvik 2007). In contrast to the highly conflictual labour relations of the Anglo-Saxon systems, company bargaining in the Nordic countries takes place under a peace obligation, a crucial precondition for high-trust labour relations. According to survey data<sup>8</sup> (see Figure 3, Annex), the density rate for workplace representation in the Nordic countries is the highest of all EU Member States (i.e. 86% in Sweden, followed by Finland (81%) and Denmark (67%).

### **Main functions of employee representation bodies**

**Information and consultation:** In Sweden's single channel system of representation only trade union members have to be informed and consulted. Likewise, in Denmark the top-level social partners, i.e. LO on the union side and DA on the employer side, signed an agreement (2004) that all employees in a company have to be consulted about representation. Representation of employee groups not affiliated to LO should be possible if there is consensus about such a representation (European Commission 2006). In Norway both trade union and other elected representatives have to be informed (Hall and Purcell 2011). It is important to note that in the Nordic countries national and sectoral collective agreements provide higher standards for information and consultation than legal provisions.

---

8. European Social Survey 2002/2003: Technical Report. London: Centre for Comparative Social Surveys, City University.

**Co-determination:** Company-based employee representation bodies have considerable co-determination competences in economic and social matters. In Sweden, where participatory rights are among the strongest in the EU, ‘co-determination’ is perceived as a decision-making instrument *both* by *unions* and *employers*. This is particularly the case in arising disputes, where employers perceive co-determination as an obligation to negotiate with the local or national union (European Commission 2006).

**Collective bargaining:** In the single-channel systems of Sweden and Norway only unions are entitled to conduct collective bargaining at enterprise level, while in Finland and Denmark this right can be conferred on unionised employee representatives elected by the workforce, i.e. shop stewards. The Nordic systems of collective bargaining are considered as highly effective with regard to the coordination of bargaining across sectors and between bargaining levels, and empirical evidence points to the higher governance capacity of single-channel systems of employee representation (e.g. Traxler *et al.* 2008b). This is due to the fact that in dual channel systems different bargaining agents at the enterprise level, i.e. unions and works councils, may interpret provisions and clauses set in (inter)sectoral agreements in a different way. Such ambiguities even arise in fully unionised works councils (Traxler *et al.* 2008b: 424.). Thus, highly articulated multi-employer bargaining systems in combination with single-channel systems giving exclusive bargaining rights to unions are most effective in ensuring a process of organised decentralisation of collective bargaining (Traxler 1995).

## 2.2 Central-Western Europe: Belgium, the Netherlands, Germany, Austria and Slovenia

### **National industrial relations and collective bargaining systems**

Industrial relations in the Central-Western European countries share important commonalities. Multi-employer bargaining at the central and/or sectoral level is predominant (see Table 1, Annex). Social partners are regularly consulted and involved in public policy-making in various policy fields including working time and working conditions, training and lifelong learning, measures aiming at the reconciling work and family life, and social security. Of these European countries, collective bargaining is most centralised in Belgium and Slovenia. Although national agreements in the form of social pacts between unions,



employers and the state play an important role in the Netherlands, wages are negotiated at industry level. In Austria and Germany the sector is the principal bargaining level whereby the metal sector agreement sets the pattern for agreements in other sectors, including private and public services (Traxler *et al.* 2001, Traxler *et al.* 2008a).

Organised labour in Central/Western Europe is generally weaker than in the Nordic countries, and union density varies greatly between countries. In 2008 the union density rate in Belgium exceeded 50% and was around 40% in Slovenia, while in the Netherlands and Germany it was below 20% - and thus even lower than the weighted average for the EU27 (i.e. 23.4%) – and around 30% in Austria (Figure 1, Annex).

In Austria – due to companies' obligatory *Wirtschaftskammer* (Chamber of Business) membership<sup>9</sup> – and in Belgium coverage rates reach almost 100%. In Slovenia bargaining coverage remains above 90% despite the abolishment of mandatory Chamber membership in 2006, while in the Netherlands coverage remains at 80%. In Germany, the trend towards an 'erosion' of bargaining coverage in the second half of the 1990s (see for instance Hassel 1999) slowed down in the 2000s, with the coverage rate slightly exceeding 60% in 2008. The resumption of the – since the early 2000s very limited – practice of extending collective agreements to companies not affiliated to an employers' association entitled to conduct collective bargaining (see Table 1, Annex) is considered an important way of stabilising the bargaining system (Bispinck *et al.* 2010). Over the past years trade unions have been increasingly involved in negotiating minimum wages in various sectors, which are then introduced by decree of the Labour Minister on the basis of the 'Posted Workers' Act' (also see Table 1 in the Annex).

### **National employee representation bodies**

The Central-Western European model of employee representation is dominated by dual channel systems with works councils as central

---

9. The Chamber of Business is the most important signatory party to collective agreements on the part of employers in the private sector and organises companies in almost all sectors, crafts and industries. Collective agreements are legally binding for the member companies of the *Wirtschaftskammer*, that is, virtually all companies in Austria. As a consequence, bargaining coverage is almost 100%.

representation bodies. Works councils are the only statutory body of workplace representation in Germany, Austria, Slovenia and the Netherlands. In Belgium works councils are usually composed only of unionists. Although works councils are *de lege* independent of unions in the former group of countries, the unionisation rate of works councils is relatively high. For instance, in Germany around 70 % of elected works councils were unionised in 2006 (WSI 2006). Employees are formally represented in managerial bodies, i.e. supervisory boards in Germany and other countries such as Denmark. The presence of trade unions in employee representation and similar bodies is highest in Belgium and Slovenia at around 65%, Austria and Luxembourg (around 60%) and comparably lower in Germany, at around 50% (see Figure 3, Annex).

Works councils and management negotiate employment conditions in certain areas of regulation specified in 'higher-level' (i.e. national or sectoral) collective agreements. Furthermore, they tailor norms and conditions set in higher-level agreements to the particular conditions and requirements existing within the company. The norm-setting power of micro-level social partners derives also from the existence of a general 'peace clause' banning collective action while a collective agreement is in effect (Müller-Jentsch 1999).

### **Main functions of employee representation bodies**

**Information and consultation:** Informing works councils on economic, financial and social matters at local or plant-level is mandatory in the Central-Western European countries. In Belgium such information has to be provided for the entire company. In Austria, Germany, Belgium and the Netherlands information rights in practice go beyond financial and business matters. Mandatory consultation rights exists for a number of issues such as mergers, business transfers, mass redundancies, training measures and the introduction of new technology.

**Co-determination:** Far-reaching co-determination rights exist in all five Central-Western European countries (European Commission 2004). Areas in which works councils have co-determination rights (with regard for instance to daily working hours, reductions/extensions of normal working hours in the company, the introduction of technical devices to monitor workers' behaviour and performance, remuneration schemes, the setting of piece-rates) are stipulated by law. One of the

most important preconditions for a strong co-determination practice is that management provides works councils with full information at an early planning stage, giving works councils adequate opportunity to participate in decisions on economic and social matters.

**Collective bargaining:** Dual channel systems with a strong works council influence predominate in Austria, Germany, the Netherlands and Slovenia. In Belgium, local unions (i.e. the union delegation or an official of the trade union represented at the company) are the most important shop-floor bargaining actors. In the Netherlands, negotiations frequently focus on pay and pay-related issues such as bonus payments. In Austria, Belgium and Slovenia micro-level bargaining agents are usually not mandated to negotiate pay in company or works agreements. In Germany and Austria, the distinction between *collective agreements* concluded between unions and employers (most frequently with employers' associations and only in few cases with a single company) and *works agreements* concluded between a company's management and the works council is of importance. Works agreements are limited in scope and apply to certain issues specified in collective agreements, and are often used as a way of implementing exemptions / exceptions from higher-level agreements. The practice of including 'opt-out clauses' in (inter)sectoral collective agreements, allowing companies to temporarily suspend pay rises or to pay wage rates less than those agreed on in times of economic 'hardship' has gained in importance in recent years (WSI 2010). However, such opt-out clauses are hardly used in Belgium and Austria (Keune 2011). Although bargaining governability and inter-level articulation in the multi-employer bargaining systems of the Central-Western European countries are considered to be relatively high, a certain degree of ambiguity with regard to the interpretation and implementation of norms set in higher-level agreements is inherent in dual channel systems (e.g. Traxler *et al.* 2008b). Unions in these countries are generally more critical about transferring bargaining rights to company-level actors, afraid of losing control of decentralised bargaining and outcomes negotiated by works councils which are sometimes not affiliated to unions (Bispinck and Schulten 2003 and Bispinck *et al.* 2010).

## 2.3 The Southerners: Italy, Spain, Portugal, Greece and France

### **National industrial relations and collective bargaining systems**

Industrial relations regimes in Southern Europe are characterised as ‘polarised’ or ‘state-centred’ (Ebbinghaus and Visser 1997). State influence in wage-setting, social and employment policies is strongest in France. In Italy and Greece collective bargaining is ‘sponsored’ by the state (i.e. the state supports and participates in negotiations), whereas in Spain and Portugal bipartite central-level bargaining between organised labour and business predominates (Traxler *et al.* 2001, Traxler 2002). Wages in southern Europe are usually negotiated by social partners at sectoral level, though in Spain and Italy the regional level also plays a role. Wage determination, in particular in the latter two countries, is carried out in a two-tier system, with basic pay being negotiated at industry level and effective pay set via local or company bargaining. In France, wage setting is most decentralised (i.e. mainly at company level), with sectoral wage agreements only negotiated in a few sectors such as metalworking. However, the increase of the statutory minimum wage imposed by the government is considered as a guideline for wage bargainers at non-central levels.

Organised labour in Southern Europe is weak compared to the Nordic and Central-Western European countries, both with regard to trade union involvement in public policy-making and organisational strength. Union density remains low (see Figure 1, Annex): in 2008 slightly above 30% in Italy, around 20% in Greece, Portugal and Spain and below 10% in France. The widespread practice of declaring collective agreements generally binding for all employers in a certain sector (or in a group of sectors as found in Spain and France) in Southern Europe, with the exception of Italy (see Table 1, Annex), helps to maintain bargaining coverage rates. In Italy the ‘fair wages’ principle enshrined in the constitution and enforced by labour courts is considered a functional equivalent to the statutory extension of collective agreements. Coverage rates are highest in France (around 90%), Spain and Italy (above 80%). In Portugal and Greece bargaining coverage is above 60%, whereby coverage declined by around 10 percentage points in Portugal between the late 1990s and the late 2000s (see Figure 2, Annex).

### **National employee representation bodies**

In the French, Spanish and Portuguese systems of dual channel representation, works councils complement trade union representation. In contrast to Spain where both unions and works councils are allowed to conduct company-level collective bargaining, representative unions have the exclusive right to bargain at company level in France and Portugal. In the Italian dual channel system trade unions are the dominant employee representation bodies. The two main bodies are 'RSUs', i.e. trade union representation bodies directly elected by all employees, or, where these do not exist, RSA's (trade union delegations) (European Commission 2006). In Italy, the so-called 'cobas', i.e. non-union employee representation committees, are particularly widespread in the public sector. The workplace presence of trade unions or similar employee representation bodies in Southern European countries is highest in Italy and France at around 65%, comparably lower in Greece and Spain at around 40%, and lowest in Portugal at 34% (see Figure 3, Annex).

In Spain, Italy and Greece a hierarchy exists between higher-level collective agreements and company agreements. Portugal is the only country where specific provisions negotiated at enterprise or plant level prevail over general norms (European Commission 2006). In France, the introduction of the 'Fillon law' (2004) changed the previous hierarchy of collectively negotiated norms, allowing lower-level agreements to deviate from standards stipulated in higher-level agreements unless such is explicitly forbidden. In practice though, company-level bargaining parties very seldom make use of this provision (Keune 2011).

### **Main functions and practices of employee representation bodies**

**Information and consultation:** Statutory requirements for informing and consulting employees exist in all Southern European countries. Any additional information and consultation rights going beyond those stipulated in the EU directive are based on collective agreements in Italy, Portugal and France. Information and consultation rights on issues going beyond the financial aspects of company policies, such as restructuring, are most far-reaching in France and Spain.

**Co-determination:** The co-determination competences of employee representation bodies in Southern Europe are traditionally limited (European Commission 2004: 23). In Italy for instance works councils

participate solely in the management of social works and the resolution of conflicts and grievances.

**Collective bargaining:** The collective bargaining rights of micro-level social partners are most far-reaching in Italy and Spain where they include wage setting (European Commission 2004). In the framework of the Italian and Spanish two-tier systems, negotiating wages is an important competence of company-level bargaining parties. It should however be noted that, in line with the bargaining hierarchy, employee representation bodies are not allowed to renew *national* collective agreements at company level. Micro-level social partners are generally not entitled to conduct collective bargaining on *wages* in Portugal and France (European Commission 2004). Exceptions to this rule are temporary situation-dependent exemptions from rates and standards set in national or sectoral agreements, or, as in the case of France, where no sectoral agreement exists. However, empirical evidence for Italy, Spain and France indicates that company-level bargaining parties very seldom make use of such (Keune 2011).

## 2.4 The Anglo-Saxon system: United Kingdom, Ireland, Cyprus and Malta

### **National industrial relations and collective bargaining systems**

Industrial relations in Ireland, Malta and Cyprus were strongly influenced by the liberal pluralist model of industrial relations originating in the UK (Ebbinghaus and Visser 1997), in which collective bargaining and labour relations are based on the principle of ‘voluntarism’. With collective agreements not legally binding, their implementation depends on the social partners. Labour legislation is fragmented, referring more to such general social rights as gender equality and non-discrimination. This means that EU labour legislation exerts a comparatively strong regulatory function on these countries’ industrial relations systems.

UK industrial relations underwent fundamental changes in the late 1970s and early 1980s, when collective bargaining at national and industry level was dismantled by statutory restrictions on trade union organisation and recognition as well as industrial action. Decentralisation was even more pronounced on the employers’ side, with employer associations, if existing at all, playing only a very marginal role in collective

bargaining. Since the early 1980s collective bargaining has been conducted almost exclusively at company level whereby individual contracts negotiated between management and individual employees are the predominant mechanism for setting wages and working conditions. In Ireland and Cyprus, multi-employer bargaining predominates (see Table 1, Annex). Recent developments in Irish collective bargaining indicate a shift from the national to the industry and increasingly to the company level. With pay bargaining becoming more conflictual during the economic crisis, inter-industry negotiations broke down in late 2009. Top-level Irish social partners later agreed to voluntary guidelines for company-level collective bargaining.

With single employer bargaining prevailing, meaning in turn low employer densities (around 60% in Ireland, Malta and Cyprus and below 40% in the UK), collective bargaining coverage rates are low, ranging from around 50% in Cyprus, around 40% in Ireland and Malta to 34% in the UK (see Figure 2, Annex). Although multi-employer bargaining prevails in Ireland, at least up to late 2009 when national negotiations failed, a lack of provisions for extending collective agreements contributed to the decline in bargaining coverage (by around 10 percentage points) in the period between the late 1990s and late 2000s (European Commission 2011). Trade union densities are lower than in the Nordic and most of the Central-Western European countries, with rates ranging from around 50% in Cyprus and Malta to around 30% in the UK and Ireland in 2008 (see Figure 1, Annex).

### **National employee representation bodies**

Although the British system of micro-level industrial relations is often described as ‘conflict-orientated’, the principle of voluntarism is widely recognised by employers, employee representatives and unions. However, the practice of company- or plant-level collective bargaining varies widely between industries and occupations (see for instance Grainger and Crowther 2007) and a company’s country of origin (e.g. trade union recognition tends to be more widespread in Japanese than in US-based MNCs, *ibid*). Empirical evidence shows that trade union recognition dropped by almost 50 % in manufacturing and private sector services between 1980 and 2004 whereby trade union presence – although declining – is still relatively strong in the public sector (Blanchflower *et al.* 2007). In Ireland and the UK single-channel employee

representation systems exist. In the Irish system for a long time only trade unions were entitled to represent employees on the shop-floor, though in recent years non-union representation bodies have gained in importance. Similarly, UK legislation also includes provisions for the election of non-unionised employee representatives (European Commission 2006). Before the implementation of the EU directive no guaranteed rights of employee information and consultation existed, and only trade unions recognised by the employer were entitled to represent employees.

### **Main functions and practices of employee representation bodies**

**Information and consultation:** Before the transposition of EU Directive 2002/14/EC, statutory rights for employee representation were absent in the UK and Ireland, with the exception of specific information and consultation rights in cases of collective redundancies and, as provided by European legislation (Directive 2001/23/EC), for the transfer of undertakings. It should also be noted that, in line with the voluntary nature of Anglo-Saxon labour relations, the establishment of workplace employee representation structures is triggered by employee requests for an employer to negotiate the introduction of such structures and is not introduced automatically. Such ‘negotiated agreements’ for information and consultation arrangements are not subject to the minimum statutory standards stipulated in European labour law in the voluntary system of industrial relations in the UK. According to the legislation on employee information and consultation that came into force in 2005 in the UK, statutory minimum requirements apply only where negotiations under statutory procedures fail (Hall and Purcell 2011).

Due to the voluntary character of the Anglo-Saxon system of employee participation, information and consultation practices are strongly shaped by company-specific communication and participation patterns and traditions. Bodies for employee representation such as works councils and Joint Consultative Committees (JCCs), the latter also including management and trade union representatives, are often used for consulting employees on issues such as company pensions, work organisation as well as the company’s financial situation and productivity developments – though on a purely voluntary basis. The emergence of union-related information and consultation structures is however endangered by declining trade union representation at the enterprise level. For instance,



according to the Department for Business Enterprise and Regulatory Reform in the UK a mere 46.6% of workplaces had some sort of trade union representation in 2008 (Prosser 2009, see also Figure 3 in the Annex). Employer recognition of shopfloor unions is slowly decreasing, though varying across sectors (Millward *et al.* 2000, Kersley *et al.* 2006). Union recognition is highest in the public sector and lowest in the private services sectors. In Ireland and Cyprus the presence of unions and other workers' representation bodies is only slightly higher than in the UK (53% and 50%, respectively), and in Malta it is the lowest of all EU Member States (10%).

**Co-determination and collective bargaining:** In contrast to the Nordic and German-style systems of employee participation, no employee co-determination tradition exists in certain company policy areas in British and Irish labour relations. Though such bodies as JCCs do sometimes negotiate voluntarist workplace 'partnership' agreements between employers and unions in the UK, they are rarely concluded in Ireland (Dobbins 2009). Although the focus has been on national-level collective bargaining in Ireland since the late 1980s, negotiations between management and workplace trade union representatives has been recently gaining in importance in the aftermath of a break-down in national bargaining in the course of the economic crisis (see section above). Company-level bargaining covers such issues as pay, working time, terms and conditions of employment, pensions, sick pay and work organisation. In the UK the company or plant level is the most important one for negotiating wages and working conditions in the private sector. Though collective agreements are not legally binding and their implementation is dependent on the willingness of bargaining parties to implement them, when provisions set forth in collective agreements are incorporated into individual labour contracts they become legally enforceable. Collective agreements covering issues other than pay and working time are not widespread (Prosser 2009).

## 2.5 The transitional economies in Central-Eastern Europe (CEE)

### **Industrial relations and collective bargaining**

Industrial relations in the Central and Eastern European countries (CEE countries) exhibit a considerable degree of heterogeneity and thus cannot not be clearly categorised. However, they still need to be classified

in one single group, as – according to Kohl and Platzler (2007: 617) – they cannot be clearly assigned to any other of the European models. Slovenia is the only CEE country where industrial relations show similarities to the Austro-German system, leading to the country being listed under the Central-Western European countries (see section 2.2). In all CEE countries the state plays a key role in labour relations (Kohler and Platzler 2007), with single-employer bargaining predominant (see Table 1, Annex). Slovakia is a borderline case. Here, (inter)sectoral structures for multi-employer bargaining do exist but decentralisation tendencies, often fostered by the state, have given rise to company-level bargaining (Cziria 2011, European Commission 2011).

The weakness of both organised labour and business in CEE countries is indicated by low organisational density rates, ranging from around 30% in Romania to around or below 20% in the Czech Republic, Bulgaria, Slovakia, Hungary, Latvia and Poland and to below 10% in Lithuania and Estonia in 2008 (see Figure 1, Annex). With single-employer bargaining predominant, collective bargaining coverage rates are below the EU27 average (60%) – with the exception of Romania (around 70%), where employer density is comparably high –, ranging from around 40% in the Czech Republic, Slovakia, Poland and Hungary, to around 30% in Bulgaria, and to around or below 20% in Latvia, Estonia and Lithuania (Figure 2, Annex).

### **National employee representation bodies**

Workplace representation of employees varies widely among the CEE Member States. Single-channel systems prevail in Estonia, Latvia, Poland, the Czech Republic and Lithuania. Union dominance of workplace representation used to be strongest in Poland, though due to recent legal changes works councils are now allowed to exist as single-channel representation in non-unionised companies. In companies with one or more management-recognised trade unions, works council members are elected by the unions. The establishment of works councils correlates strongly with trade union shopfloor presence. In non-unionised companies setting up a works council is often hampered by management resistance. The Polish system of employee representation was modelled on the workplace representation structures of the Czech Republic and Lithuania, where works councils are allowed to exist as the single channel of representation but cease to exist when trade union

representation is established within the company (European Commission 2006).

Empirical evidence indicates that the presence of bodies collectively representing workers in companies is comparably low in CEE countries (see Figure 3, Annex). The rate for the presence of unions and similar employee representation bodies is lowest in Poland and the Baltic countries (20 - 30%), and only slightly higher in Hungary (around 35%). In Slovakia and the Czech Republic the rates are 50 and 44% respectively. According to more recent figures, the presence of collective employee representation bodies at workplace level is declining in all CEE countries (including Slovenia) for which data is available (Kohl 2008).

### **Main functions and practices of employee representation bodies**

**Information and consultation:** In the CEE countries the EU information and consultation directive is transposed via both statutory provisions and collective agreements, with the exception of Bulgaria where the establishment of employee information and consultation bodies is based exclusively on statutory requirements (Hall and Purcell 2011). Information on *de facto* information and consultation practice going beyond statutory provisions in CEE countries is scarce (e.g. Hall and Purcell 2011, Hülsmann and Kohl 2006). However, there is some evidence that the quality and timeliness of information is particularly poor with regard to such issues as companies' product and investment strategies as well as performance. Typically, consultation takes place to a much lesser extent than information (Hall and Purcell 2011).

**Co-determination and collective bargaining:** The involvement of employee representatives and local trade unions in corporate decision-making is very limited in Central and Eastern Europe. Only in Hungary and Slovakia does the law confer co-determination rights on works councils and similar employee representation bodies. In the case of Slovakia works councils are under certain conditions also entitled to negotiate wages (European Commission 2004). In the majority of CEE countries however the right to collective bargaining at enterprise level is conferred exclusively on trade unions, with the exception of Estonia where workers' representatives can be authorised to conduct collective bargaining in non-unionised companies. However, in practice company-level collective bargaining is limited, dependent on trade union presence

and strategies at enterprise level. As a consequence, trade unions participate in company-level bargaining mainly in large companies, while trade union representation in SMEs is marginal (Kohl 2008, Hall and Purcell 2011).

The weakness of both unions and in particular employers in terms of organisation and representativeness and the lack of a legal and institutional framework for autonomous collective bargaining has inhibited the establishment of bargaining practices and their institutionalisation within the industrial relations systems. As a consequence, trustful relations between unions and employers, a prerequisite for effective collective bargaining and social dialogue, did not evolve in most of the CEE countries. The unions' limited bargaining practice also negatively affects their perception by employees and the latter's propensity to join unions. Workers in countries with exclusive collective bargaining systems (i.e. where single-employer bargaining is predominant and bargaining coverage is low) are often not aware of the rights and advantages offered by collective agreements (Hülsmann and Kohl 2006).

### **3. MNCs as bargaining parties: effects on national and transnational industrial relations**

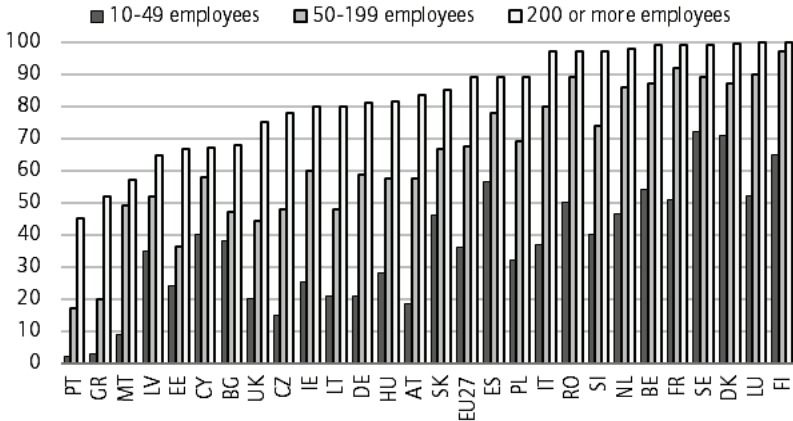
In addition to national differences, collective bargaining coverage, union presence and the existence of company-level employee representation bodies vary with company size. Since no complete and comparative data on collective bargaining coverage rates by company size are available for the EU-27, trends in the relationship between MNC bargaining coverage and aggregate coverage rate are estimated (see Table 1). Leaving aside those countries characterised by almost full coverage of workers across sectors<sup>10</sup>, MNC bargaining coverage tends to be higher than or equal to the national aggregate rate, with the exception of Estonia and Latvia where the MNC coverage rate is lower than that at the national level.

**Table 1 Trends in collective bargaining coverage: MNCs and national aggregate**

<b>Higher for MNCs than for domestic companies</b>	<b>BG, CZ, ES, IE, LT, MT, NL, SE, SK, UK</b>
Same for MNCs and domestic companies	CY, DE, DK, EL, FI, HU, LU, NO, PL, PT
Lower for MNCs than for domestic companies	EE, LV
Virtually whole economy covered	AT, BE, FR, IT, SI, (RO)

Source: Marginson and Meardi 2010.

**Figure 1 Coverage of institutional employee representation, by country and company size**



Source: Eurofound 2009.

Likewise, the frequency of institutional employee representation bodies increases with company size (see Figure 1). The gap between representation in small (i.e. companies with 10 to 49 employees) and large companies (with more than 200 employees) is particularly wide in Austria, Germany, the Czech Republic and Lithuania. Strikingly, variations in employee representation in large companies are comparably low; with

**10.** Romania is a borderline case, with bargaining coverage estimated to be around 70% in 2008 according to another source (European Commission 2011) and no information available on the difference between MNC coverage and the national aggregate.

80% or more workers covered by such bodies in 18 out of the EU-27 countries. Greece and Portugal are the only countries where 50% or less of the workforce in companies with more than 200 employees are reported to be covered by formal representation bodies.

### **Effects of MNC policies on collective bargaining and trade union strategies**

Although institutional conditions in large multinational companies are more favourable for workers in terms of formal representation and collective bargaining coverage than in small companies, the high degree of international mobility of MNCs, their lack of embeddedness in national industrial relations systems, their political influence as employers of large labour forces and, as a result, their highly credible potential to threaten states with relocation are tilting the balance of power between labour and business further towards the latter. Furthermore, trade unions have to negotiate with individual transnational companies instead of employer organisations. MNCs pursue particularistic interests, seeking agreements tailored to their needs instead of taking collective, sectoral (or national) interests into account, as is the case with employer associations. The mismatch between structures and practices within MNCs and in national collective bargaining is particularly pronounced in the multi-employer bargaining arrangements (Marginson and Meardi 2010) prevailing in the majority of EU countries (see Table 1, Annex). Alongside organised labour, supranational trade unions and employee representation bodies have to aggregate the differing, and sometimes contrasting, interests of members and workers from different countries.

Thus, for MNCs and trade unions or formal employee representation bodies entering into negotiations, the strategic considerations of management are decisive. At the organisational level management strategies are aggregated in company policies on HRM and employee voice. Representation and voice practices - such as union recognition, direct or indirect (i.e. institutional) forms of employee participation - are typically shaped by the industrial relations system of the MNC's country of origin (Marginson and Meardi 2010). Other factors such as the extent of international integration of MNC operations and the degree of product standardisation also affect management preferences for industrial relations practices (ibid.).

### **Effects of MNC participation on national-level collective bargaining**

Although in the majority of EU countries large multinational companies are more frequently covered by collective agreements than SMEs (see Table 2), a number of individual MNCs conclude separate agreements, even in countries where multi-employer bargaining prevails. It is important to note that, in contrast to IFAs and EFAs, collective agreements concluded by MNCs are usually national in scope. Generally speaking, such MNC agreements tend to provide for higher standards of pay and working conditions than those stipulated in sectoral agreements, in particular in the Central and Eastern European countries and in Southern Europe.

MNCs have been the source of innovative collective bargaining, not only by addressing new issues, but also by opting out from sectoral agreements. In some countries MNCs have been promoting changes in industrial relations, most often in terms of increased flexibility in wage-setting, working time and other conditions. The introduction of performance-related pay systems and flexitime arrangements are two of the most important innovations in collective bargaining.

Other MNC bargaining practices are however negatively impacting national industrial relations structures. Opting out from sectoral agreements is a strategic option used by certain MNCs in countries where extension practice is limited. Likewise, switching to sectoral agreements stipulating less favourable conditions for workers in MNCs operating in more than one or overlapping sectors has been observed in Central-Western and Southern European countries (Marginson and Meardi 2010). Although the majority of MNCs tend to belong to employer associations, non-membership or membership of a national rather than sectoral employer organisation contributes to the erosion of sectoral collective bargaining. Furthermore, some MNCs are recognising unions in existing plants but refusing to do so in newly established ones. Such ‘double breasting’ strategies are most frequently pursued in MNC subsidiaries in the UK, Ireland and the Baltic countries (*ibid.*).

The most destructive effect of the growing relevance of MNCs as collective bargaining actors however is the rise of competitive bargaining, with the use of ‘coercive comparisons’ of labour costs and productivity levels between subsidiaries located in different countries. Supranational trade unions and employee representation bodies such as EWCs are often one

step behind MNC management with regard to the cross-border exchange of data on labour costs, wages and productivity. Furthermore, when labour markets are depressed, national unions tend to put national interests first, thereby ensuring the jobs of their own (potential) members and severely inhibiting any aggregation of interests by supranational union organisations.

### **Effects of MNC participation on transnational-level collective bargaining**

Although the growing influence of MNCs on collective bargaining tends to be rather detrimental to national arrangements and practices, they might, seen from a more constructive perspective, contribute to the emergence of an additional layer in a multi-level system of ‘European’ industrial relations (Marginson and Sisson 2006). Although transnational company agreements are not collective agreements in the strict sense, as they do not address pay and working time, certain observers consider them a first step towards transnational collective bargaining (Ales *et al.* 2006). A cross-border harmonisation of standards and the promotion of common, transnational company policies deriving from transnational company agreements are effects observable in very specific areas. The adoption of codes of conduct on ‘corporate social responsibility’ is an example in this respect (Marginson and Meardi 2010). In the vast majority of cases however there is no guarantee of a transnational ‘harmonisation effect’. Instead, the implementation of purely voluntary and therefore not legally binding provisions negotiated in transnational framework agreements depends entirely on the willingness of the signatory parties to comply. Implementation procedures are only included in a minority of transnational agreements (Marginson and Meardi 2010). This leads trade unions from countries ensuring the legal enforceability of collective agreements to be reluctant to negotiate voluntary transnational agreements whose implementation is perceived as doubtful. In particular trade unions from countries characterised by highly coordinated and inclusive multi-employer bargaining systems (i.e. in the Nordics and Central-Western Europe) are very much against negotiations on key topics such as pay-related provisions, working time and work organisation at MNC level as they fear a dilution of their high national standards.

The rise of MNCs has undoubtedly fostered cross-border cooperation between unions and the transnational mobilisation of workers, often



supported and coordinated by ETUFs. Furthermore, a number of ETUFs have recognised the important role played by EWCs as signatory parties to transnational agreements (see section 1), intensifying their cooperation efforts with them. By strengthening mutual cooperation, EWCs and European sector-level unions could indeed play a much stronger role in countering threats of relocation and coercive labour cost comparisons and in monitoring transnational restructuring. Often enough, the potential of EWCs as strategic tools for cross-border mobilisation on various issues, including industrial action, and cooperation is still not largely considered by unions, meaning that relations between trade unions and EWCs are sometimes contentious, with unions trying to keep EWCs away from collective bargaining (Gennard 2009, Hann 2010).

## Conclusions

Collective bargaining at the level of multinational companies and in the form of negotiations between employee representation bodies and MNC management has increased in importance since the early 2000s (Schömann *et al.* 2008, Telljohann *et al.* 2009, Marginson and Meardi 2010). Despite the acknowledged relevance of this issue, EU political actors have not yet addressed one fundamental shortcoming of transnational company negotiations, i.e. the fact that transnational framework agreements are not legally binding. A legal framework needs to be introduced, ensuring the enforceability of such agreements (Ales *et al.* 2006, Gennard 2009). Two main problems possibly burdening transnational company bargaining with regard to the substantive (i.e. topics addressed in negotiations) and procedural aspects of transnational agreements can be distinguished. First, in addition to the wide range of legal-institutional systems of collective bargaining and employee representation present in EU Member States, different conceptions and traditions of collective bargaining and the functions of employee representation bodies are affecting transnational company bargaining and inhibiting the effective implementation of agreements with a transnational scope. Second, with multinational companies gaining in importance in collective bargaining, the power balance between the bargaining parties is shifting. This all has an overall effect on transnational company bargaining.

With EU enlargement, the degree of heterogeneity of industrial relations structures and practices has further increased. One of the most important differences is between the decentralised collective bargaining systems with single-employer bargaining prevailing for the determination of pay and working conditions in the Anglo-Saxon countries and the majority of ‘new’ Member States and the more centralised, multi-employer bargaining systems existing in the Nordics and Central-Western European countries and – to a more limited extent – in Southern Europe. However, there are important differences between the Anglo-Saxon model and the ‘transition model’ of the CEE Member States that are also affecting transnational collective bargaining at the level of multinational companies. Collective bargaining on pay and conditions is an established practice in the UK where micro-level bargaining partners have gained notable bargaining autonomy. By contrast the social partners in Central and Eastern Europe are strongly dependent on the state. Although the state has a strong interventionist role in such areas as minimum wages, working time and the extension of collective agreements in a number of Western European countries, most of all in France, local unions are important actors in wage bargaining. In the CEE countries the role of local unions, works councils and similar employee participation bodies in negotiating pay and working conditions at the company level is limited due to missing institutional and organisational prerequisites for autonomous collective bargaining (see section 2.5). High union fragmentation and union confederations’ low degree of shopfloor authority weaken articulation between different levels of union organisation and make it difficult to bring interests together. The lack of collective bargaining practice and experience on the part of unions and works councils prevents them from playing a strong and active role in negotiations with MNCs.

Considerable national differences exist with regard to notions and perceptions of the information, consultation and co-determination role of works councils and employee representation bodies. For instance, works councils in Germany and the Nordic countries have far-reaching co-determination powers in a range of areas, whereas the co-determination rights of works councils in Southern and Eastern Europe and in the UK are limited or non-existent. These different competences and experience of works councils participating in negotiations with management can affect the power configuration within EWCs, dependent on which national ‘model’ is predominant. The distinction

between single- and dual-channel systems of employee representation is important in this respect. In countries with a single-channel system, micro-level negotiations are firmly linked to higher-level structures of union organisation and collective bargaining, providing a high degree of congruence with regard to the interpretation of substantive provisions and formal collective bargaining procedures and ensuring effective articulation between different bargaining levels. This contrasts greatly with dual-channel systems where bargaining governability is lower due to the lack of articulation between works councils and sectoral trade unions. This is particularly true in countries where works councils are entitled to negotiate wages within the framework of two-tier bargaining systems, as is the case in Italy and Spain.

The second fundamental factor affecting transnational collective bargaining is the emergence of MNCs as bargaining parties. MNC management enjoys a crucial advantage in collective bargaining with employee representation bodies, including EWCs, and national and supra-national trade unions. The imbalance in power between companies operating internationally on the one hand and labour movements that are strongly rooted in national industrial relations systems and labour markets on the other hand has detrimental effects on collective bargaining and the regulation of labour (Hyman 2001, Crouch 2004, Castells 1996). With the international mobility of capital much greater than that of labour, relocation threats by MNCs are often perceived as credible by organised labour. Such asymmetry in bargaining power affects both the substantive agenda of negotiations and procedural aspects of collective bargaining at transnational and national level.

Increasing market internationalisation together with price and cost transparency have reinforced the trend towards competitive cost and productivity comparisons across borders between an MNC's production sites or subsidiaries. This is leading to an increase in concession bargaining, even more so in times of economic recession, slack labour markets, and in sectors and regions subject to de-industrialisation and companies facing restructuring and reorganisation (Freyssinet and Seifert 2001, Haipeter 2009, Haipeter and Lehndorff 2009). More important though are the facts that MNCs are a driving force for bargaining decentralisation and flexibilisation, and that they make use of second-tier negotiations more frequently than domestic companies (Marginson and Meardi 2010). Alongside institutional factors such as trade union density and

the existence of a supportive legal framework for ensuring employee representation and participation at the workplace, decentralised collective bargaining is strongly determined by company-specific conditions. Management positions and policies on union access and recognition, their propensity to negotiate with collective labour representation bodies, and their cooperation with regard to the timely and complete provision of information are preconditions for the development of high-trust relations between management and local unions, works councils or similar employee representation bodies.

The increasing importance of transnational company negotiations as a rather implicit, informal or indirect form of transnational collective bargaining has been addressed by supranational union organisations. EWCs play a decisive - and increasing - role in transnational negotiations. For trade unions, strengthening cooperation with EWCs is mutually beneficial. EWC capacity for effective action is dependent on resources and services provided by trade unions. On the other side of the coin, EWCs are effective instruments for unions, promoting cross-border mobilisation and cooperation, including industrial action. A number of ETUFs have adopted guidelines for transnational company bargaining as a way of clarifying procedures, including mandates, for negotiations between EWCs and management.<sup>11</sup> Despite the manifold problems associated with transnational company bargaining, MNCs could develop into an important arena for employee representation and participation in internationalised markets, provided that both parties undertake to enforce agreements and ensure their full coverage. Within a 'European' multi-level system of industrial relations, transnational framework agreements may serve as an important tool for the transnational harmonisation of minimum working conditions, complementing national labour regulation and collective bargaining.

---

**11.** The European Metalworkers' Federation adopted an 'internal procedure for negotiations at multinational company level' in 2006. Similar rules and procedures were adopted by UNI Europa Finance (2006), the European Trade Union Federation: Textiles, Clothing, Leather (2007), the European Federation of Building and Woodworkers (2009), UNI Europa Graphical (2009), the European Federation of Public Service Union (2009) and the European Mine, Chemical and Energy Workers' Federation (2010).

## References

- Ales, E., S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdes Dal-Re (2006) *Transnational collective bargaining: past, present and future. Final report*, Brussels: European Commission.
- Arrowsmith, J. and Marginson, P. (2006) 'The European cross-border dimension to collective bargaining in multinational companies', *European Journal of Industrial Relations*, 12 (3), 245-266.
- Bispinck, R. and Schulten, T. (2003) 'Decentralisation of German collective bargaining? Current trends and assessments from a works and staff council perspective', *WSI-Mitteilungen*, Special English Issue, 56, 24-32
- Bispinck, R., Dribbusch, H. and Schulten, T. (2010) 'German collective bargaining in a European perspective: continuous erosion or re-stabilisation of multi-employer agreements?', WSI Discussion Paper No 171.
- Blanchflower, D.G., Bryson, A. and Forth, J. (2007) 'Workplace industrial relations in Britain, 1980-2004', NIESR Discussion Paper No 288.
- Castells, M. (1996) *The rise of the network society*, Oxford: Blackwell.
- Crouch, C. (2004) *Post-democracy*, Cambridge: Polity.
- Cziria, L. (2011) *Slovakia: EIRO annual review - 2009*, Dublin: European Foundation for the Improvement of Living and Working Conditions.
- De Grauwe, P. (2009) 'The Euro at ten: achievements and challenges', *Empirica*, 36 (1), 5-20.
- Degryse, C. (2011) 'European social dialogue: state of play and prospects', Internal report for the ETUC, Brussels: European Trade Union Confederation
- Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17 (2), 145-158.
- Dobbins, T. (2009) *Ireland: industrial relations profile*, Dublin: European Foundation for the Improvement of Living and Working Conditions.
- Dølvik, J.E. (2007) *The Nordic model of collective bargaining and trade unionism*, Stockholm: NFS.
- Dølvik, J.E. and Visser, J. (2009) 'Free movement, equal treatment and worker rights: can the EU solve its trilemma of fundamental principles?', *Industrial Relations Journal*, 40 (6), 491-509.
- Dufresne, A. (2002) 'Wage co-ordination in Europe: roots and routes', in Pochet, P. (ed.) *Wage policy in the Eurozone*, Brussels: PIE-Peter Lang, 79-109.

- Dufresne, A. and Mermet, E. (2002) 'Evolutions de la coordination des négociations collectives en Europe', ETUI DWP No 2002.01.02.
- Ebbinghaus, B. and Visser, J. (1997) 'Der Wandel der Arbeitsbeziehungen im westeuropäischen Vergleich', in Hradil, S. and Immerfall, S. (eds) *Die westeuropäischen Gesellschaften im Vergleich*, Opladen: Leske + Budrich, 333-376.
- Eichengreen, B. (1993) 'Labor markets and European monetary unification', in Masson, P.R. and Taylor, M.P. (eds) *Policy issues in the operation of currency unions*, Cambridge: Cambridge University Press, 130-162.
- European Foundation for the Improvement of Living and Working Conditions (Eurofound) (2009) *European Company Survey 2009*, Luxembourg: Publications Office of the European Union.
- European Commission (2004) *Industrial relations in Europe 2004*, Luxembourg: Publications Office of the European Union.
- European Commission (2006) *Industrial relations in Europe 2006*, Luxembourg: Publications Office of the European Union.
- European Commission (2008) *Industrial relations in Europe 2008*, Luxembourg: Publications Office of the European Union.
- European Commission (2011) *Industrial relations in Europe 2010*, Luxembourg: Publications Office of the European Union.
- Freyssinet, J. and Seifert, H. (2001) *Negotiating collective agreements on employment and competitiveness*, Luxembourg: Publications Office of the European Union.
- Gennard, J. (2009) 'Development of transnational collective bargaining in Europe', *Employee Relations*, 31 (4), 341-346.
- Glassner, V. (2009) 'Transnational collective bargaining coordination at the European sector level. The outlines and limits of a 'European' system', *International Journal of Labour Research*, 1 (2), 113-129.
- Glassner, V. and Keune, M. (2010) 'Negotiating the crisis? Collective bargaining in Europe during the economic downturn', DIALOGUE Working Paper No 10.
- Glassner, V. and Pochet, P. (2011) 'Why trade unions seek to coordinate wages and collective bargaining in the Eurozone: past developments and future prospects', ETUI Working Paper No 2011.03.
- Glassner, V., Keune, M. and Marginson, P. (2011) 'Collective bargaining in a time of crisis: developments in the private sector in Europe', *Transfer*, 17 (3), 303-321.
- Grainger, H. and Crowther, M. (2007) *Trade union membership 2006*, London: Department of Trade and Industry.

- Gollbach, J. and Schulten, T. (2000) 'Cross-border collective bargaining networks in Europe', *European Journal of Industrial relations*, 6 (2), 161-179.
- Hall, M. and Purcell, J. (2011) *Information and consultation practice across Europe five years after the EU Directive*, Dublin: European Foundation for the Improvement of Living and Working Conditions.
- Haipeter, T. (2009) 'Kontrollierte Dezentralisierung? Abweichende Tarifvereinbarungen in der Metall- und Elektroindustrie', *Industrielle Beziehungen*, 16 (3), 232-253.
- Haipeter, T. and Lehndorff, S. (2009) 'Collective bargaining on employment', DIALOGUE Working Paper No 3.
- Hancké, B. (2000) 'European works councils and industrial restructuring in the European motor industry', *European Journal of Industrial Relations*, 6 (1), 35-59.
- Hann, D. (2010) 'The continuing tensions between European works councils and trade unions - a comparative study for the financial sector', *Transfer*, 16 (4), 525-540..
- Hassel, A. (1999) 'The erosion of the German system of industrial relations', *British Journal of Industrial Relations*, 37 (3), 483-505.
- Hülsmann, J. and Kohl, H. (2006) *Social dialogue capacity building in the 10 new EU Member States and the acceding countries Bulgaria, Romania and Turkey*, Summary report for the European Foundation for the Improvement of Living and Working Conditions, Dublin (based on national interviews).
- Hyman, R. (2001) 'European integration and industrial relations. A case of variable geometry?', *Antipode*, 33 (3), 468-83.
- Keller, B. and Platzer, H.-W. (2003) *Industrial relations and European integration. Trans- and supranational developments and prospects*, Aldershot: Ashgate
- Kersley, B., Alpin, C., Forth, J., Bryson, A., Bewley, H., Dix, G. and Oxbridge, S. (2006) *Inside the workplace: findings from the 2004 Workplace Employment Relations Survey*, London: Routledge.
- Keune, M. (2011) *Derogation clauses on wages in sectoral collective agreements in seven European countries*, Dublin: European Foundation for the Improvement of Living and Working Conditions.
- Kohl, H. (2008) 'Where do trade unions stand in Eastern Europe today? Stock-taking after EU enlargement', *Internationale Politik und Gesellschaft*, 3, 107-130.

- Kohl, H. and Platzer H.-W. (2004) *Industrial relations in Central and Eastern Europe. Transformation and integration. A comparison of the eight new EU Member States*, Brussels: ETUI.
- Kohl, H. and Platzer, H.-W. (2007) 'The role of the state in Central and Eastern European industrial relations: the case of minimum wages', *Industrial Relations Journal*, 38 (6), 614-635.
- Leisink, P. (2002) 'The European sectoral social dialogue and the graphical industry', *European Journal of Industrial Relations*, 8 (1), 101-17.
- Marginson, P. (2005) 'Industrial relations at European sector level: the weak link?', *Economic and Industrial Democracy*, 26 (4), 511-540.
- Marginson, P. and Meardi, G. (2010) 'Multinational companies: transforming national industrial relations?', in Colling, T. and Terry, M. (Eds.) *Industrial relations: theory and practice*, Oxford: Wiley-Blackwell, 207-230.
- Marginson, P. and Sisson, K. (2006) *European integration and industrial relations: multi-level governance in the making*, Basingstoke: Palgrave Macmillan.
- Marginson, P. and Sisson, K. (1996) 'Multinational companies and the future of collective bargaining: a review of the research issues', *European Journal of Industrial Relations*, 2 (2), 173-197.
- Millward, N., Bryson, A. and Forth, J. (2000) *All change at work? : British employment relations 1980-98, as portrayed by the workplace industrial relations survey series*, London: Routledge.
- Müller-Jentsch, W. (ed.) (1999) *Konfliktpartnerschaft: Akteure und Institutionen der industriellen Beziehungen*, München: Hampp Verlag.
- Prosser, T. (2009) *United Kingdom: industrial relations profile*, Dublin: European Foundation for the Improvement of Living and Working Conditions.
- Scharpf, F.W. (1996) 'Negative and positive integration in the political economy of European welfare states', in Marks, G., Schmitter, P., Streeck, W. and Scharpf, F.W. (eds) *Governance in the European Union*, London: Sage, 15-39.
- Scharpf, F.W. (2010) 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'', *Socio-Economic Review*, 8 (2), 211-250.
- Schömann, I., A. Sobczak, E. Voss and P. Wilke (2008) *Codes of conduct and international framework agreements: new forms of governance at company level*, Luxembourg: Office for Official Publications of the European Communities.



- Schulten, T. (2003) 'Europeanization of collective bargaining: trade union initiatives for the transnational co-ordination of collective bargaining' in Keller, B. and Platzer, H.-W. (eds) *Industrial relations and European integration. Trans- and supranational developments and prospects*, Aldershot: Ashgate, 112-136.
- Telljohann, V., da Costa, I., Müller, T., Rehfeldt, U. and Zimmer, R. (2009) 'European and international framework agreements: new tools of transnational industrial relations', *Transfer*, 15 (3-4), 505-525.
- Traxler, F. (1998) 'Collective bargaining in the OECD: developments, preconditions and effects', *European Journal of Industrial Relations*, 4 (2), 207-226.
- Traxler, F. (1995) 'Two logics of collective action in industrial relations?', in Crouch, C. and Traxler, F. (eds) *Organized industrial relations in Europe: what future?*, Aldershot: Avebury.
- Traxler, F. (2002) 'Wage regulation between industrial democracy and market pressures. towards a European model?', *European Sociological Review*, 18 (1), 1-16.
- Traxler, F. (2003) 'European Monetary Union and collective bargaining', in Keller, B. and Platzer, H.-W. (eds) *Industrial relations and European integration. Trans- and supranational developments and prospects*, Aldershot: Ashgate, 85-111.
- Traxler, F., Kittel, B. and Blaschke, S. (2001) *National labour relations in internationalized markets: a comparative study of institutions, change, and performance*, Oxford: Oxford University Press.
- Traxler, F., Bernd B. and Glassner, V. (2008a) 'Pattern bargaining: an investigation into its agency, context and evidence', *British Journal of Industrial Relation*, 46 (1), 33-58.
- Traxler, F., Arrowsmith, J., Nergaard, K. and Molins López-Rodó, J.M. (2008b) 'Variable pay and collective bargaining: a cross-national comparison of the banking sector', *Economic and Industrial Democracy*, 29 (3), 406-431.
- Visser, J. (2009) *ICTWSS: Database on institutional characteristics of trade unions, wage setting, state intervention and social pacts in 34 countries between 1960 and 2007*, Amsterdam Institute for Advanced Labour Studies (AIAS), University of Amsterdam, version 2, January 2009. <http://www.uva-aias.net/208>
- Vandenbrande, T., Van Gyes, G., Lehndorff, S., Schilling, G., Schief, S. and Kohl, H. (2007) *Industrial relations in EU Member States 2000-2004*, Dublin: European Foundation for the Improvement of Living and Working Conditions.
- WSI (ed.) (2006) 'Gestärkte Betriebsräte', *Mitbestimmung*, 12/2006.
- WSI (ed.) (2010) *WSI-Tarifhandbuch 2010*, Frankfurt, M.: Bund-Verlag.

## Annex

Table 1 Levels of collective bargaining, extension practice and minimum wages

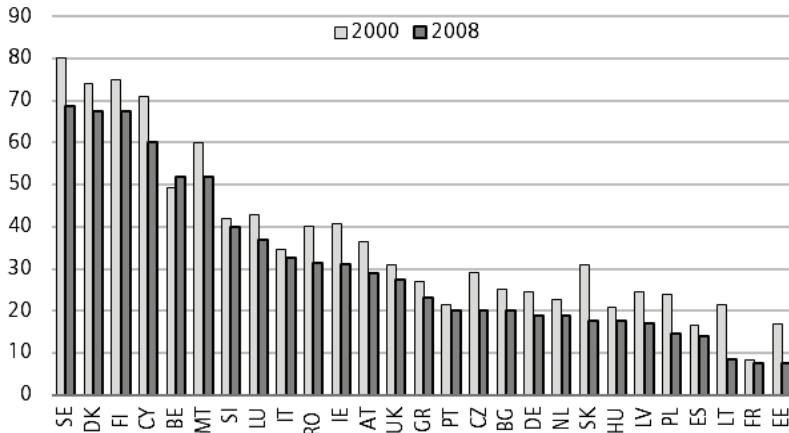
	Intersectoral	Sectoral	Company	Predominance of MEB <sup>a</sup> or SEB <sup>b</sup>	Practice of extending collective agreements	Statutory minimum wage regulation
AT		XXX	X	MEB	XXX*	(Yes)
BE	XXX	XX	X	MEB	XXX	Yes
BG		X	XXX	SEB	X	Yes
CY		XX	X	MEB		Partly
CZ		X	XXX	SEB	XX	Yes
DK	X	XXX	XX	MEB		No
EE		X	XXX	SEB	XX	Yes
FR		X	XXX	MEB	XXX	Yes
FI	XXX	XX	X	MEB	XXX	No
DE		XXX	X	MEB	XX*	Partly
GR	XX	XX	X	MEB	XXX	Yes
HU	X	X	XXX	SEB	XX	Yes
IE	XXX		X	MEB		Yes
IT		XXX	X	MEB	*	No
LV		X	XXX	SEB	XX	Yes
LT		X	XXX	SEB	X	Yes
LU		XX	XX	MEB	XXX	Yes
MT		X	XXX	SEB		Yes
NL		XXX	X	MEB	XX	Yes
PL		X	XXX	SEB	X	Yes
PT		XXX	X	MEB	XXX	Yes
RO	X	X	XXX	SEB		Yes
SK	X	XX	XX	SEB	XX	Yes
SI	XX	XX	X	MEB	XX	Yes
ES		XXX	X	MEB	XXX	Yes
SE		XXX	X	MEB		No
UK		X	XXX	SEB		Yes

Note: XXX = most important level, extensive extension practice; XX = important level, limited extension practice; X = existing but marginal level, marginal extension practice; 'Blank' = level is non-existent, no extension practice; '\* = functional equivalent to extension;

<sup>a</sup> 'Multi-employer bargaining'; <sup>b</sup> 'Single-employer bargaining'

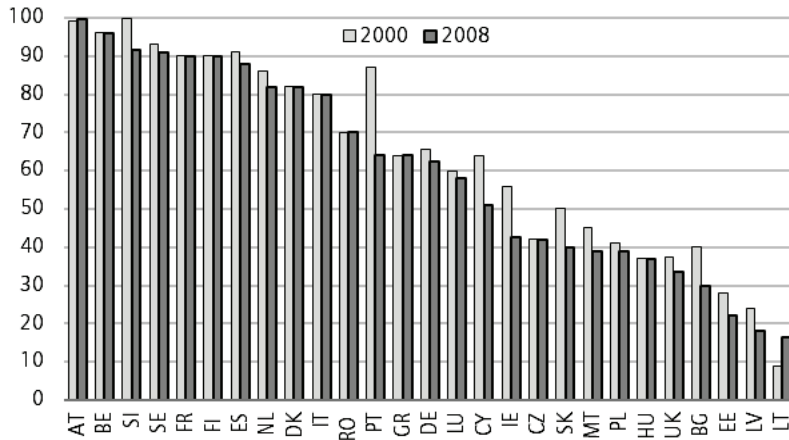
Sources: Marginson/Traxler 2005, European Commission 2004 and 2011, ETUI 2011b.

Figure 1 Union density by countries, 2000 and 2008



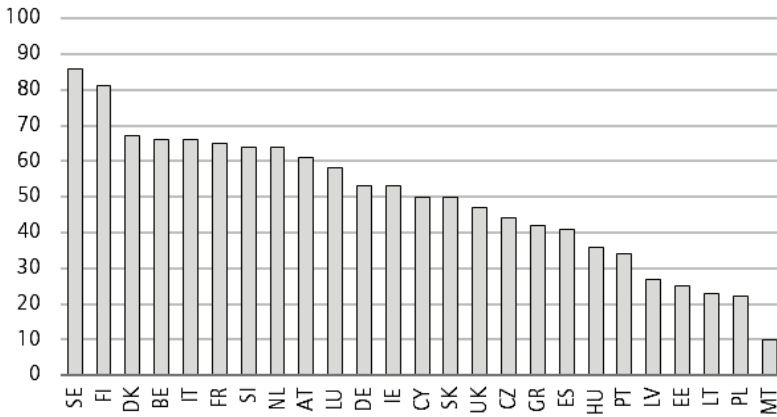
Note: Net union density as share of employed union members in the total number of dependently employed persons  
 Source: European Commission 2011.

Figure 2 Collective bargaining coverage, 2000 and 2008



Note: Adjusted coverage rate as share of workers covered by any collective agreement at all in the total number of dependently employed persons  
 Source: European Commission 2011.

Figure 3 **Presence of trade unions or similar employee representation bodies at the workplace**



Note: Share of workers in the total number of employees that agrees to the question 'Is there a trade union or similar organisation at your workplace?'

Source: Vandenberghe *et al.* 2007, European Social Survey, data refers to 2002-2003.



## Chapter 3

# European framework agreements: 'nomina nuda tenemus' or what's in a name? Experiences of the European social dialogue

Stefan Clauwaert

### Introduction

The European Commission defines 'transnational company agreement' as 'an agreement comprising reciprocal commitments, the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives' (European Commission 2008). A distinction is made between International Framework Agreements (IFA's) and European Framework Agreements (EFAs). With IFAs generally being considered as global instruments with the main purpose of ensuring compliance with international labour standards in all of the target company's locations, EFAs are generally limited in their geographical scope to European countries and cover a broader range of more concrete and focused topics and arrangements.<sup>1</sup> Although this seems a logical way of clarifying a relatively straightforward situation, it might still create confusion, in particular when juxtaposing this definition with less official yet regularly used terms found in documents on European industrial relations.

---

1. A third group called 'mixed framework agreements' was recently introduced due to the overlapping scopes of the agreements. See Chapter 6.

For instance, according to the European Industrial Relations Dictionary, five types of European collective agreements exist:

1. Interconfederal/intersectoral agreements between ETUC, BUSINESS EUROPE, UEAPME and CEEP such as the framework agreements on parental leave (including its revision), part-time work and fixed-term work incorporated in directives, and the so-called autonomous agreements such as the ones on telework, stress at work, or harassment and violence;
2. multi-sector agreements negotiated and signed by the European social partners representing different sectors (e.g. the multi-sector Agreement on Workers' Health Protection through the Good Handling and Use of Crystalline Silica and Products Containing It);
3. European industry/sectoral agreements between social partners organised on an industry/sectoral basis at European level (e.g. agreements on working time arrangements reached in different sectors of the transport industry (air, sea, rail and road));
4. agreements with a multinational company having subsidiaries in more than one EU Member State (e.g. European Works Council agreements and framework agreements on labour policies, international labour standards and restructuring issues signed by European Works Councils and in certain cases also by European industry federations);
5. agreements covering regions extending to more than one Member State. These take the form of agreements between employers and inter-regional trade union councils in a number of cross-border areas.<sup>2</sup>

Transnational company agreements, whether in the form of international or European framework agreements, would thus tend to belong to the group of agreements mentioned under item 4 above. However, classifying them under the general heading of European 'collective agreements' does not coincide with the overall view of scholars who for

---

2. [http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/european\\_collectiveagreements.htm](http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/european_collectiveagreements.htm)

several reasons agree that such agreements cannot be classed as ‘collective agreements’ (Sobczak 2007).<sup>3</sup>

However, when looking at the definition of the term ‘framework agreement’ in the same dictionary, we find the following: ‘a framework agreement is the term used to describe the successful outcome of the European social dialogue’ (be it interprofessional, sectoral or multi-sectoral) and whereby ‘the term “framework” is intended to highlight the particular nature of the agreement as providing an outline of general principles to be implemented in the Member States “either in accordance with the procedures and practices specific to management and labour and the Member States or at the joint request of the signatory parties, by a Council decision on a proposal from the Commission”’.<sup>4</sup>

So what’s in a name? In this chapter the focus lies on European framework agreements as negotiated and signed within the framework of European social dialogue (interprofessional and sectoral) as institutionalized in Articles 152-155 of the Treaty on the Functioning of the European Union (TFEU). Part One gives a brief overview of the history and (legal) framework of this dialogue. Part Two focuses on results achieved. Whereas in Chapter 1 reference is made to numerous scholars working on the question of these agreements<sup>5</sup>, Part Three of this chapter instead provides a concise overview of attempts by the European social partners in particular to clear the mist hanging over several aspects of these European framework agreements such as how they are nominated, how they are implemented, etc.

## 1. History and (legal) framework

Acting on an initiative of the then President of the Commission, Jacques Delors, the European social partners (at that time ETUC, UNICE (now BUSINESSEUROPE) and CEEP) started a social dialogue in 1985, presaging the development of a European contractual area and often

---

3. See also Chapter 6.

4. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/frameworkagreements.htm>

5. See also Chapter 1.



described as the Val Duchesse dialogue<sup>6</sup>. A major landmark for the success of this cross-industry social dialogue was their agreement of 31 October 1991 on the role of the social partners in developing the Community's social dimension (also known as the Agreement on Social Policy). This Agreement was almost literally taken over in the so-called 'Social Protocol' and annexed to the 1993 Maastricht Treaty, as well as being incorporated in the main body of the 1996 Amsterdam Treaty in the form of then Articles 137 and following.

Under Article 154 TFEU (ex-Article 138 TEC), the Commission has an obligation to consult the European social partners in two phases before adopting legislative proposals in social policy fields, in particular those listed under Article 137 TEC (now Article 153 TFEU). Following this consultation process, the European social partners can present an opinion or a recommendation to the Commission or inform the Commission of their intention to open negotiations on the subject covered by the consultation.

Article 155 TFEU (former Article 139 TEC) states that:

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for

---

6. This because the inaugural meeting of this European social dialogue was held in 'Val Duchesse', a castle on the outskirts of Brussels. Interesting to note is that this start falls more or less together with the successful conclusion of first transnational company agreements at Thomson Grand Public (1985) and BSN-Danone (1986). See also Chapter 6.

which unanimity is required pursuant to Article 153(2).’ (underlining added by author)<sup>7</sup>

According to the European Commission, ‘since the Amsterdam Treaty, European social dialogue has had the capacity to be an autonomous source of European social policy legislation. European social partners may adopt agreements that can be implemented through a Council Directive, which makes them legally binding for all employers and workers in Europe once they are transposed into national legislation or collective agreements (“erga omnes” effect); they may also adopt autonomous agreements to be implemented through customary national procedures. In the latter case, the agreements are binding only for the signatories and their affiliates (“relative” effect)’ (European Commission 2010: 13).

These basic ‘rules of the game’, as contained in these few Treaty articles and Commission documents, have over the years been further enhanced and/or clarified – also in view of developments and lessons learnt over time in European social dialogue – by five Commission Communications and one Staff Working Document (respectively European Commission 1993, 1996, 1998, 2002, 2004 and 2010). Below, a brief summary is given of what these documents entailed, in particular in relation to the negotiation capacities of the European social partners and the agreements reached as a result of their dialogue.

### 1.1 European Commission (1993): Communication from the Commission on the application of the agreement on social policy

This first Communication of 1993 focused mainly on clarifying the conditions for implementing the Agreement/Protocol annexed to the

---

7. According to its predecessor, Article 118(b) EEC Treaty (Single European Act of 1986), ‘the Commission shall endeavour to develop the dialogue between management and labour at European level, which could, if the two sides consider it desirable, lead to relations based on agreement’. In contrast to Article 155 TFEU there was no reference to ‘contractual relations’. Article 139 also remains silent as to what is required for an agreement to actually establish contractual relations in the sense of a binding commitment. Nevertheless and according to Schiek the then article 139(1) established a new type of contract, the ‘social partner agreement’ (Schiek 2005: 47).

Maastricht Treaty both in relation to the consultation of the European social partners and for the negotiation and implementation of these agreements (European Commission 1993).

The first pivotal issue to solve was the question of the representativeness of the organisations able to negotiate such European-wide agreements. To be eligible for consultation and to have the legitimacy to suspend the legislative process and opt for an agreement-based approach, the social partner organisations must:

- be cross-industry, or relate to specific sectors or categories and be organised at European level;
- consist of organisations which are themselves an integral and recognised part of Member States' social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible;
- have adequate structures to ensure their effective participation in the consultation process.<sup>8</sup>

---

**8.** Interestingly, in a joint opinion of 29 October 1993 on 'proposals by the social partners for implementation of the Agreement annexed to the protocol on social policy of the Treaty on European Union', ETUC, UNICE and CEEP put forward far more stringent criteria. For them the social partners had to meet all the following conditions:

- Be organised horizontally or sectorally at European level;
- Be composed of organisations which are themselves regarded at their respective national levels as representative of the interests they defend, particularly in the fields of social, employment and industrial relations policy;
- Be represented in all Member States of the European Community and, possibly, of the European Economic Area or have participated in the 'Val Duchesse' social dialogue;
- Be composed of organisations representing employers or workers, membership of which is voluntary at both national and European level;
- Be composed of members with the right to be involved, directly or through their members, in collective negotiations at their representative levels;
- Be instructed by their members to represent them in the framework of the Community social dialogue. (ETUC et.al. 1993)

In any case, the list of such representative organisations is reviewed regularly in the light of experience and of the results of an ongoing study on representativeness. To date, more than 80 European organisations representing employers or workers and acting on inter-professional and/or sectoral level have met these criteria. The list of organisations is available under: <http://ec.europa.eu/social/main.jsp?catId=522&langId=en>

Whereas the Commission did not want to take a restrictive view on the number of organisations involved in such consultation (although at the same time conscious of the practical problems posed by a multiplicity of potential actors), it was in any case more hesitant to nominate or clarify which were the organisations which could actually start negotiations. The Communication stated that ‘the social partners concerned will be those who agree to negotiate with each other. Such agreement is entirely in the hands of the different organisations.’ (European Commission 1993:20) The only proviso stated by the Commission was that the organisations signatory to an agreement should bear in mind the provisions of the 1991 Agreement regarding small and medium-sized undertakings (Article 2(2)). As for the coverage of EFTA countries (now EEA countries), it was stressed that ‘in practice, the social partners’ organizations normally cover the EFTA countries, so that they are de facto integrated at all stages of the consultation procedure, with negotiation being a matter for the social partners’. (European Commission 1993:21) Furthermore, the Communication only stipulated that ‘the question of whether an agreement between social partners representing certain occupational categories or sectors [to start negotiations] constitutes a sufficient basis for the Commission to suspend its legislative action will have to be examined on a case-by-case basis with a particular regard to the nature and scope of the proposal [for Community/ Union action and on which the organisations are consulted] and the potential impact of any agreement between the social partners concerned on the issues which the proposals seek to address’. (European Commission 1993:20) The latter condition would become particularly relevant for the admission of the UEAPME to the negotiation table later on. As for the content of the negotiations, the Commission stressed that the social partners concerned were in no way required to restrict themselves to the content of the proposal (European Commission 1993: 20).

The Communication also dealt extensively with the implementation of a concluded agreement via the two routes defined in what is now Article 155 TFEU. It stated that, in the case of the social partners opting to implement an agreement via this ‘voluntary route, the terms of this agreement will bind their members and will affect only them and only in accordance with the practices and procedures specific to them in

their respective Member States'.<sup>9</sup> The 11 High Contracting Parties furthermore declared that the 'first of the arrangements for application of the agreements between management and labour at Community level (...) will consist in developing, by collective bargaining according to the rules of each Member State, the content of the agreements, and that consequently this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation.' (European Commission 1993: 22)

In conclusion, the Commission already foresaw that 'the new situation created by the co-existence of two legal frameworks for action in the social field will be complex and difficult to manage. The new role for the social partners is an important step forward but will need time to grow and develop. (...) The important point at this early stage of implementing the new mechanism is to allow space for natural evolution. The creation of heavy structures is not likely to yield the best results at this early stage. The Commission feels that this Communication lays down the ground rules for the implementation of the new procedures so that business can be conducted efficiently and openly. (...)'. (European Commission 1993: 25) A conclusion all the more valid today.

## 1.2 European Commission (1996): Communication concerning the Development of the Social Dialogue at Community Level

In its 1996 Communication, the Commission provided an assessment of cross-industry and sectoral social dialogue, the efficiency and impact of its then existing structures and its development perspectives. With the then recent successful completion of negotiations on a European framework agreement on parental leave in mind, the Commission also looked at the first lessons to be learned for the negotiation of agreements under the Agreement on Social Policy (European Commission 1996).

---

9. Underlining added as the term 'voluntary' has led to several problems necessitating a currently ongoing discussion on the nature and implementation of such agreements. See below.

Regarding the development prospects for such negotiations, alongside a possible review of procedures, the focus lay on the representativeness of the contracting parties. The Commission noted that the issue of participation in such negotiations 'has obviously proved to be sensitive and controversial' though it also continued to believe – as mentioned in the 1993 Communication – that 'only the social partners themselves can develop their own dialogue and negotiation structures and that it cannot impose participants on a freely undertaken negotiation.'<sup>10</sup> (European Commission 1996: 14) On the other hand, the Commission referred to its responsibility to assess the validity of an agreement in the light of its content, which required an assessment of whether those affected by the agreement had been represented. It considered that the question of the representativeness of the parties engaged in a negotiation had to be examined on a case-by-case basis, as the conditions would vary depending on the subject matter under negotiation. It had therefore to examine whether those involved in the negotiation had a genuine interest in the matter and could demonstrate significant representation in the domain concerned. The Commission wanted to encourage the European social partner organisations to co-operate more closely in finding a solution to this question, appealing to the social partners to be open and flexible on the issue in order to ensure appropriate participation in negotiations and inviting them to see 'what steps the social partners can take to reinforce the acceptability of a negotiated agreement to all interested parties, including social partner organisations who did not participate, the Council, the Commission and the European Parliament'. (European Commission 1996: 14).

It is interesting to note that, in the context of the theme of this publication on transnational collective bargaining and agreements, the Commission also stressed that 'while the principal levels of Community social dialogue are the interprofessional and sectoral dialogue, organised centrally, there is a growing need to assist the development of new levels of dialogue in the light of the challenges facing the EU. These include: – the social dialogue in the growing transnational industries.

---

**10.** At that time the UEAPME indicated its intention to initiate proceedings before the European Court of Justice, criticising the fact that it was not party to the negotiations on parental leave and consequently questioning the validity of that first framework agreement and whether it was applicable to its members.

The European Works Council Directive has already played an important role in encouraging greater dialogue, but has demonstrated how national-based industrial relations systems are no longer sufficient; (...)’ (European Commission 1996: 16)

### 1.3 European Commission (1998): Communication on adapting and promoting the social dialogue at Community level

This Communication focused – alongside extending the remit of the social partners to new areas of work – on the need for adapting the consultation procedures both at cross-industry and sectoral level. It also contained the Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees (ESSDC) as well as the draft Council Decision proposing amendments to the functioning and composition of the Standing Committee on Employment (European Commission 1998b). As for developments in the European sectoral dialogue, the main innovations were that a new framework for the establishment of sectoral social dialogue committees was provided whereby these committees were going to constitute the key forum for sectoral dialogue<sup>11</sup>, that these committees would also be consulted in a timely and substantial manner on sector-specific issues with important social implications and the fact that the development of negotiations at sectoral level was a key issue (European Commission 1998: 11 and 17). The Commission considered that the potential of the European sectoral social dialogue was not used to the full and hoped that the ESSDC’s would be conducive to entering into negotiations on voluntary agreements

---

**11.** The Commission Decision of 20 May 1998 providing for this new framework refers in its considerations to the possibility provided by the Treaty for dialogue at European level which could lead if desirable to relations based on agreement (then Article 118b TEC) as well as point 12 of the Community Charter of the Fundamental Social Rights of Workers. It also established in its Article 1 the representation criteria allowing participation in an ESSDC, i.e. organisations (a) shall relate to specific sectors or categories and be organized at European level; (b) they shall consist of organizations which are themselves an integral and recognized part of Member States’ social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States; and (c) they shall have adequate structures to ensure their effective participation in the work of the Committees.

promoting the key issues in the sectors.<sup>12</sup> (*Underlining added by the author*) Such negotiations would either complement cross-industry agreements or establish independent agreements limited to the sector concerned (ibid: 18).

The Commission also returned to the question of participation and representativeness in contractual relations at both cross-industry and sectoral level, reiterating that ‘the Commission cannot intervene in the negotiations. It is up to the social partners to decide who sits at any negotiating table and it is up to them to come to the necessary compromises. The respect of the right of any social partner to choose its negotiating counterpart is a key element of the autonomy of the social partners.’ (ibid: 15) At that time the UEAPME was still questioning the validity of both the parental leave agreement and the framework agreement on part-time work before the ECJ as it had not been party to the negotiations.<sup>13</sup>

As for the implementation of the concluded agreements, in particular when they were to be implemented by the social partners, the existence of good information and follow-up mechanisms was deemed crucial to their implementation effectiveness. The Commission expressed its readiness to support the social partners in developing such mechanisms.

In this Communication, the Commission also drew attention to the fast-developing social dialogue within multinational companies following the adoption of the EWC Directive and expressed its intention ‘to continue to support the development of links between the European and transnational levels so as to help the parties concerned to draw upon the best experiences and ideas.’ (ibid: 21)

- 
12. In that same section of the Communication reference is made to the EFA/ETUC-GEOPA/COPA Framework Agreement on the Improvement of Paid Employment in Agriculture in the Member States of the European Union of 24 July 1997 as ‘a good and recent example of what can be done when the most is made of that potential’ [of the sectoral dialogue].
  13. Cases T-135/96 and T-55/98. The Commission welcomed the positive example of the involvement of experts from EUROCOMMERCE, FENI, COPA and HOTREC in the negotiations on part-time work as an important step and encouraged the social partners to go further to make the agreements even more acceptable by ensuring optimum representation. (idem: 18).



#### 1.4 European Commission (2002): Communication on 'The European social dialogue, a force for innovation and change'

In this Communication, issued shortly after the successful completion of the negotiations on the first autonomous framework agreement on telework (ETUC *et al.* 2002a), the Commission, alongside promoting the key role of social dialogue and social partners in European governance, devoted a lot of attention to the particular problem of improving the implementation and monitoring of the results of European social dialogue. It also called on the European social partners to further develop their autonomous dialogue and to establish joint work programmes (European Commission 2002). In the context of EU enlargement, they were also advised to continue to improve their internal decision-making machinery, in particular for the purpose of establishing negotiating mandates and concluding agreements. It is recognized that only with sufficiently robust national structures will social partners from candidate countries be able to participate effectively in negotiations and other European social dialogue activities and also implement agreements at national level.

Given the increased use and adoption of so-called 'new generation' texts (like charters but also 'autonomous' agreements like the one on telework), the European social partners were firmly called upon to endeavour to clarify the terms used to describe their contributions and reserve the term 'agreement' for texts implemented in accordance with the procedures laid down in the former article 139(2) TEC (now article 155(2) TFEU). As for the implementation of such autonomous agreements, the Commission 'calls on the social partners to strengthen substantially the procedures for on-the-spot monitoring and to prepare regular reports on implementation of the agreements signed. These reports should outline progress on the content of the implementation of agreements and their coverage. Such structured reporting is particularly necessary where the agreement negotiated by the social partners follows Commission consultation under Article 138 of the Treaty [now article 154 TFEU]'. Further, the Communication states that 'looking ahead and in the medium term, the development of the European social dialogue raises the question of European collective agreements as sources of law. The discussions on the forthcoming reform of the Treaty should take this into consideration' (European Commission 2002: 18-19). It is stressed later on in the text – in connection with the status of

social dialogue in the candidate countries – that social dialogue is enshrined in the Treaty and forms an integral part of the ‘acquis communautaire’.

It was further stated that reinforcing European and transnational dialogue among firms was considered a fundamental challenge for Europe whereby the link between the company level and the more centralised levels of dialogue was seen as crucial.

### 1.5 European Commission (2004) Communication: Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue

This was probably up till now the most crucial Commission Communication on European social dialogue instruments, their status, impact and implementation. Looking at ways of enhancing the role of European social dialogue as a form of better governance, the Commission expressed its concern that many texts contained imprecise and vague follow-up provisions, emphasising that the added value of a text depended not solely on whether it was binding, but on its effective follow-up at national level. It therefore proposed new terminology for the different texts which were classified in four broad categories:

- (1) **agreements** (whether or not implemented through European directives) which are binding and must be followed up and monitored, since they are based on Article 155 of the Lisbon Treaty;
- (2) **process-oriented texts** (frameworks of action, guidelines, codes of conduct, policy orientations), which, albeit not legally binding, must be followed up, and progress in implementing them regularly assessed;
- (3) **joint opinions and tools**, intended to influence European policies and to help share knowledge;

and finally

- (4) **procedural texts**, like rules of procedures for the ESSDCs but also encompassing for instance the social partners’ Agreement on Social Policy of 31 October 1991 (European Commission 2004: 15-19).

Although welcoming the increasing adoption of such new generation texts, the Commission encouraged the European social partners to make greater use of peer review techniques inspired by the open method of coordination for following-up these texts, for example by setting targets (quantitative, where feasible) or benchmarks, and regularly reporting on progress made towards achieving them.

As for autonomous agreements implemented in accordance with Article 139(2) TEC (now 155(2) TFEU), the Commission announced its intention to have its own monitoring process for such agreements. It also pointed out that, following the wording of Article 139(2) TEC; i.e. 'Community level agreements shall be implemented', there was an obligation to implement such agreements and for the signatory parties to exercise influence on their members in order to implement them (European Commission 2004: 16).

In an annex to this Communication, the Commission also proposed a checklist for drafting (new generation) social partner texts whereby it requests the social partners to provide, for each text, information on such aspects as: whom the texts are addressed to, the status and purpose of the text, the deadline by which the provisions should be implemented, how the text will be implemented at national level, etc. (European Commission 2004: 20).<sup>14</sup>

---

**14.** The full set of proposed required information entails:

- Clearly indicate to whom they or the various provisions are addressed, e.g. the Commission, other European Union institutions, national public authorities, social partners;
- Indicate the status and purpose of the text clearly;
- Where applicable, indicate the deadline by which the provisions should be implemented;
- Indicate clearly how the text will be implemented and promoted at national level, including whether or not it should be implemented in a binding fashion in all cases;
- Indicate clearly through which structures the monitoring/reporting will be undertaken, and the purpose of the reports at different stages;
- Indicate when and/or at which intervals monitoring/reporting will take place;
- Specify the procedures to be followed for dispute settlement (e.g. disagreements over the interpretation of the meaning of the text);
- Be dated;
- Be signed;
- Agreements should include an annex listing the members of the signatory parties at whom the text is directed;
- Indicate which language(s) is/are the original.

The Commission basically considered there was a need for a framework to help improve the consistency of the social dialogue outcomes and to improve transparency, deeming this Communication to be a first step in that direction and expressing its intention to examine the possibility of drawing up a more extensive framework. However, the Commission readily stated that its preferred approach would be for the social partners to negotiate their own framework, calling on them to consider this possibility (European Commission 2004: 11).

Despite these clear and detailed follow-up provisions and given the fact that many of these new generation texts included the follow-up being ensured almost primarily by the social partners themselves, the Commission saw the need for an efficient and effective follow-up with greater interaction and even synergies between the different levels of industrial relations, from the European level, via national and sectoral levels, down to the company level. Regarding synergies between the European social dialogue and the company level, the Commission expressed its wish for the social partners to explore possible synergies between in particular sectoral social dialogue and European works councils, announcing a study on transnational collective bargaining and a consultation at a later stage of the social partners regarding the development of a Community framework for transnational collective bargaining (European Commission 2004: 11).

## 1.6 European Commission (2010): Staff Working Document on the functioning and potential of European sectoral social dialogue

Last but not least, the Commission Staff Working Document of 22 July 2010 generally takes stock of the functioning of the European sectoral social dialogue and identifies possible improvements with a view to extending the scope and quality of the consultation and negotiation processes. In doing so, the Commission noted that the sectoral social partners had not yet fully exploited the potential of sectoral social dialogue for negotiating agreements. This was seen as due to the fact that ‘major sectors where large transnational companies are prevalent (steel, telecommunications, chemical industry, civil aviation) tend to pay less attention to the European sectoral level because the social partners prefer to negotiate directly at company level, including also within European

Works Councils)'. The Commission therefore expressed its intention to continue providing technical and financial support to such negotiations in the context of sectoral social dialogue (European Commission 2010: 14).<sup>15</sup> As for the national-level implementation of autonomous agreements concluded at EU level, the Commission stated that European social partners needed to invest more in monitoring processes and to develop relevant indicators to improve implementation and evaluation of their agreed texts. Reference was made here to the implementation indicators set forth in the autonomous agreement on workers' health protection through the good handling and use of crystalline silica and products containing it (European Commission 2010: 17-18).<sup>16</sup>

## **2. Results achieved**

Looking back on 20 years of European social dialogue at both cross-industry and sectoral level, the results achieved can be considered – at least from a quantitative point of view - as impressive, with more than 600 joint texts issued, ranging from framework agreements, joint work programmes, declarations, statements to such joint instruments as specific websites<sup>17</sup>. An overview of these joint texts can – alongside more general information on the European social dialogue - be found on a specific European Commission website including also a database where these joint texts can be consulted.<sup>18</sup>

Looking at signed European framework agreements, the cross-industry European social dialogue has up till now (September 2011) led to seven European framework agreements, three of which have been incorporated into a Directive:

- 
15. One example of technical assistance is the readiness of the Commission to provide legal assistance during negotiations where appropriate in particular because consistency with European law and quality in legal drafting are particularly important for instance for agreements to be implemented by means of European Directives.
  16. More information on this agreement is available on the dedicated website: [www.nepsi.eu](http://www.nepsi.eu)
  17. Reference is made here to the so-called 'Resource centres' operated by ETUC and the employer organisations where they – with a view to raising awareness on and disseminating the results of the European social dialogue – have posted an enormous amount of information accessible to the general public. See: <http://resourcecentre.etuc.org> or <http://www.erc-online.eu/Content/Default.asp>
  18. [http://ec.europa.eu/employment\\_social/social\\_dialogue/](http://ec.europa.eu/employment_social/social_dialogue/)

- the European Framework Agreement on parental leave concluded by UNICE, CEEP and ETUC on 14 December 1995 (transposed into Council Directive 96/34/EC of 3 June 1996); and of which a revised version was successfully negotiated and signed on 18 June 2009 by BUSINESSEUROPE, UEAPME, CEEP and ETUC (transposed into Council Directive 2010/18/EU of 8 March 2010)
- the European Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC on 6 June 1997 (transposed into Council Directive 97/81/EC of 15 December 1997);
- the European Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP on 18 March 1999 (transposed into Council Directive 1999/70/EC of 28 June 1999).

Four other European framework agreements emerging from this cross-industry social dialogue are so-called autonomous framework agreements, meaning that they have not been incorporated into a Directive, but are instead implemented via the second implementation route foreseen in Article 155 TFEU, i.e. ‘in accordance with the practices and procedures specific to management and labour and the Member States’. These are:

- the European Framework Agreement on telework concluded between ETUC, UNICE/UEAPME and CEEP on 16 July 2002;
- the European Framework Agreement on work-related stress concluded between ETUC, UNICE, UEAPME and CEEP on 8 October 2004;
- the European Framework Agreement on harassment and violence at work concluded by ETUC, Business Europe, UEAPME and CEEP on 26 April 2007;
- the European Framework Agreement on inclusive labour markets concluded by ETUC, Business Europe, UEAPME and CEEP on 25 March 2010.

Turning to European framework agreements emerging from the European sectoral social dialogue, the European Commission Staff Working Document of July 2010 taking stock of the main achievements of this form of social dialogue since 1998 refers to five agreements incorporated into a Directive and one so-called autonomous framework agreement (European Commission 2010; see table below). With regard to the latter, the autonomous agreement on workers’ health protection through the good handling and use of crystalline silica and products containing it, it is pointed out that this was the first European multi-sectoral agreement as well as the first time that the Official Journal published this type of Agreement<sup>19</sup>

Sectors	Agreements
Hospitals	COUNCIL DIRECTIVE 2010/32/EU of 10 May 2010 implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU
Maritime	COUNCIL DIRECTIVE 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners’ Associations (ECSA) and the European Transport Workers’ Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC
Transport	COUNCIL DIRECTIVE 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners’ Association (ECSA) and the Federation of Transport Workers’ Unions in the European Union (FTS)
Railways	COUNCIL DIRECTIVE 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers’ Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector
Civil aviation	COUNCIL DIRECTIVE 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers’ Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA)
14 industrial sectors	Agreement on workers’ health protection through the good handling and use of crystalline silica and products containing it (signed on 25 April 2006)

(Source: European Commission 2010:11)

---

19. OJ C 279 of 17 November 2006, p. 2

Surprisingly, this table does not mention the CER – ETF Agreement on some aspects of the organisation of working time in the rail transport sector of 30 September 1998 and which was implemented via Directive 2000/34/EC of 22 June 2000, even though it is listed when doing a search (using the search criteria ‘type: agreement council decision’) of the European Commission database on joint texts.

A similar discrepancy is found between the autonomous agreements listed in the 2010 Commission Staff Working Document and the results of a search on ‘type: autonomous agreements’ in that same database, with no reference made either to the Agreement on the European license for drivers carrying out a cross-border interoperability service between ETF and CER of 27 January 2004<sup>20</sup> or to the European agreement on the implementation of the European Hairdressing Certificates of 18 June 2009 between Coiffure EU and UNI-Europa Hair & Beauty.<sup>21</sup>

Neither of the two search results contains any reference to the Recommendation framework agreement on the improvement of paid employment in agriculture in the Member States of the European Union (24/07/1997), the European agreement on vocational training in agriculture (05/12/2002) and European agreement on the reduction of workers' exposure to the risk of work-related musculo-skeletal disorders in agriculture (21/11/2005), even though their titles include the term ‘agreement’

A new framework agreement - the European autonomous agreement on the Content of Initial Training for CIT Staff carrying out Professional Cross-Border Transportation of Euro Cash by Road between Euro-Area Member States - was concluded on 24 November 2010 in the private security sector between UNI-Europa and COESS. At the request of the signatory parties, the agreement was – at the time of writing - in process of being incorporated into a Council Directive.

---

**20.** On 10 June 2009, the CER and ETF issued a Joint Declaration on their 2004 Agreement on a European Locomotive Driver's License to clarify the application of the Agreement.

**21.** A third source, the database containing all possible joint European social dialogue texts set up by the Observatoire Social Européen (OSE), comes up, when using ‘agreement article 139’ as a search argument, with the same hits as the ones in the European Commission database, thereby also classifying the joint declaration mentioned in footnote 19 as an agreement.



Last but not least, there is the autonomous European Framework Agreement on Competence Profiles for Process Operators and First Line Supervisors in the Chemical Industry concluded between ECEG and EMCEF on 15 April 2011.

Such search results, dependent on the sources used and documents consulted, confirm the need and concern of European social partners and the European Commission to clarify the understanding about and terminology used for the different instruments concluded in the context of their dialogue, in particular for framework agreements, as it often leads to problems and misunderstandings in the implementation of the texts.

### **3. Attempts by the European Commission, the European Parliament and social partners to clear the mist**

The existence of a (legal) framework for European social dialogue does not mean that all is rosy in the European social dialogue. This applies in particular to its outcomes, whether in the form of framework agreements or otherwise. As for transnational framework agreements, here as well there are still several problems and questions regarding the instruments used and their implementation. The sooner these are resolved or clarified the better it will be, as letting them persist will undoubtedly further negatively impact opinions on European social dialogue, its outcomes and the impact thereof.

Although doubts were already expressed a long time ago about the actual and probably patchy impact of the autonomous agreements<sup>22</sup>, it could be said that this probably triggered the shift towards greater autonomy and a more independent European social dialogue, resulting

---

**22.** See Branch (2005) for a comprehensive overview and analysis of the challenges and benefits of the implementation of autonomous agreements at that time and including manifold reference to such earlier literature on the potential ‘patchy’ implementation. In the meantime, this ‘rather patchy’ is also confirmed by the different implementation reports worked out jointly by the European social partners, the European Commission, the ETUI and other bodies and which can be found at the ETUC Resource centre website: <http://resourcecentre.etuc.org>. See also in this regard for example Branch (2005), Clauwaert (2011), Prosser (2006) and (2007).

in a debate on the instruments of and a renewed framework for European social dialogue.

The period 2000-2002 seems crucial here, being characterised *inter alia* by:

- The launch of the Lisbon Strategy (2000), providing European social dialogue with greater recognition and giving it an important role in achieving its targets;
- The failure of the 2001 negotiations on a framework agreement on temporary agency work which was also foreseen as the final part of a triptych of agreements on atypical contracts following the successful negotiations on part-time and fixed-term work;
- The European social partners' joint Laeken Declaration of December 2001 in which they expressed their willingness to develop a work programme for a more autonomous social dialogue including the diversified use of practices and instruments but without really clarifying the possible status and (monitoring of the) implementation of these different texts; (ETUC *et al.* 2001)
- The Commission's 2001 establishment of the High-Level Group on Industrial Relations and Change which delivered its report in February 2002
- The successful conclusion of negotiations on the first 'voluntary' framework agreement on telework (July 2002) (ETUC *et al.* 2002a)
- The November 2002 adoption of the first joint European social partners' work programme for 2003-2005 (ETUC *et al.* 2002b), etc.

The Commission's call, in its above-mentioned 2002 Communication, for the European social partners to endeavour to clarify the terms used to describe their contributions and reserve the term 'agreement' for texts implemented in accordance with the procedures laid down in the former article 139(2) TEC (now article 155(2) TFEU) and to strengthen

substantially the procedures for on-the-spot monitoring and to prepare regular reports on implementation of the agreements signed, is to be seen in this context. Of similar weight is the already-mentioned statement, also found in the Communication, that: 'looking ahead and in the medium term, the development of the European social dialogue raises the question of European collective agreements as sources of law. The discussions on the forthcoming reform of the Treaty should take this into consideration' (European Commission 2002: 18-19).

A second milestone in this regard is in a certain way the year 2004. Two years had passed during which the signatory parties to the framework agreement on telework were engaged in its implementation. Several problems had arisen, centred around the term 'voluntary' agreement. This led the Commission, in its 2004 Communication 2004 and with the consent of the European social partners, to switch to the term 'autonomous' agreement. Later that year, in October, the European social partners concluded and signed their second autonomous agreement on work-related stress. The lessons learnt from the implementation of the telework agreement also – alongside the switch in terms – implicitly figured in the text of the agreement on stress, triggering ETUC to ask for and obtain more stringent provisions in the latter agreement on its monitoring and implementation.

### 3.1 The European social partners taking the lead themselves

All this led, again almost solely on the initiative of ETUC, to the inclusion of a new action in the second joint work programme of the European social partners for the period of 2006-2008 stating;

'8. based on the implementation of the telework and stress agreements and the frameworks of actions on the lifelong development of competences and qualifications and on gender equality, (European social partners will) further develop their common understanding of these instruments and how they can have a positive impact at the various levels of social dialogue.' (ETUC *et al.* 2006a)

Given the lessons learned, a reference to this was also incorporated in the conclusions of the final European social partners' joint implementation report on the telework agreement stating that 'The reporting exercise

shows the heterogeneity both in reporting and implementation. This is partly due to the fact that it is the first time that member organisations have had to do this. It is also partly due to the novelty of the issue itself and partly due to the diversity of industrial relations systems. However, some challenges had to be overcome, for example, the translation of the EU framework agreement or the development of a common understanding on the nature of the autonomous EU framework agreement. These elements will feed into the discussions European social partners will have, according to their work programme 2006-2008, in order to further develop their common understanding of these instruments and how they can have a positive impact at the various levels of social dialogue.’ (ETUC *et al.* 2006b: 29) In view of the preparation of this overall joint reflection, ETUC decided during the meeting of the ETUC Social Policy and Social Legislation Working Group of 17 January 2007 to set up a specific internal ad hoc working group on this matter. This group met on 3 and 25 April and on 4 October 2007. It is important to note that from the outset ETUC did not intend to limit this exercise to merely developing a ‘common understanding of the European social dialogue instruments’, but rather to engage in an overall reflection and discussion on all European social dialogue processes/ structures/ actors/tools, as it considered and still considers that the effectiveness and quality of the European social dialogue is not only dependent on its outcomes. The threefold objective was thus to: 1) better understand the different European social dialogue instruments, 2) improve the quality and impact of European social dialogue structures, procedures and instruments, and 3) enable further steps to be taken in the construction of a genuine European industrial relation system. As far as is known, no similar activities were taken and/or documented within the European employers’ organisations.

No concrete joint actions were undertaken during the course of that second work programme, leading to the third joint work programme for 2009-2010 in a sense reiterating ‘action point 8’ of the second work programme:

‘The European social partners will also further develop their common understanding of the various instruments resulting from their negotiations, determine their impact on the various levels of social dialogue, further co-ordinate the various levels of social dialogue and negotiations, including the development of better synergies between European;’ and will be ‘Monitoring, assessing and

evaluating the implementation of EU social dialogue framework agreements and frameworks of actions;(...)' (ETUC *et al.* 2009)

With a view to finally starting these joint talks in the course of the second half of 2011 but also in preparation of its 12<sup>th</sup> Statutory Congress held on 16-19 May 2011 in Athens, ETUC launched, with the financial support of the Commission, a project involving a) a report on the 'European Social Dialogue: State of Play and Prospects' written by the European Social Observatory (ETUC and OSE 2011); and b) a European Conference, held on 25-26 January 2011 in Brussels, to debate with affiliated organisations and representatives from the European employer organisations and European institutions the results of the report. The report's goal was twofold: firstly, to make a comprehensive qualitative and quantitative assessment of European social dialogue; and secondly, to try to identify the prospects for social dialogue on the basis of a questionnaire sent to all organisations affiliated to ETUC and interviews with union activists at national and European level. The report consisted of three parts: a first part focusing on data collection for the qualitative and quantitative assessment and also comprising a literature review; a second part focusing on the results of the survey conducted amongst the member organisations; and a third part attempting to draw conclusions and examine the potential prospects for European social dialogue with a particular emphasis on the political and economic context within which it takes place.

Regarding the assessment of the outcomes, the report revealed that the respondents had identified a real problem, not only with cross-industry social dialogue instruments – the effectiveness of which was in serious doubt – but also with the content of the adopted texts. The questionnaire revealed that over the past fifteen years, the content of the texts (from parental leave to inclusive markets) had been considered less and less reliable.<sup>23</sup> In addition to content issues, respondents had major concerns

---

**23.** A striking feature of this evaluation of the contents of ESD joint documents by the respondents is that the three documents ranked highest correspond precisely – also in chronological terms – to the first three framework agreements signed by the European social partners and subsequently transposed into directives by the Council of the EU, namely the framework agreements on parental leave (1995), part-time working (1997) and temporary working (1999). They are followed by the autonomous agreements and the framework of actions, where once again the ranking corresponds almost exactly to the chronological order of adoption of the documents in question: Telework (2002),

about the implementation of joint texts, including ‘hard’ mutual commitments such as framework agreements and autonomous agreements (initially referred to as voluntary agreements), and ‘softer’ ones like recommendations and codes of conduct. Numerous issues were raised, including the reluctance of employers to cooperate nationally, the lack of interest shown by governments in social dialogue at national level, and insufficient knowledge (or no knowledge at all) of European texts on the part of grass-roots trade union organisations.

Despite the difficulties encountered and identified in the European social dialogue but also taking into account the larger context in which it takes place – the political environment (European Parliament, national governments), institutional activities (the role of the European Commission), the role and will of European social partners (both trade unions and employers), national social, economic and political stakeholders and the economic situation –, more than 95% of respondents agreed that improving European cross-industry social dialogue was a matter of priority. In this sense, they brought up the need for a clear framework for using social dialogue and its instruments. A framework directive was requested to clarify these procedures. When confronted with this call for a clear framework during the panel discussion at the European conference in early January 2011, the representatives of the European employer organisations did not basically object, with any divergence of views clearly lying in the overall content and form of such a framework.

In the context of the European Social Partners’ Integrated Programme 2009-2011, BUSINESSEUROPE, CEEP, UEAPME and ETUC jointly organised, with the financial support of the European Commission, a European conference on ‘European social dialogue: achievements and challenges ahead’, held in Budapest on 3-4 May 2011. Debates focused on the findings of a research project into the implementation and impact of European Social dialogue outcomes at national level, conducted by a team of experts between January and March 2011. The conference offered an important occasion for national social partners to discuss the

---

Stress (2004), Equality (2005), Violence (2007), Inclusive Labour Markets (2010) and Skills (2002). (ETUC and ESO 2011: 73-75).

results and share their views on future challenges. The main challenges facing European social dialogue seem to be: 1) the question of its future role in European policy-making, with many delegates expressing their concern about the weakened influence of such social dialogue at EU level; 2) the need to maintain autonomy and work on autonomous agendas; and 3) the need to continue to support social dialogue structures throughout Europe and in particular in those countries where the role of social dialogue is still rather weak. Concrete suggestions on how to improve the European social dialogue emerged: 1) institutionalisation of social dialogue through a European-level ‘social dialogue directive’; 2) a clear need to improve social dialogue at national level; 3) to ensure more powerful instruments focusing more on concrete results and which are thus more binding and precise; and 4) a need to give greater visibility to the outcomes of European social dialogue. Related more to transnational collective bargaining, one quite important result of the survey reflecting the responses received from trade union organisations in particular on how to improve the performance of European social dialogue is linked to the relationship between cross-industry and sectoral social dialogue as well as other forms of transnational social dialogue, for instance in multinational companies.

Finally, reference is made to the ETUC Congress Resolution on ‘Mobilising for Social Europe: Strategy and Action Plan 2011-2014’ adopted at its 12<sup>th</sup> Statutory Congress in Athens on 16-19 May 2011. This sets priorities for ETUC, one of which is European social dialogue and its possible reform (ETUC 2011, see also in this regard Clauwaert 2011a).

In Chapter 10 ‘Mobilising for a social Europe for a genuine social dialogue at all levels’, ETUC notes the possibilities offered by and the developments and progress made in the European social dialogue. However, it also notes that cross-industry dialogue in particular has undoubtedly entered a new phase and is currently experiencing a very difficult period, with one of the reasons being that employers over the last ten years have gradually refused the idea of binding framework agreements. A further reason is that the Commission, obsessed in particular with its programme for ‘better regulation’ (now relabelled ‘smart’ regulation which frequently means ‘less regulation’), has provided ever less input for the social dialogue.

Furthermore, ETUC stresses that the general political context is not currently favourable to the development of European social legislation geared to progress or even, in some countries, to the development of national social dialogue at the cross-industry or the sectoral level, with this representing a major problem for the implementation of certain European commitments (in particular, autonomous agreements). Reference is also made to the results to the above-mentioned ETUC/ESO report, in which a majority of affiliates consider that the quality of the content of the texts adopted in the framework of the cross-industry social dialogue has diminished in terms of their legal and practical effectiveness. And a very broad majority considers that the implementation of these joint texts at national level is patchy and inadequate (this applies also to the agreements subject to Article 155§2 of the Lisbon Treaty). While dissatisfaction is deep, there is still a strong determination to improve the cross-industry social dialogue.

This is why ETUC must mobilise all its energy to relaunch the cross-industry social dialogue in the spirit of the Maastricht Social Agreement. This requires the building of a common trade union vision and strategy, the definition of clear goals and demands for the social dialogue, an ongoing effort to persuade and put pressure on employers, appeals to the European Commission to play its role in the social dialogue (in particular the cross-industry dialogue), a search for support from Euro-MPs and member states, etc. All of this is necessary in order to improve working conditions for all workers in Europe, in particular in the context of the current crisis. The main messages ETUC wants to put over in this regard are that:

- It is important to issue a firm reminder that the European social dialogue, both cross industry and sectoral, is a tool of solidarity whose primary function is to achieve genuine improvements in working conditions for all workers in Europe. Accordingly, the European social dialogue should complement, and be used to strengthen, existing mechanisms of collective bargaining and worker participation, at different levels, for the expression of worker interests and the improvement of working conditions, as well as improving the quality of employment. This process should take place, what is more, in a context of upward harmonisation and in accordance with the



letter and the spirit of the European Communities' founding Treaty.

- The Commission must be urged to adopt a more proactive approach to the cross-industry and sectoral social dialogue. Its task is to provide input in the form of proposals for the development of a set of social regulations in keeping with the economic integration of Europe.
- The European-level social partners should be consulted and allowed to play, if they so wish, their role of co-legislators, in relation to all matters of immediate or less direct relevance to workers, according to the spirit and the letter of the Treaty (Article 152 of the TFEU).

Basically it is seen as important to develop a genuine social dialogue at all levels (national, European, transnational companies, regional, world). A strengthening of worker rights of information, consultation and participation is key to the improvement of social dialogue at these levels. ETUC therefore gives the following commitments with regard to the reference period:

- ETUC is committed to ensuring that the European social dialogue will contribute to the upward harmonisation of social rights in a manner that will enable all workers in the EU to benefit from the same social rights. In European social dialogue negotiations, ETUC will pursue two priority goals, namely, improvement of the working conditions of all European workers and the fight against social dumping.
- This strengthening of the ambition of the content of the joint texts must be accompanied by a strengthening of the implementation and monitoring of the texts adopted in the framework of the European social dialogue by means of the creation of a permanent European secretariat of the social dialogue with its own budget and staff. Steps must be taken to ensure that these texts have a real impact on workers.

### 3.2 The least expected and unknown attempt by the 'outsider', the European Parliament

The European social partners and the European Commission are not the only ones who have tried to clarify certain aspects of this debate on the autonomous instruments in particular and a renewed framework for the European social dialogue in general. The European Parliament, which since the very beginning of the European social dialogue has played rather an 'outsider' role in this process, also once raised its voice, coming up with very concrete legislative proposals in particular on a renewed framework for such dialogue.

Only few of us will recall the debate in the European Parliament in the wake and aftermath of the revision of the Treaty 'at Amsterdam'. Although already envisaged in the revision of the Treaty 'at Maastricht', it was the Amsterdam Treaty that provided for a more comprehensive set of provisions on European social dialogue, using the provisions of the Social Protocol/Agreement annexed to the Maastricht Treaty (and as already mentioned itself stemming from a European social partners' agreement of late 1991) as a basis. The emergence of European social dialogue (at that time the parental leave and part-time agreements were in the course of being adopted) and its institutionalisation in the Social Protocol/Agreement annexed to the Maastricht Treaty had (again) raised questions of transnational trade union rights of participants in the social dialogue process and how these could be dealt with in the Treaty as such.

Against this background, the European Parliament commissioned an own-initiative research project on 'Trade union rights in the EU member states', conducted by the late Professor Brian Bercusson, the report of which was presented in January 1997 to the European Parliament Committee on Social Affairs and Employment together with a 'Draft report on trade union rights' by the rapporteur and Dutch MEP Ria Oomen-Ruyten. (European Parliament 1997). With the latter including a motion for a resolution on 'trade union rights in the Treaty concerning the European Union', this document was not to be regarded as 'just another EP report', but as a genuine, far-reaching and comprehensive proposal to the then Intergovernmental Conference preparing the text for the Treaty revision in view of regulating transnational

trade union rights in the body of the Treaty and thereby using the text of the Social Protocol/Agreement as a basis.

The main objective of the amendments/provisions proposed by the European Parliament was to regulate and establish the main triptych of trade union rights at European level, i.e. the rights of freedom of association, collective bargaining and collective action.

The provisions of the Social Protocol/Agreement were integrated into the Amsterdam Treaty in an amended way in the form of Articles 136-139 TEC (now Articles 151 and 153 - 155 TFEU)<sup>24</sup>. Unfortunately none of the EP's proposed amendments was actually accepted. If this had been the case, the following aspects being included:

- A reference to 'dialogue between management and labour at Member State and at transnational and/or Community levels' instead of just 'dialogue between management and labour' in Article 151 (1);
- The European Parliament recognized the competence of national-level social partners to implement Directives via collective agreements but also wondered what this would mean in relation to the effective implementation of European agreements not incorporated into Directives. Given the social dialogue and collective bargaining practices existing at the time throughout the EU, the European Parliament considered that many of them would have to make alterations to their regulatory frameworks. This incited the EP to call for an amendment to Article 155(2) to ensure the elaboration of 'national basic agreements' which would 'conform to the requirements of directives or framework agreements concluded at Community level';
- The deletion of Article 153 (5) relating to the exclusion of a European regulatory competence on pay, the right of association, the right to strike or the right to impose lock-outs;

---

**24.** Article 152 TFEU, *inter alia* institutionalising the tripartite social summit, is a new article inserted in Lisbon and thus not figuring in the Amsterdam Treaty.

- Adding a paragraph to Article 154 (1) relating to the Commission’s two-phase consultation process: ‘[I]n particular, the Commission shall undertake consultations with a view to formulating a legal framework for the social dialogue at Community level’. The commentary to this amendment in the accompanying explanatory statement stated that this would have at least two effects: firstly it would oblige the Commission to exchange views with the European social partners on such a legal framework within a reasonable short space of time as the issue was now explicitly mentioned in the Treaty; and secondly, a basis was thereby created for a legal right to collective bargaining at European level;
  - Amending Article 155(1) as follows ‘should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements, in particular at inter-occupational and sectoral level.’
  - Adding to Article 155 two new paragraphs on collective bargaining:
    - ‘To this end, management and labour at European level shall have the right to negotiate and conclude collective agreements. In particular, management and labour:
      - Must negotiate in a spirit of cooperation with a view to reaching an agreement;
      - Shall have the right to material support from the Community in proportion to the task of participation in the social dialogue
- The Commission shall take all measures appropriate to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations at Community level with a view to this regulation of terms and conditions of employment by means of collective agreements.’

And

- ‘The Member States shall ensure that the first of the arrangements for applications of the agreements between management and labour at Community level will consist in developing the

content of the agreements by collective bargaining according to the rules of each Member State. In particular:

- Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements in order to implement agreements concluded at Community level;
- Management and labour and the Member States shall take all appropriate measures to ensure that agreements concluded at Community level shall be implemented in accordance with the procedures and practices specific to management and labour and the Member States;
- Member States shall take all measures appropriate to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the articulation of national systems of collective agreements with agreements concluded at Community level;

The objective of the latter proposed amendment was to ensure that Member States made every effort to ensure that European agreements were indeed dealt with in national collective bargaining and that their implementation was ensured by national-level collective agreements.

- Finally adding two further provisions to Article 155: a) a right to resort to collective action in the event of conflicts of interest including the right to strike at national and transnational level, in particular for transfrontier workers; and b) the encouragement to establish and use, at the appropriate levels, conciliation, mediation and arbitration procedures to facilitate the settlement of transnational industrial disputes.

As already mentioned, none of these amendments was actually included in the texts of Articles 136-139 TEC integrated into the Amsterdam Treaty. The subsequent discussions on the proposals did however lead to a Resolution, albeit of a different nature and tenure. The Resolution on 'Transnational trade union rights in the European Union', finally adopted in July 1998, contained the following paragraphs of particular relevance to this book and chapter (i.e. European social dialogue, the

right to negotiations at European level and (the implementation) of European agreements):

- ‘G. whereas the right to negotiate at European level is already implicitly recognized in the EU Directive on the European Works Council and in the working time Directive;’
- ‘H. whereas the Treaty of Amsterdam establishes the possibilities of collective bargaining and negotiations at European level,’
- ‘2. Considers that ILO Conventions Nos 87 and 98, drawn up in the 1940’s, and the European Social Charter of the Council of Europe which established freedom of association and the right to collective bargaining at national level, must be applied at Community level and calls on the Commission to examine how this can be best achieved;’
- ‘6. Calls on management and labour either themselves or as part of the social dialogue to draw up proposals for negotiation rules and principles;’
- ‘7. Calls on the Commission to devote sufficient time, resources and staffing to the servicing of the social dialogue;’
- ‘8. Urges the Commission to act in its facilitating and mediating capacity and to have an investigation carried out into how management and labour can best establish contractual relations or agreements on the basis of Article 139 of the Treaty of Amsterdam;’
- ‘11. Considers that management and labour must enter into dialogue on the creation of appropriate instruments to avoid collective labour disputes,’
- ‘12. Considers it is essential that, in order to facilitate the resolution of transnational conflicts, efforts should be made for the establishment and implementation, at the appropriate levels, of conciliation, mediation and voluntary arbitration procedures;’<sup>25</sup>
- ‘14. Considers that the Council must use the options available under Article 138(1), (2) and (3) and Article 139(2) of the Treaty of Amsterdam to support the European social partners in the elaboration of a course of action for the conclusion of agreements;’ (European Parliament 1998b)

---

**25.** See on this particular issue, Clauwaert (2011b).

In the explanatory notes of the draft version of this resolution of March 1998, as adopted by the EP Committee on Employment and Social Affairs, it was also mentioned that:

- ‘14. The right to collective bargaining and collective action must be seen as two sides of the same coin. In the case of collective bargaining, both parties must be willing to negotiate with a view to achieving a good result. Given the scope currently afforded by the Treaty, acknowledging this right at European level also implicitly says something about the national level. Not every agreement needs to be given generally valid effect through the legislative process. The European agreements may also be implemented in the form of agreements between management and labour at national level. They need to engage in bargaining to this end, so that the European agreements can be included in national collective labour agreements. That being so, management and labour must have the right to negotiate these matters at national level. Establishing a right at European level implicitly acknowledges the right at national level.
  
15. The right to collective action is a necessary corollary to the right of collective bargaining. Management and labour must be given the means of conducting collective bargaining. Here too, the right is granted at national level but not at European level. What is more, collective action is permissible in some European countries only in respect of national bargaining on working conditions. To prevent the trade union movement in particular from having to conduct European bargaining without any appropriate instruments, the right to collective action must be enshrined in the Treaty. This right extends to collective action in the case of:
  - bargaining at European level;
  - bargaining at national level in order to implement European agreements in the form of national agreements.’ (European Parliament 1998a: 9)

Although heavily contested by the European social partners at that time (including the trade union side), this proposal of the European Parliament was one of the most comprehensive and well-developed proposals for strengthening the (legal) framework of European social dialogue and its instruments. It would seem worthwhile to revisit it or at least use it as a basis for further work on the matter.

## 4. Conclusion

‘Nomina nuda tenemus’, the Latin phrase used in the title of the chapter, is part of the longer Latin sentence: ‘Stat rosa pristina nomine, **nomina nuda tenemus**’, which could be translated as: ‘And what is left of the rose is only its name...’.

With regard to European framework agreements, the subject of this chapter, and in particular in the context of ‘transnational collective bargaining and transnational company agreements’, names are certainly something we have, although they are used in a very confusing way. Even those concluding the agreements often do not know their exact meaning and implications.

This chapter has attempted to show that, compared to the transnational company agreements and despite the existence of a legal framework, not all is rosy with regard to European social dialogue in general and the framework agreements (and other outcomes) deriving from it. A lot of aspects (e.g. in relation to the effective implementation and enforcement of such agreements) remain in need of further clarification to give these outcomes (even) greater added value. This is all the more relevant due to the fact that, although the name of these instruments might sound empty or naked, their content is certainly not. Such agreements often contain genuine rights and obligations needing to be implemented and applied. Only then will they make an appreciable difference to the working conditions of the workers they apply to.

But the time seems ripe to review at least the specific framework of European social dialogue. Most of its strengths, weaknesses, opportunities and threats have been identified, analysed and documented, in particular by such directly involved stakeholders as the European social partners, the European Commission or European Parliament. In addition, the political will to engage in such discussions seems finally to exist. So why not take this opportunity to try and clarify certain aspects relating to transnational company agreements, building on the experience gathered up to now in both European social dialogue and transnational collective bargaining - many problems identified and challenges to be faced are the same or at least very similar.



## References

- APFE *et al.* (2006), *Agreement on workers' health protection through the good handling and use of crystalline silica and products containing it*, 25 April 2006, Brussels.
- Branch, A. (2005) 'The evolution of the European social dialogue towards greater autonomy: challenges and potential benefits', *International Journal of Comparative Labour Law and Industrial Relations*, 21 (2), 321-346.
- CER and ETF (1998) *Agreement on some aspects of the organisation of working time in the rail transport sector*, 30 September 1998, Brussels.
- CER and ETF (2004) *Agreement on the European license for drivers carrying out a cross-border interoperability service*, 27 January 2004, Brussels.
- CER and ETF (2009) *Joint declaration of the CER-ETF agreement on a European locomotive driver's license to clarify the application of the agreement*, 10 June 2009, Brussels.
- Clauwaert, S. (2011a) '2011: 20 years of European interprofessional social dialogue: achievements and prospects', *Transfer*, 17 (2), 169-179.
- Clauwaert, S. (2011b) 'Alternative ways of settling (collective) labour disputes in European (Community) law', in M. Rigaux and P. Humblet (eds.) *Conciliation, médiation et arbitrage. Vers une régulation européenne des modes alternatifs du règlement des conflits (collectifs) du travail ?*, Brussels: Bruylant, 51-75.
- Coiffure EU and UNI-Europa Hair & Beauty (2009) *European agreement on the implementation of the European Hairdressing Certificates*, 18 June 2009, Brussels.
- Council of the European Union (1996) Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19.6.1996, p. 4-9.
- Council of the European Union (1997) Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work, OJ L 14, 20.1.1998, p. 9-14.
- Council of the European Union (1999) Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43-48.
- Council of the European Union (1999) Council Directive 1999/63/EC of 21 June 1999 concerning the agreement on the organisation of working time of seafarers concluded by the European Community Shipowners'

- Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FTS), OJ L 167, 2.7.1999, p. 33.
- Council of the European Union (2009) Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC, OJ L 124, 20.05.2009, p. 30-50.
- Council of the European Union (2010) Council Directive 2010/18/EU of 8 March 2010 implementing the revised framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18.3.2010, p. 13-20.
- Council of the European Union (2010) Council Directive 2010/32/EU of 10 May 2010 implementing the framework agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU, OJ L 134, 1.6.2010, p. 66-72.
- ECEG and EMCEF (2011) *European framework agreement on competence profiles for process operators and first line supervisors in the chemical industry*, 15 April 2011, Brussels.
- EFA, ETUC and GEOPA-COPA (1997) *Recommendation framework agreement on the improvement of paid employment in agriculture in the Member States of the European Union*, 24 July 1997, Brussels.
- EFFAT and GEOPA-COPA (2002) *European agreement on vocational training in agriculture*, 5 December 2002, Brussels.
- EFFAT and GEOPA-COPA (2005) *European agreement on the reduction of workers' exposure to the risk of work-related musculo-skeletal disorders in agriculture*, 21 November 2005, Brussels.
- ETUC (2011) *Mobilising for social Europe: strategy and action plan 2011-2014*, Athens Congress 2011, 16-19 May 2011, Brussels.
- ETUC, BUSINESSEUROPE, UEAPME and CEEP (2007) *Framework agreement on harassment and violence at the workplace*, 26 April 2007, Brussels.
- ETUC, BUSINESSEUROPE, UEAPME and CEEP (2009) *Work programme of the European social partners 2009-2010*, 7 May 2009, Brussels.
- ETUC, BUSINESSEUROPE, UEAPME and CEEP (2010) *Framework agreement on inclusive labour markets*, 25 March 2010, Brussels.
- ETUC, BUSINESSEUROPE, UEAPME and CEEP (2011) *European social dialogue: achievements and challenges ahead: results of the stock-taking survey amongst national social partners in the EU*

- Member States and candidate countries*. Final synthesis report – May 2011, Brussels. <http://resourcecentre.etuc.org/EU-SD-Joint-Project-88.html>
- ETUC and OSE (2011) *European social dialogue: state of play and prospects*, Brussels. [http://www.etuc.org/IMG/pdf/Dialogue\\_social\\_2010\\_Rapport\\_OSE\\_CES\\_EN.pdf](http://www.etuc.org/IMG/pdf/Dialogue_social_2010_Rapport_OSE_CES_EN.pdf)
- ETUC, UNICE and CEEP (1993) Proposals by the social partners for implementation of the agreement annexed to the protocol on social policy of the Treaty on European Union, 29 October 1993 and annexed to the UNICE position paper on ‘Commission communication concerning the development of the social dialogue at Community level of 26 February 1997’, Published in UNICE (1998) ‘UNICE position papers 1997 Part one’, UNICE: Brussels, p. 139-148.
- ETUC, UNICE, UEAPME and CEEP (2001) *Joint contribution by the social partners to the Laeken European Council*, Brussels.
- ETUC, UNICE, UEAPME and CEEP (2002a) *Framework agreement on telework*, 16 July 2002, Brussels.
- ETUC, UNICE, UEAPME and CEEP (2002b) *Work Programme of the European Social Partners 2003-2005*, 28 November 2002, Brussels.
- ETUC, UNICE, UEAPME and CEEP (2004) *Framework agreement on work-related stress*, 8 October 2004, Brussels.
- ETUC, UNICE, UEAPME and CEEP (2006a) *Work programme of the European social partners 2006-2008*, 23 March 2006, Brussels.
- European Commission (1993) Communication from the Commission on the *application of the agreement on social policy*, COM(93) 600 final, 14 December 1993, Brussels.
- European Commission (1996) Commission Communication concerning *the development of the social dialogue at Community level*, COM(96) 448 final, 18 September 1996, Brussels.
- European Commission (1998a) Commission Communication. *Adapting and promoting the social dialogue at Community level*, COM (98) 322 final, 20 May 1998, Brussels.
- European Commission (1998b) Commission Decision 98/500/EC of 20 May 1998 on the establishment of sectoral dialogue committees promoting the dialogue between the social partners at European level, OJ L 225, 12.8.1998, p. 27-28.
- European Commission (2002) Communication from the Commission. *The European social dialogue, a force for innovation and change - Proposal for a Council Decision establishing a Tripartite Social*

- Summit for growth and employment*, COM(2002) 341 final, 26 June 2002, Brussels.
- European Commission (2004) Communication from the Commission. *Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue*, COM(2004) 557 final, 12 August 2004, Brussels.
- European Commission (2008) Commission staff working document. *The role of transnational company agreements in the context of increasing international integration*, SEC (2008) 2155, 2 July 2008, Brussels.
- European Commission (2010) Commission staff working document *on the functioning and potential of European sectoral social dialogue*, SEC(2010) 964 final, 22 July 2010, Brussels.
- European Parliament (1997) Draft report on trade union rights – Committee on Social Affairs and Employment – Rapporteur: Mrs. Ria Oomen Ruyten”, PE 220.024, 14 January 1997.
- European Parliament (1998a) Draft report on trade union rights – Committee on Social Affairs and Employment – Rapporteur: Mrs. Ria Oomen Ruyten”, PE 223.118/rev, 3 March 1998.
- European Parliament (1998b) Resolution on transnational trade union rights in the European Union, A4-0095/1998, July 1998.
- Falkner, G. (2003) ‘The interprofessional social dialogue at European level - past and future’, in B. Keller and H.-W. Platzer (eds.) *Industrial Relations and European Integration*, Aldershot: Ashgate, 11-29.
- Prosser, T. (2006) ‘Is the ‘new phase’ of the European social dialogue the development of an autonomous and effective form of social dialogue?’, Warwick Papers in Industrial Relations No 82.
- Prosser, T. (2007) *Europeanization through procedures and practices? The implementations of the framework agreements on telework and work-related stress in Denmark and UK*, Copenhagen: University of Copenhagen.
- Schiek, D. (2005) ‘Autonomous collective agreements as a regulatory device in European labour law: how to read article 139 EC’, *Industrial Law Journal*, 34 (1), 23-56.
- Sobczak, A. (2007) ‘Legal dimensions of international framework agreements in the field of corporate social responsibility’, *Relations Industrielles-Industrial Relations*, 62 (3), 466-488.
- UNI-Europa and CoESS (2010) *European autonomous agreement on the content of initial training for CIT staff carrying out professional cross-border transportation of euro cash by road between Euro-area Member States*, 24 November 2010, Brussels.



## Chapter 4

# European Works Councils and transnational company agreements – balancing on the thin line between effective consultation and overstepping competences

Romuald Jagodzinski

### Introduction

Over a decade after EWC Directive 94/45/EC came into effect, European Works Councils (EWCs) are now a well-established dimension of European industrial relations and have become the most deeply rooted instrument of transnational employee representation. With some 975<sup>1</sup> EWCs currently in active operation, they are by far the most numerous supranational forums for transnational dialogue at the enterprise level, contributing actively to the development and reinforcement of the European Social Model (Jagodzinski 2011). Their emergence in the 1980s in the form of the French *comités de groupe* led to the adoption of the EU-wide legal framework in 1994, blazing the trail for other multinational companies and their employees. As a consequence of this introduction of elements of democracy into the workplace at Community level and into corporate governance practice, transnational information and consultation rights for employees in multinational companies have become an intrinsic and distinctive feature of business reality within the EU. Thanks to the generally positive experience with these bodies dedicated to upholding employee rights to information and consultation, further directives strengthening this entitlement at various levels were adopted: at national level, by introducing works councils at plant level (Directive 2002/14/EC); at transnational level in the form of works

---

1. EWC Database of ETUI, [www.ewcdb.eu](http://www.ewcdb.eu), 2011 (April).

councils and board-level representation, embodied by non-executive employee directors at board level in either one- or two-tier systems within a *Societas Europaea* (SE) (e.g. MAN Diesel SE, Allianz SE, Strabag SE); again at transnational level, securing an organized structure for information and consultation rights in European Cooperative Societies (SCE) and possibly in the forthcoming European Private Companies (EPC). In this sense EWCs have proven both their pragmatic value for employees (though not uncontested and not without problems with regard to the quality of information and consultation; see for instance Waddington 2010) and companies (Vitols 2009; Laamers 1998), and their strong institution-building capacity (Waddington 2010).

The question emerging from the above quick overview concerns the capacity and the role of EWCs in building a new transnational level of collective bargaining. The question seems valid due to two trends: 1) the development of EWC practice, with the increasing efficiency of some of them and the functional extension of their scope of competence resulting in functional spill-overs (acquisition or 'colonisation' of new areas of competence beyond those originally defined in Annex 1 to directive 94/45/EC) and 2) in terms of power (a transition from information and consultation to negotiating competences).

## **1. EWC-related reasons and motives behind the emergence of transnational collective bargaining in Europe**

As indicated above, one of the explanations for EWC involvement in TCB is arguably their growing experience as transnational actors. In fact, it can be said that, for a long time, they were the only institutional actor representing employees at a transnational level in multinational companies (now complemented by SE works councils in European Companies). Arguably, European trade union organisations (European Trade Union Federations) existed long before the introduction of EWCs, yet by nature they are umbrella structures covering entire branches of industry, rather than focusing exclusively on one single company. Looking at EWCs, there are currently 434 active bodies (EWCs and World Works Councils) (44.5% of all active EWCs) with a record going back ten years or more, indicating a wealth of collective experience and expertise on the part of EWC members, the EWC

coordinators from the sectoral European Trade Union Federations (European Industry Federations) assisting them, and the trade union officers supporting their work. These 434 EWCs represent a powerful transnational potential, developed over the years in many challenging situations such as restructuring, collective redundancies, mergers and take-overs. Referring to these longstanding EWCs as a ‘potential’ does not of course automatically mean that all of them function effectively. Unfortunately, not all EWCs live up to the contemporary reality and challenges of multinational enterprises (Waddington 2010) faced with intense globalisation and transnational competition. The resultant constant cost-saving, restructuring and social dumping measures have serious implications for employees in such companies. As daily EWC practice reveals and many studies and analyses have shown (e.g. Jagodzinski *et al.* 2008), some of the main reasons for this state of affairs are the loopholes in EWC Directive 94/45/EC. These are abused by certain employers who perceive employee participation in company management solely as a cost factor and unnecessary burden resulting in competitive disadvantages vis-à-vis other market players. Such an attitude expresses a misunderstanding of the concept of modern capitalism and company management, which relies first and foremost on the knowledge and skills of employees. Research actually shows that EWCs are by no means the source of competitive disadvantages, being present in companies scoring best in stock markets (Vitols 2009). The other side of the coin is, however, that there are also numerous companies not allowing the information and consultation of employees and not accepting the active role that EWCs aspire to.

The efficient functioning of an EWC is, on the one hand, a result of a company’s adoption of a modern system of corporate governance that supports or, at least, accepts employee involvement in the handling of change and restructuring. In such a company, employee representatives are recognised as stakeholders having a direct interest in its good performance and as counsellors, whose expertise and contribution can be profitable for management in terms of shaping restructuring in a socially responsible way. In the vast majority of cases the effectiveness of EWC operations is a direct result of the experience and standing gained over many years of existence. Active EWC work for a decade or more has not only provided these collective worker representation bodies with a wealth of knowledge and experience, but has also enabled them to acquire the confidence indispensable for demanding information,



expressing opinions or negotiating with company management. Furthermore, their long operational track record has allowed EWCs to develop procedures and contacts for exchanging information with national-level worker representation structures (local works councils, trade unions) as well as giving them the opportunity to prove the value and relevance of EWC work to individual plants and their staff. The development of EWC potential often derives from the challenges they face. EWCs have to deal with the social consequences of constant change in companies, including transnational mergers and acquisitions, restructuring processes, intensified internationalisation of business activities, increased mobility of production factors, outsourcing as well as the development of CSR. Their consequent involvement in information processes and the formulation of opinions within the framework of a consultation only vaguely defined by directive 94/45/EC have resulted in EWCs naturally becoming involved or invited by MNCs to elaborate contractual solutions to the social challenges posed by the changing circumstances in MNCs. This is where an ambiguity concerning the role(s) of an EWC and the expectations placed in it has arisen: the thin line between effective consultation and co-determination (signing TCAs) has arguably been overstepped, leading to controversy over the role of EWCs in the emerging TCB.

## **2. Transnational company agreements (TCA)**

As a result of this build-up of experience and other economic factors, at least 215 such joint texts have been signed in some 138 multinational companies, dealing with certain issues of transnational work organisation at company level (Pichot 2006)<sup>2</sup>. I deliberately do not use the term ‘transnational collective agreements’ to refer to the outcome of ‘transnational collective bargaining’ (TCB) here due to the

---

2. In the course of executing the recent European Commission ‘Tender n<sup>o</sup>VT/2009/048: Database on transnational company agreements: contents development’, it was established that around 220 transnational company agreements have been signed so far. Waddington (2010) indicates 82 transnational company agreements signed by 36 EWCs, including 23 IFAs. The most recent and complete source of such agreements is the European Commission’s Database on Transnational Company Agreements (<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1141>) listing 215 such texts concluded in 138 companies employing together over 10 million employees.

political controversy on this matter existing among the various actors concerned<sup>3</sup>.

The aforementioned TCAs were, in the majority of cases, signed in major multinational companies, employing high numbers of staff, active in many countries and with their headquarters predominantly in France, Germany, the Nordic countries or the US. Though most were signed after 2000, some date back to the 1990s or even the late 1980s (the 1988 Danone International Framework Agreement is considered to be the first IFA ever). For the most part, the agreements were concluded in the metal, food and construction and woodworking sectors (in the last sector the majority of them have a global scope). The joint texts in question have both a global and a European (EU) scope. The range of issues covered encompasses such subjects as (items listed in order of the share of agreements in which a provision on a given topic appears): fundamental rights (CSR), trade union rights, health and safety, equal opportunities, training skills, wages, social dialogue, working time, subcontracting, environment, restructuring, and others<sup>4</sup>. In some two-thirds of cases they were signed by both an EWC and an international/European trade union organisation (e.g. European Industry Federation, EIF), whereas only in some 20% of cases were such joint texts (co-)signed by national trade unions. The range of multinational companies that have engaged in transnational collective negotiations and signed agreements of the type described includes such major international players as GM, Ford, Danone, Diageo on restructuring; Arcelor, ENI, Lafarge, Vivendi on health and safety issues; Total, Deutsche Bank, Air France, Dexia on employment, training and mobility; Unilever, GEA, Philip Morris on data protection; Volkswagen, Rhodia, Suez, Club Med, Daimler Chrysler on fundamental rights (corporate social responsibility, CSR).

---

3. The most neutral terms for this kind of document are *transnational company agreements*, or *transnational texts*, or *transnational negotiations*, or *joint texts* without reference to the adjective 'collective'. This serves the purpose of avoiding confusion with the classical, traditionally national collective bargaining. The common denominator of these names is the fact that their users avoid referring to *collective bargaining* in its transnational dimension, as this would presuppose that collective bargaining is no longer an exclusively national issue, but has been moved up to the supranational European level. The consequences of adopting such a view – or, at least, of agreeing to use of TCB as a valid term – are somewhat remarkable and will be discussed later in this paper.

4. Source: E. Pichot 2006.

### **3. The legality of transnational collective bargaining**

It is obvious at first glance that the issues covered by these transnational agreements are very disparate, while often the scope of application of individual agreements is restricted to single, rather narrowly defined aspects of working conditions. Thus the remark that they are still far from having achieved the status of collective labour agreements signed at national level is, to a certain extent, apt here. At the same time, however, looking at supranational European institutions and structures from a national perspective often leads to confusion and misunderstandings, ignoring the fact that the European system is governed by its own supranational rules. Thus, national measures, ideas and concepts may well be inappropriate when used as gauges for European ones. To illustrate how different-level legal orders deal with consultation and collective bargaining, the following sections look first at the ILO norms, and then at the EU *acquis communautaire*.

#### 3.1 ILO norms referring to (transnational) collective bargaining

Specific areas referred to in the TCAs undoubtedly represent just fragments of the coverage of national-level collective bargaining. What is more, they meet the criteria of collective bargaining defined by various acts of the International Labour Organisation. To illustrate the relevance of ILO norms to TCAs, specific provisions of the following ILO norms will be analysed: the 1951 Collective Agreements Recommendation; ILO Convention 98 of 1949 on the right to organize and collective bargaining; ILO Convention 150 of 1978 on labour administration; ILO Convention 151 of 1978 concerning protection of the right to organise and procedures for determining conditions of employment in public services; ILO Convention 154 of 1981 on promotion of collective bargaining; and ILO Recommendation 163 of 1981 concerning the promotion of collective bargaining.

The ILO defines collective bargaining as 'Voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by

collective agreements<sup>5</sup>. In search of an answer to the question of whether the transnational agreements signed in certain companies by EWCs can be labelled collective agreements, one can again resort to ILO conventions and recommendations. In its Collective Agreements Recommendation of 1951, the ILO defines collective agreements as ‘all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more representative workers’ organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other<sup>6</sup>. Art. 2 of ILO Convention 154 on the promotion of collective bargaining provides a more extensive definition of CB:

‘all negotiations which take place between an employer, a group of employers or one or more employers’ organizations, on the one hand, and one or more workers’ organisations on the other for

- a) Determining working conditions and terms of employment; and /or
- b) Regulating relations between employers and workers; and/or
- c) Regulating relations between employers or their organizations and workers’ organizations or workers’ organizations’.

Finally, there is the question of the appropriate level of collective bargaining. Art. 4 of ILO Recommendation 163 on the promotion of collective bargaining explains the levels at which CB can take place:

- (1) Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.
- (2) In countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels.’

---

5. ILO Convention 98 of 1949 on the right to organize and collective bargaining.

6. Section II, Article 2, Collective Agreements Recommendation No. 41, 1951.

Though the above provision does not explicitly mention the transnational level, the list of levels is not exhaustive, but rather a more detailed exemplification and definition of the *phrase 'collective bargaining is possible at any level whatsoever', i.e. perfectly covering TCB.*

All these definitions are open to criticism. Firstly, they can be criticised for their general phrasing (except for Convention 154 of 1981) and their only indirect or auxiliary effect on EU Member States (not an EU *acquis*). Secondly, what is on the one hand the strength of ILO conventions, namely their universal character, can in this particular case be perceived as a weakness: all definitions, while useful and adopted by a commonly acknowledged organisation, are adopted on a global, supra-European level. It can consequently be argued that these ILO norms need to be general enough to accommodate different industrial relations traditions from all over the world and thus do not refer precisely enough to the latest developments in European industrial relations that might be more progressive than on the global level.

On the other hand, criticised as the definitions may be, they seem to belong to the few internationally accepted definitions of 'collective bargaining'. Therefore, in view of the lack of a more precise definition of 'collective bargaining' in the EU *acquis* it seems justified to use the ILO one.

Finally, it should be noted that such 'voluntary negotiation', as defined in the ILO general standards, did indeed take place with regard to some of the above-mentioned transnational company agreements (others were presented by management to employee representatives on a 'take it or leave it' basis). The negotiations were voluntary in the sense that there is no legal obligation or general framework for such European-level bargaining within a company. Arguably, another form of European-level bargaining fulfilling the ILO criteria are the sectoral or inter-sectoral negotiations taking place within the context of the European Social Dialogue. We therefore argue that these two forms should also be included in the concept of TCB (see chapter 3).

### 3.2 Council of Europe *acquis* on transnational collective bargaining

The review of international legal sources on collective bargaining would not be complete without reference to the Council of Europe *acquis*. It should however be stated right from the start that, in contrast to the ILO, the Council's preoccupation with this topic has been far more limited and that references are not as straightforward. The point of departure is the Council's European Social Charter (revised version) which includes the right to collective bargaining (Part I, point 6 and Part II, Article 6). Though not actually providing a definition of collective bargaining, Article 6 of the Charter does list what parties should undertake to ensure that the right to bargain collectively is exercised effectively: 1) promoting consultations between workers and employers; 2) promoting machinery for voluntary negotiations between employers or employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements; 3) promoting conciliation and dispute settlement solutions; and 4) recognising the right to collective action in case of conflicts of interest. Interestingly both the said consultations and 'voluntary negotiations' are mentioned only in conjunction with employers and their organisations and workers' organisations which points towards a limited scope of parties – i.e. excluding employee representation bodies - eligible to engage in collective bargaining (see below the section 'Parties eligible to bargain collectively').

Despite the fact that the European Social Charter does not deal extensively with collective bargaining (apart from acknowledging the right of workers to collective bargaining in Art.6), it does recognise the 'right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking.' (Part I, Art. 22). In view of a lack of any further specification of collective bargaining it remains unresolved whether the transnational level is also included alongside the traditional national level. Though Art. 22 does not specify any level, it does make reference to an undertaking, i.e. a company. Given the fact that companies operate transnationally, this general provision of Art. 22 in combination with Art. 6 could lead to inferring that collective bargaining, at least with regard to working conditions, can take place in all companies, independent of their scope of operations. Despite the fact that the inference is drawn in two steps in

view of the fact that the European Social Charter by no ways limits the right to collective bargaining one can conclude that there is nothing preventing the use of this concept in a transnational context.

### 3.3 Parties eligible to bargain collectively

Another important question concerning transnational negotiations (or, as often phrased, transnational collective bargaining) to which ILO sources (but not the European Social Charter) provide a reply is the one about the parties competent to bargain collectively. There are two key aspects to this question: the level at which they are eligible to operate and whether employee representatives are eligible as bargaining partners, alongside workers' organisations.

Regarding the first aspect, the views expressed by the ILO Committee of Experts stating that 'The determination of the bargaining level is essentially a matter to be left to the discretion of the parties' (ILO 1985, paragraph 632) make it clear that there is no limitation of collective bargaining only to national or any other specific level. Consequently, it is up to the bargaining parties to determine the appropriate level that is most effective in terms of handling the content of collective negotiations.

With regard to the second aspect, ILO Convention 150 of 1978 on labour administration, its role, functions and organisation<sup>7</sup> provides an indirect definition of such competent parties (Art. 5). Apart from employers' representatives it includes workers representatives<sup>8</sup>. In a

---

7. They are defined by Art. 1 of the Convention as: 'For the purpose of this Convention-- (a) the term labour administration means public administration activities in the field of national labour policy; (b) the term system of labour administration covers all public administration bodies responsible for and/or engaged in labour administration--whether they are ministerial departments or public agencies, including parastatal and regional or local agencies or any other form of decentralised administration --and any institutional framework for the co-ordination of the activities of such bodies and for consultation with and participation by employers and workers and their organisations.' Even though the convention does not deal with collective bargaining as such by means of stipulating parties participating in social dialogue (*sensu largo*) it provides prerequisites for discussing the latter.

8. Art. 5(1) stipulates: 'to secure, within the system of labour administration, consultation, cooperation and negotiation between the public authorities and the most representative organisations of employers and workers, or, where appropriate, employers' and workers' representatives'.

similar way ILO Convention 151 of 1978 concerning protection of the right to organise and procedures for determining conditions of employment in public services (with public sector trade union activity not being allowed in certain countries) specifically lists employee representatives among the competent parties in public service negotiations<sup>9</sup>.

More generally, ILO Collective Agreements Recommendation No. 41 of 1951 also recognises duly elected and authorised representatives of workers as eligible actors to bargain collectively. Contrary to this approach, Article 2 of the already mentioned ILO Convention 154 of 1981 on the promotion of collective bargaining limits the scope just to *workers' organizations*, even though Article 3 somewhat inconsistently refers to negotiations with workers' representatives<sup>10</sup>. In this sense Articles 2 and 3 are not conclusive as far as a clear exclusion of workers' representatives is concerned. Nonetheless, such an exclusion of workers' representatives is nowhere to be found in the ILO conventions and recommendations. On the contrary, Recommendation No. 91 of 1951 for instance states that appropriate means should be provided 'to negotiate, conclude, revise and renew collective agreements' (Art. 1(1)), and, as parties eligible to perform these functions, it foresees that 'in the absence of such organisations, the representatives of the workers duly elected and authorized by them in accordance with national laws or regulations' (Art. 2(1)) can step in. The confusion is augmented by ILO Recommendation No. 163 of 1981 concerning the promotion of collective bargaining which again limits the range of eligible actors to representative employers' and workers' organizations (Art. 2 and 3(a)).

Though these conventions recognise 'representative organizations of employers and workers' as parties to collective agreements, they also seem to provide room for other methods of CB that allow 'representatives of employees' or 'workers' representatives' to bargain.

- 
9. Art. 7 imposes an obligation on the Member States 'to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters'.
  10. With a reservation that the existence of such representatives is not used to undermine the position of the workers' organizations concerned (Art. 3(2))



Finally, comparative studies of national bargaining systems reveal inconsistencies and a variety of solutions. The relevant indicator for the present analysis is whether national collective bargaining allows for works councils negotiating and signing agreements with employers. Instances of such non-trade union bargaining by works councils would provide arguments in favour of recognising TCB by EWCs. Under German law and when specific opt-out clauses (and other conditions) exist, works councils are allowed to sign and/or modify already existing sectoral collective agreements (Traxler 1994: 175; Haipeter 2011). Further countries providing works councils with a (conditional) competence to negotiate collective agreements under specific circumstances are Austria (Baker & McKenzie 2009: 15), France (*ibid.* 89), Italy (Glassner in this volume), the Netherlands (Glassner in this volume), Spain (Baker & McKenzie 2009: 255), Slovenia (ETUCO and Infopoint 2002) and Latvia (*ibid.*). The above shows that the disparity of solutions applied to national-level collective bargaining does not limit the range of parties eligible to negotiate to trade unions. Therefore it seems justifiable to conclude that introducing or recognising an EWC competence in TCB would not represent a foreign body in European industrial relations, even if ‘the multiplication of the representing agents’ and the ‘tangling of functions’ that have been observed over the past few years are upsetting the traditional distinction between single and double representation channels and indicate that ‘company collective bargaining is no longer an activity strictly reserved for unions’ (Laulom 2005: 284-287; quotation from: Bethoux *et al.* 2008: 23).

Summing up, we conclude that, with regard to international sources of law, the ILO conventions and recommendations, even though sometimes only general or inconsistent (e.g. with regard to eligible parties), do not prevent EWCs concluding TCAs. We can infer from the above analysis that the ILO norms provide a sufficient legal framework to accommodate TCB as an eligible level of collective bargaining. Moreover, they do not seem to limit collective bargaining just to employers’ and workers’ representative organisations, but also foresee the possibility for workers’ representatives to engage in collective negotiations. These international regulations are also confirmed and applied in practice in several EU Member States where works councils are recognised and have been participating in collective bargaining. One may thus conclude that, even if collective bargaining by works councils is not a mainstream trend in national industrial relations in Europe, it is by no means

uncommon. Consequently, given the fact there is no other European employee representation structure at company level in multinational companies it seems there is room for recognising or equipping European works councils with such competencies.

### 3.4 EU *acquis* reference to TCB: the treaty level

In view of the general character of international sources and their global applicability, one can narrow the search to more specific EU provisions on TCB. There are three main questions that I would like to look into in this respect. The first one is whether (T)CB is within the EU's regulatory competence. The second question, if the reply to the first one is in the affirmative, is whether such treaty provisions could serve as a (sufficient) legal base for adopting a legal framework for transnational collective bargaining. Thirdly, one needs to look into whether, under the EU *acquis*, it is currently possible for EWCs to lawfully participate in negotiations with company management and sign TCAs.

With regard to the first question on the EU's regulatory competence, the debate was reopened in connection with the Commission's 2006 TCB study (Ales *et al.* 2006). The legal basis for the proposed optional legal framework for TCB consisted of the provisions of Art. 115 TFEU (previously Art. 94 of the Treaty Establishing the European Community) giving the Community the competence to issue laws necessary for the functioning of the internal market; and Art. 28 of the EU Charter of Fundamental Rights. It is also possible to anchor the introduction of such an optional framework in Art. 153 TFEU (ex. 137, paragraph 1 point (f) ECT) stipulating the Community's competence to support and complement activities in the field of 'representation and collective defence of the interests of workers and employers including co-determination, subject to paragraph 5'. Reservations raised with regard to EU competence in the area of collective bargaining were eventually overruled by the ECJ's verdict in the Albany case where it was argued that Art. 153 (5) TFEU (formerly Art. 137 (5) ECT) did not exclude the right of collective bargaining from the Community's regulatory scope. In any case, the Constitutional Treaty modifying the regulatory scope of Art. 137 (5) via the application of Art. 28 of the EU Charter of Fundamental Rights would seem to provide both the necessary capacity for EU-level

collective bargaining and the grounds for EU institutions to shape the possible framework.

As a way of tackling the second and third questions, one needs to look for specific provisions in the *acquis* referring to TCB. These are scattered across several acts. The first relevant source is Art. 12 of the Community Charter of Fundamental Social Rights for Workers. Unfortunately, it does not provide a more precise definition of collective bargaining, apart from mentioning that such a ‘dialogue between the two sides of industry at European level’ may ‘result in contractual relations in particular at inter-occupational and sectoral level’. Similarly vague is Art. 6 of the European Social Charter of the Council of Europe (1961, revised in 1996) providing for the right to negotiate and conclude collective agreements. Unfortunately, this merely recognises the right to bargain collectively, without providing any explanation.

More content and food for debate can be found in Art. 28 of the EU Charter of Fundamental Rights which, with regard to the right to negotiate and conclude collective agreements, stipulates that ‘Workers and employers, or their respective organisation, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels (...)’. According to Veneziani (Veneziani 2006: 298) there are four distinctive components of Art. 28:

- The process (collective bargaining)
- The outcome (a collective agreement)
- The actors (workers, employers, their organisations)
- The levels (the ‘appropriate levels’).

As regards the first component it is clearly ‘collective bargaining’ that is defined in the article, which shows that the characteristics of the ‘*process*’ fully justify the use of the term TCB with regard to TCAs and ESD. The criterion allowing negotiations to be classified as CB is their outcome: a collective agreement (*ibid.*). Admittedly, the outcome (i.e. the collective agreement) is not defined by Art. 28 in any way (the potential scope of workers and employers covered, content, articulation between different levels of agreements, its position in the hierarchy of law, etc.; Veneziani 2006: 300). As Veneziani points out (*ibid.*), the undefined nature of transnational collective agreements allows for a

variety of types of collective agreements known at national level (see also Eurofound 2002), with the Charter not appearing ‘to restrict or limit the range of possible types’ (Veneziani 2006: 301).

As regards the level, Art. 28 states that the level of collective bargaining should be ‘appropriate’ which can be interpreted as a level satisfying the needs of the contractual parties (see also above the ILO Committee of Experts, 1985 para 632). This mention of an appropriate level for the conclusion of collective agreements may be a sufficient legal basis for the emergence of a European level of collective bargaining, if social partners deem this dimension necessary and suiting business reality. Such an interpretation is also found in the Explanations relating to the EU Charter of Fundamental Rights (provided by the Bureau of the Convention): ‘The reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides.’ This explanation shows that Art. 28 might indeed be considered a sufficient legal basis for adopting a framework for transnational collective bargaining in the EU. This capacity of Art. 28 is not lessened by the indication included in the Explanations that this level of collective bargaining might be included when ‘Union legislation so provides’. It seems to be too narrow an interpretation, as the wording of Art. 28 makes a direct reference not only to Community and national law, but also to practice. Since the latter has already taken the form of transnational agreements (a part of which is implemented via agreements between trade unions and management at national level), which, by the way, are in line with the international norms set by the ILO, one can arrive at the conclusion that this expansion of collective bargaining can already be accommodated within the current *acquis communautaire*. Corroborating this view, Art. 155 of the Treaty on the Functioning of the EU (TFEU) clearly stipulates: ‘Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements’. Another example of an already binding legal basis in which to embed transnational negotiations on a frequent topic of collective agreements, although admittedly beyond the core analysis of EWCs’ involvement in TCB, yet relevant for the present line of argumentation, is the Working Time Directive, which in a sense encourages social partners to negotiate working time on a sectoral basis.

This short analysis of the capacity of Art. 28 of the EU Charter of Fundamental Rights allows us to conclude that the signing of TCAs can be accommodated within the scope of the article.

The remaining open question, key to finding a reply as to whether Art. 28 provides for EWCs to play a role in TCB, is the one regarding the actors or parties eligible to sign such agreements. The wording of Art. 28 ('or their respective organisations') is, arguably, not unambiguous, but seems to cover all possible collective bargaining parties (i.e. workers and employers, or their respective organisations), regardless of whether they are organised or not (Blanpain and Ameglio 2003: 20; Veneziani 2006: 314). Such a broad phrasing of Art. 28 reflects the various national solutions in place which entitle, on the part of labour, the trade unions, representatives of workers, employees' associations or their respective organisations (ibid.) to conduct negotiations. This broad approach has been confirmed by the European Committee of Social Rights which found that Art. 6 of the European Social Charter had a broad scope covering 'all workers and employers' that are entitled to bargain collectively, i.e. 'also a simple *de facto* group of workers' (European Committee of Social Rights 1998: 277; see also Ryan 2003: 74)<sup>11</sup>. As regards the optional choice between 'workers' "or" 'workers' organizations', it is arguably meant to provide workers not formally organised with the possibility to bargain collectively (Veneziani 2006: 315). This wide-ranging interpretation is somewhat narrowed by the ILO Freedom of Association Committee which states that workers' representatives or non-organized workers are only parties eligible to bargain collectively when no organization exists (ILO 1985, para. 608). All in all, as Veneziani (Veneziani 2006: 316) points out, the EU Charter of Fundamental Rights lacks clarity due to its inconsistent wording across its various articles, referring in Art. 27 to workers' representatives and in Art. 28 to workers' organizations. Sticking to the exact wording of each article does however allow us to draw the conclusion that the existing EU sources on transnational CB accommodate the transnational level of negotiations. In other words, in the author's view the current

---

11. The wording referring to employers and workers only (without mentioning their organisations) was used in previous drafts of the article prepared in Convent 45 (July 28 2000) and complemented with reference to their organisations only in Convent 47 (14 September 2000). (See Bryan 2003: 76)

*acquis* provides a legal basis both capacious enough to accommodate TCB as a lawful form of collective negotiations at transnational level (but not sufficiently developed) and flexible enough to allow any future more specific and precise framework to be developed without the need to substantially redesign existing treaty-level provisions. Furthermore, with regard to the third question concerning the legality of EWC involvement one can conclude that the treaty-level provisions do not limit the scope of eligible parties to trade unions only, implying that, if the signing such agreements by non-trade union organizations of workers is not forbidden (in fact, it is foreseen), EWCs as bodies representing workers could be considered as parties eligible to lawfully sign such agreements at transnational level.

### 3.5 EU secondary *acquis* and EWC entitlement to engage in TCB

Stepping down from the Treaty level to the level of EU directives one finds further indications regarding transnational collective bargaining. Analysing the existing secondary legislation there are two threads one can explore to ascertain whether a collective bargaining competence can be derived for EWCs. The first line of argumentation sees the very competence of a Special Negotiating Body (SNB) to negotiate with management an agreement establishing an EWC as sufficient proof and a full-bodied form of transnational collective bargaining ('the voluntaristic approach'). The second thread to be explored analyses the debate over whether the information and consultation rights of EWCs overlap co-determination and collective bargaining competencies ('the legalistic approach').

#### **The voluntaristic approach**

With regard to the first line of argumentation, support for its main hypothesis is found in the European Parliament's 1998 'Report on transnational trade union rights in the European Union'<sup>12</sup>. Firstly, in part A ('Motion for a Resolution') the report pointed to an already existing (institutionalised) right to negotiate at European level, embodied

---

12. Adopted on 03/03/1998 by the Committee on Employment and Social Affairs of the European Parliament (17 votes in favour, 4 against, 2 abstentions); Rapporteur: Ria Oomen-Ruijten.

by the European Works Council and the Working Time directives (point G). The report went on to emphasise that ‘the Treaty of Amsterdam establishes the possibilities of collective bargaining and negotiations at European level’ (ibid: point H), arguing moreover that the implementation of such transnational trade union rights, including the right to transnational collective bargaining, was a must for the EU to ‘fully implement the European single market’ (ibid: point J). Furthermore the EP considered that the coordinated implementation of employment policy and Economic and Monetary Union would provide an impetus for the process of European collective bargaining (ibid: point 1). The core argument of the report is that negotiations to establish an EWC and bargaining within the Working Time Directive were to be considered as negotiations at European level, i.e. forms of TCB (ibid: point 7). It was also stressed that although ‘the possibility’ to bargain at European level already existed, the European employers’ and employees’ organisations were not provided with the proper tools to make use of this right (ibid: point 11). In this context ‘[t]he right to collective bargaining and to collective action must be seen as two sides of the same coin’ (ibid: point 14). Importantly, the Committee emphasised that the emerging TCB need not be perceived as a danger to and competition for national-level collective negotiations, a fear often harboured by national trade unions, but that ‘establishing the right at European level implicitly acknowledges the right at national level’ (ibid). All in all, even though without much practical effect, this initiative of the European Parliament demonstrates EU institutions’ awareness of the emerging transnational level of collective bargaining and support for a formal recognition of a *de facto* established competence. S. Laulom, one of the members of the Ales team (Ales et. al 2006), is one of the most prominent proponents of the view that, on the basis of the EWC directive 94/45/EC, SNBs have been conducting full- fledged transnational negotiations through their negotiation of agreements establishing EWCs. His view is based on the fact that the contracting parties to such agreements are free to determine the outcome of such negotiations and, in fact, have the liberty to agree upon any form of workers’ influence which they find useful or suitable (Laulom 2005: 46).

Winding up this line of argumentation one can argue that the competencies assigned to EWCs by the directives represent not a ceiling, but rather a floor, a minimum standard or a point of departure. The point of departure in understanding the EWC directives is determined

by the fact that the outcome of information and consultation arrangements is not prescribed, not limited and left to the discretion of the contracting parties. Consequently, there is no express prohibition to overstepping the boundary separating consultation from bargaining. The key determinant here is the voluntarism of the contracting parties: EWCs cannot pretend to bargain transnationally, should the employer refuse to participate in such negotiation. Consequently, what can be identified as the key causative factor for transnational collective bargaining within this approach is the mutual recognition of the contracting parties. As with the national level, this remains the pillar of collective negotiations, even if, or despite, the lack of the EWC directives' provisions on this matter.

### **The legalistic approach**

As mentioned at the beginning of this section there is also a second thread in the search for sources of an EWC competence to conduct transnational negotiations. This approach, converse to the first one, focuses on the means (information and consultation rights) available to EWCs and the outcomes (transnational company agreements) of EWC action. In this sense, the two approaches are not contradictory, as the first one identifies the competence to bargain transnationally (an SNB negotiating the very establishment of an EWC), whereas the second one focuses on the tools at the disposal of (an already existing) EWC. By this token the second approach refers to the debate on the boundaries between information and consultation, co-determination and workers' participation that has been going on at least since the 1980s.

An analysis of legal sources with regard to the second approach can be started by looking at the directives on collective redundancies (98/59/EC) and business transfers (2001/23/EC) and the framework directive on information and consultation (2002/14/EC). They all provide for the information and consultation of employees in cases of company restructuring. Most importantly, they stipulate that consultation should take place 'at the relevant level of management and representation, depending on the subject under discussion'. Such a formulation seems to open the door to transnational negotiations, should the European level be the most appropriate in a given situation.

Continuing the review of legal sources including references to capacities for European collective bargaining, one arrives at what is the core of this



analysis: EWC Directive 94/45/EC and the recast directive 2009/38/EC. Concerning the question whether EWCs are competent to participate in TCB and sign binding TCAs, two aspects need to be considered: 1) can EWCs as non-trade union bodies representing workers be parties to transnational collective agreements; and 2) is the signing of collective agreements by EWCs within the limits of the powers conferred on them by existing law. The first aspect has already been positively answered through the analysis of international law and Treaty-level *acquis communautaire*. The second aspect will be dealt with in the following section.

The former (now repealed) Directive 94/45/EC guaranteed employee representatives the right to information and consultation, defined as an exchange of views at the level of transnational enterprises. This is probably the core of the debate, i.e. whether the 1994 EWC directive was a sufficient basis for EWCs to engage in transnational negotiations, or whether they have been exceeding their legal competences by going beyond the mandate originally given to them by the European legislator. On the one hand, Directive 94/45 arguably sets no limits to EWC negotiating powers, while on the other hand it clearly defines EWCs as information and consultation bodies and thereby somewhat limiting their scope. Studying EWC Directive 94/45/EC, especially Art. 1 (a) of the Annex ‘Subsidiary requirements’, we immediately find that ‘The competence of European Works Council shall be limited to information and consultation (...)’.<sup>13</sup> One can of course try to interpret this provision by arguing that EWCs, when negotiating and signing transnational collective agreements, are in fact exercising an advanced and very effective form of consultation; such reasoning however ignores the teleological interpretation of the Community legislator’s intention, namely that the competence of EWCs should remain confined to these two explicitly mentioned functions. At the same time however, the European legislator did not set clear boundaries to the consultation competence of EWCs in the body of the directive applying to negotiated EWCs. This implied freedom to go beyond a narrowly defined consultation limited to an expression of opinion or an exchange of views resulted in at least 9 EWCs<sup>13</sup> achieving explicit negotiation competences in their

---

13. 2 SE Works Council at: Allianz Shared Infrastructure Services and GfK SE, and 9 EWCs at: Credit Lyonnais, Danske Bank, Dura Automotive Systems, Heidelberg

founding agreements (Jagodzinski 2012 forthcoming). A further 9 EWCs and SE works councils have the competence to ‘reach consensus’<sup>14</sup>. These instances present a practical confirmation of the view expressed in the first approach (see above) arguing that an SNB is *de facto* conducting transnational bargaining since it can negotiate outcomes by no means limited by law. Although these EWCs represent only a small fraction of the overall number of operating EWCs and SE works councils, one should also recognise that the above figures reflect only a portion of the real scale of the phenomenon. The above-mentioned EWCs are bodies with a negotiating competence explicitly guaranteed in their constituting agreements. At the same time, the lack of such a provision has not prevented many others from signing transnational company agreements. Arguably, according to the earlier discussed ILO recommendations and conventions, the choice of an EWC as a negotiating body has been an eligible decision of management and labour for consultations leading to the conclusion of binding agreements on working conditions at a level they considered appropriate.

With the recast directive 2009/38/EC repealing directive 94/45/EC (but not the provisions implementing it at national level), the legal situation has somewhat changed as the definition of consultation has been significantly amended. Now defined in greater detail, consultation ‘means the establishment of dialogue and exchange of views between employees’ representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees’ representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings’ (Art. 2.1 g).

---

Cement, Linde in agreement of 1996, Mondi Business Paper, Södra, Verlagsgruppe Passau and Veolia Environment (source: ETUI database of EWCs, 2011)

14. Q-Cells SE Works Council, Itella Corporation EWC, E.ON Energy Trading SE Works Council, Danske Bank Group EWC, Klöckner & Co SE Works Council, Kraft Foods European Council, Trevira EWC, Air France KLM EWC, BT European Consultative Council (source: ETUI database of EWCs, 2011).

In the Directive's subsidiary requirements the entitlement to consultation is complemented with the right of employee representatives to 'obtain a response, and the reasons for that response, to any opinion they might express' (Annex 1, Art. 1 a). There is no mention of negotiating powers and the aim seems not to go beyond an expression of opinion. This view is confirmed by Recital 25 of the Preamble to Directive 2009/38/EC stating that 'The definition of 'consultation' needs to take account of the goal of allowing for the expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate'. Furthermore, had the EU legislator considered granting negotiating powers to EWCs, it would have shaped the wording of the new definition of 'consultation' around that used in Directive 2002/14/EC. This sets forth that consultation is done 'with a view to reach an agreement' (Sachs-Durand 2010: 317). Since the Commission, in recasting the EWC directive, sought consistency with other EU legislative acts on information and consultation rights (e.g. the Statute complementing the SE Directive 2001/86/EC), one can infer that, had the intention been to give EWCs negotiating powers, this could have been easily, and in a justified way, done by changing the definition of 'consultation' in line with the wording of Directive 2001/86/EC.

On the other hand however, the recast EWC directive granted EWCs the new competence (without prejudice to the competence of other bodies or organisations in this respect) of representing collectively the interests of employees (Art. 10.1). This provision was introduced to ensure that EWCs can go to court in cases of conflict with management and that their legal standing as collective representation bodies is appreciated when seeking justice. This motivation is not however explicitly expressed in the directive, thereby opening the door to an extensive interpretation of Art. 10.1. In a broad interpretation it would be feasible to argue that the competence to 'represent collectively the interests of employees' can accommodate a mandate of employee representatives to participate in signing TCAs. However, such an interpretation seems only possible when reading Art. 10.1 independently of Art. 2.1 g, where the outcome of consultation is defined as an expression of opinion, rather than the conclusion of an agreement.

The first general observation or reflection on the analysis within the 'Legalistic approach' is that it is much more focused on the technical

analysis of the matter. It seems that two inferences can be drawn. Firstly, by applying a liberal paradigm one could argue that TCB by EWCs is allowed by the directives, even if no specific and explicit bargaining competences are actually articulated in the law. This is because the EWC directives, while not *expressis verbis* allowing EWCs to bargain collectively, also do not prohibit them from doing so. Even if not allowed by law, it thus does not constitute a violation of law. One could consequently use a voluntaristic explanation, arguing that if such actions are not illegal it is up to the contracting parties to decide whether to engage in TCB. Secondly, another possible conclusion emerges: as discussed above, the lack of clearly defined boundaries of consultation and co-determination in European directives on information and consultation allows for extensive interpretations of the notion of consultation. Such an interpretation *sensu largo* consequently allows the conclusion to be reached that EWCs are not limited by law in their consultation competencies and that therefore TCB with their participation is legally justifiable.

### 3.6 Non-legal aspects regarding the legitimacy of EWC involvement in TCB

Legal aspects reflect an important, but not the only part of reality. There are further problems concerning EWC involvement in signing TCAs. Firstly, the question of whether they have a sufficient mandate needs to be explored. As already mentioned, they were originally intended as bodies for information exchange and consultation and it was for this purpose that delegates were elected at individual sites. If now the same delegates sign agreements modifying working conditions and sometimes even the work contracts of individual employees, the reproach automatically arises of their lacking legitimacy for such action. This becomes even more serious and valid in a situation where such EWC members approve agreements with company management that, in consequence, have binding effects on company employees not involved in the election of such delegates, or where EWC composition is not based on the principle of proportionality. Such a situation occurs in cases where a certain subsidiary is not made part of the company's information and consultation procedure (i.e. not entitled to send delegates to the EWC), or only passively participates in this procedure. Such a constellation is acceptable as long as information and consultation is concerned, but

not when co-determination is at stake. Additionally, one needs to take into account the difference in potential voter turnout between elections for delegates to an information and consultation body and elections to a body with co-determination competencies. It can be assumed that turnout in the latter case would be much higher.

Secondly, EWCs are not trade union bodies and national-level collective bargaining as we know it has been predominantly (though not exclusively) the domain of trade unions. The reason for the predominantly exclusive mandate of trade unions has always been their specific authorisation entitling them to represent the interests of employees, especially in situations where binding commitments recognised by law are entered into. EWC Directive 94/45/EC, however, contained no recognition of either trade unions or their European-level organisations (e.g. ETUFs), thereby strengthening the arguments of those opposed to extending EWC rights to a mandate for conducting transnational collective negotiations. Despite the recognition of ETUFs in the recast directive 2009/38/EC there is still, however, no change of mind on the part of trade unions with regard to an EWC mandate to negotiate. Agreements already concluded with EWC participation are the problem. Arguably, one way of adding legitimacy to existing TCAs would be to impose a requirement to have them ratified or co-signed by national trade unions in those countries in which they are implemented, similar to the guidelines adopted by certain ETUFs (EMF, EMCEF, UNI-Europa).

#### **4. Questions requiring an urgent answer**

As regards any future legal framework for TCB there are many questions that require answering. EWCs are not the only ‘problematic’ actors in the whole set-up. Also unclear is who shall negotiate on the part of labour: the European Trade Union Federations (formerly European Industry Federations) with their European sectoral dialogue mandate, or perhaps the already mentioned national trade unions hitherto involved in company-level negotiations. ETUFs seem better equipped to perform this function due to their European background and resources; yet national trade unions have traditionally been involved in corporate-level collective bargaining in individual Member States. One of the major questions is how to reconcile these stakeholders and appoint the one best equipped to perform these functions. Recognising this overlapping

of competencies and its significance for the successful introduction of transnational collective bargaining, a study group under the leadership of E. Ales in 2006 proposed establishing an optional legal framework. This would allow the establishment of joint negotiating bodies consisting of representatives of the various parties or even stakeholders, including ETUFs, trade unions and EWCs.

Similar questions apply on the part of management. Confusion about who should negotiate such transnational collective agreements for entrepreneurs, with all their consequences, also needs to be dissipated. Whether it will be managers of a particular company only, or whether they will be represented or assisted by employers' organisations such as Business Europe (former UNICE) for instance and/or national organisations, remains to be decided.

An answer to some of these questions was provided by the research group of Prof. E. Ales (Ales *et al.* 2006) which supplied a clear definition of the roles of the parties concerned. EWCs would have the task and competence of triggering collective bargaining procedures, though without the mandate to unilaterally start and engage in transnational negotiations with management. After obtaining a mandate from the European trade union organisations to be involved in transnational negotiations from their very beginning, EWCs would then initiate talks with company management by obtaining the necessary information. Subsequently, the task of negotiating binding agreements would be performed by European trade union organisations (i.e. for instance EIFs). The latter would also have the mandate to unilaterally initiate transnational negotiations.

Turning to legal facets of the proposed supplementary framework, one needs to discuss the hierarchy and status of these agreements. Shall they take precedence over national collective agreements? If not, then another question emerges on whether it will be possible to guarantee that such transnational agreements respect national collective agreements in all the countries in which they apply (for a more in-depth analysis of these questions see Chapter 7). The next question to arise is that of implementation: will the transnational agreements be directly applicable to all signatory parties, or will there be any transposition measures necessary to ensure their binding effect? In the view of the E. Ales's study group, such agreements would not automatically have

binding power, with such being granted indirectly via implementation through unilateral managerial decisions adopted by all national subsidiaries. From the perspective of a balanced footing of contractual parties, such an approach discriminates against labour by putting it below par compared with management. As such, this particular proposal represents a weakness of the whole concept, which could be simplified and made clearer by granting such agreements legal force without any transposition measures.

Furthermore, in order to safeguard proper implementation and ensure the application quality of these agreements, questions of legal enforcement, monitoring, dispute resolution and recourse to independent courts at the relevant level need to be clarified. First of all the monitoring mechanism, necessary for identifying malfunctions and abuses or breaches of transnational agreements, need to be defined. Further, in the case of legal conflicts, procedures for their resolution before court would have to be laid down. At this point the question of court jurisdiction involving a choice between either national labour courts or the Court of Justice of the European Union (CJEU) at least as the last instance for interpretation, would have to be answered. All these questions remain unanswered (except for the unquestionable general competence of the CJEU to decide in cases involving the interpretation of the *acquis*). Similarly, the study group's report includes no clear concept of enforcement measures. This question has to be addressed, in particular with regard to the appropriate level on which enforcement should take place. Rumour has it that the initial draft of the Communication from the Commission, 'Partnership for change in an enlarged Europe', announcing the study on transnational collective bargaining, included provisions on procedures designed for transnational dispute settlement, but that, as a result of heavy lobbying from employer organisations, this point was deleted from the study specifications<sup>15</sup>.

---

15. Clauwaert, S. and Warneck, W. 2007.

## 5. Critical views on the emergence of TCB

Establishing that current EU legislation allows TCB does not however mean that all criticism of the concept of transnational collective bargaining is overruled. Certain participants in this debate claim that the recently signed transnational agreements can hardly, given their scope and the actors involved, be compared with national collective agreements. Yet such argument is of only limited value for the discussion since it ignores the fact that there is nothing like a uniform standard of collective bargaining in the EU and that national collective bargaining systems present a myriad of solutions and approaches in all possible respects. Each Member State has its own traditions of collective negotiations which differ in respect to the bargaining level (national, sectoral, inter-sectoral, individual plants), parties and actors (tripartite or bipartite, trade unions, works councils), scope (parties to the contract only, all employers and employees) and content of collective agreements, the binding force of collective agreements, etc.<sup>16</sup> Any attempt to copy the national level and adopt a framework that follows one of the national systems will naturally be a violation of traditions of another one; therefore, it must be argued that TCB in its European dimension will necessarily be a process *sui generis*, probably far from what is currently known at national level.

Since the 1990s trade unions and their organizations have been developing coordination of European collective bargaining, albeit via a different approach than truly transnational bargaining. They instead aimed at synchronising national collective bargaining policies as well as at elaborating common viewpoints<sup>17</sup> rather than at developing a single European collective bargaining platform. Coordination of collective bargaining is thus oriented more towards introducing the European dimension into the local, regional and national level of bargaining<sup>18</sup>. Despite the difference in approach, the European-level coordination of collective negotiations might be a good point of departure for tackling the challenge of dealing with the emergence of their EU-wide level.

---

16. For more details on differences in national collective bargaining systems see: M. Keune 2004; or: Commission Consultative Nacional de Convenios Colectivos, 2004. See also European Foundation for Improvement of Living and Working Conditions 2002.

17. Clauwert *et al.* 2004.

18. Clauwaert, S. and Warneck, W. 2007.



## 6. The Commission's initiative: report of a study group on TCB and proposal for an optional legal framework

To answer some of the above questions, a study group including renowned researchers in European industrial relations was commissioned by the European Commission DG for Employment, Social Affairs and Equal Opportunities in 2005 to prepare an analysis and assessment of the possibility of introducing an optional legal framework for transnational collective bargaining<sup>19</sup>.

The European Commission had already recognised this legal ambiguity of TCAs back in 2004. In the section '*Preparing further developments*' of its communication '*Partnership for change in an enlarged Europe*'<sup>20</sup>, it identified the need to improve consistency of social dialogue outcomes and transparency<sup>21</sup>.

The Commission had thus already envisaged the introduction of a proposal for the requisite legal structure and consultations on this subject with European Social Partners. Formally, the aim of developing an optional legal framework was included in the Social Agenda 2005-2010 one year later when the *Communication on the Social Agenda*<sup>22</sup> was announced. In this document the Commission argued that the framework could benefit both companies and workers by extending the social partners' capacities and adapting them to the changing circumstances<sup>23</sup>.

---

19. E. Ales *et al.* 2006.

20. European Commission 2004.

21. Ibid: 'In view of the growing number of new generation texts, the Commission considers there to be a need for a framework to help improve the consistency of the social dialogue outcomes and to improve transparency.(...) Interest in and the importance of transnational collective bargaining has been increasing in recent years, particularly in response to globalisation and economic and monetary union. EWCs are adopting a growing number of agreements within multinational companies which cover employees in several Member States. There is also a growing interest in cross-border agreements between social partners from geographically contiguous Member States, as well as agreements between the social partners in particular sectors covering more than one Member State.'

22. European Commission (2005).

23. Ibid: 'Providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training. It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses. Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy.'

In the Commission's view, the introduction of a legal framework for transnational collective bargaining thus represented a further step towards completion of the common market.

As the Commission rightly observed in the *Communication on the Social Agenda 2005-2010*, the lack of such an option could be an obstacle to achieving the common market in its full scope. Additionally, it should be added that, in a mid-term perspective, adoption of such a framework could potentially contribute to achieving the goals of the Lisbon Strategy. With this in mind, the Commission assigned a group of academics, led by Professor E. Ales, the task of conducting a study on transnational collective bargaining. Specific reasons and objectives for initiating this study were the following<sup>24</sup>:

- to provide a comprehensive overview of the current developments in transnational collective bargaining in Europe and to identify the main trends;
- to identify the practical and legal obstacles to the further development of transnational collective bargaining;
- to identify and suggest any actions that might be taken to overcome these obstacles and promote and support further development in the field of transnational collective bargaining;
- to provide the Commission with a sound knowledge basis to assess the need for the development of Community framework rules, complementing national collective bargaining and highlighting relevant aspects such rules would have to take into account.

The study team adopted a research method based on the analysis of instruments and field experiences of transnational dialogue at sectoral and company level. Such an investigation was expected to deliver conclusions about whether a new legal framework for transnational collective bargaining was necessary as a complementary dimension of European-level collective negotiations. Firstly, an examination of contemporary European-level transnational tools was carried out, with

---

24. E. Ales *et al.* 2006.

the research team positively appraising the European sectoral dialogue. Secondly, a similar analysis was conducted with regard to transnational tools at corporate level, notably those deriving from the EWC and SE Directives. Concerning the second analysis, the study group arrived at the conclusion that the company level echelon of the transnational set of instruments contained, alongside some strong points, considerable weaknesses. At the end of the report's analytical section the research team inferred a need for institutional acknowledgement and development of a European level of transnational collective bargaining complementing the tools currently available, such as European Social Dialogue and transnational dialogue within companies.

The authors of the report rightly identified potential fields of conflict among actors affected by the transnational agreements so far concluded. On the one hand, EWCs, quite often involved in these collective negotiations and whose members often signed the final agreements, thereby exceeded the original competence designed for them; from information and consultation bodies intended to obtain information on a company's performance and employment trends, they had developed into bodies undertaking negotiations and co-determination functions on such matters as skills and training, health and safety, equal opportunities, (vocational) training - topics that usually constituted the main issues for the European sectoral dialogue committees. Trade unions, on the other hand, often felt jeopardized in their traditional domain of employee representation by the enhancement of EWCs' areas of activity; at the same time, in the EWC Directive the legislator had not provided for any tools minimising the risk of a clash between EWCs and trade unions, such as recognition of the role of the latter in the operation of EWCs. The research team was undoubtedly correct in recognising the possibility of overlapping and even conflict between these two forms of employee representation; additionally, the aforementioned European social dialogue committees were also directly affected by the developments. It is legitimate to expect that, since transnational agreements are often signed on the occasion of restructuring measures or with restructuring as their common theme, the potential for their emergence will grow as restructuring further intensifies in the years to come. The plea for an optional legal framework introducing order and structure into the matter can be seen in this regard as an important remedy against possible friction between labour actors. Moreover, adopting institutional frameworks for such agreements could

help develop their anticipatory character instead of a reactive approach in cases of restructuring, currently their dominant feature.

## **7. Theory and the crystal ball: function followed by form followed by mass action?**

Finally, from the academic point of view this drive towards creating a new level of collective bargaining can be looked at from the perspective of the concept of neo-functionalism known in political science under the motto ‘forms follow functions’<sup>25</sup>. According to the logic of neo-functionalism, once practical development has taken place and become established, an institutional superstructure should follow in order to accommodate the change. The neo-functional theory seems very suitable for explaining EWC involvement in TCB on at least two levels. Firstly, one can easily spot the spill-over effects of effective consultation by EWCs (see also Bethoux 2008: 24). Those EWCs that have proven their capacity and value in consultation on basic topics identified by the EWC Directive have often gradually extended their scope of competence (reflected by subsequent renegotiated versions of their constitutive agreements) and upgraded their contribution from an exchange of views via expressing opinions, making statements and recommendations to actually signing company-level transnational agreements. Secondly, the neo-functional theory serves well to justify the need for adopting a legal framework for transnational collective bargaining. Since it argues that pragmatic development functions precede the creation of institutional superstructures it helps to explain the current state of play, described best as a transitory period between the development of practice with a growing number of signed TCAs and the adoption of an EU legal framework regulating the European level of collective bargaining (the institutional superstructure).

However, in order to ensure more robustness to theoretical explanations of TCB development, I would also like to refer to Lowell Turner’s concept of ‘structure before action’ (Turner 1993). Turner points out

---

<sup>25</sup>. See for instance: Ernst Haas 1976. ‘Turbulent Fields and the Theory of Regional Integration’, 1976; or: David Mitraný 1975.

that in democratic societies organized labour and its structures of representation develop along widespread patterns of causality: 'social movements give rise to organization and institutionalization' (ibid). These processes do not however apply to international arenas where transnational collaboration (e.g. among labour or environmental groups) develops through networking and further institution-building on the part of representatives of already established organisations (themselves being products of social movements), rather than through social movements. In these cases, continues Turner, new structures of representation (in our case those involved in TCB) may precede or even occur in absence of social movements. What Turner doubts however is that structures created in such a way can be effective in the long run, i.e. whether actors can acquire real power in the absence of mass protest (social movement), the catalyst at national or local level. Turner's question is very pertinent for any analysis of TCB and especially its future, as various scenarios are possible. Turner predicts two possible scenarios: 1) that such forms of transnational collaboration will gain little ability or power to influence the policy of various agents (national and transnational); 2) that they first acquire real power, then being bolstered by mass protest or social action.

In my view at the moment of predicting the future of TCB Turner's theory is pushed to its limits and can only partially be applied to TCB. Admittedly, the first scenario forecasting that transnational collective negotiations will never become a form of representation with real power or influence on transnational agents (e.g. the Commission, the European Social Partners, national trade unions) is possible yet seems to have already been proven unlikely. The fact that the European Trade Union Federations have developed strategies for signing TCAs and the Commission's initiative to launch studies on an optional legal framework confirm that this form of workers' representation has already gained sufficient influence and power to have an impact on transnational agents, stimulating them to act. With regard to Turner's second scenario it seems that, because transnational developments and processes (including EWCs and board-level employee representation in SEs) at large, and TCB specifically, are perceived as so distant from the national level, only a very limited spectrum of workers (national and local groups) is actually aware of their status and potential impact. Consequently, it seems there is little potential for mass protest/action at national or local levels bolstering (and possibly legitimising) the

power of TCB as a form of representation. On the other hand however, it is undoubtedly possible that, when workers' representatives acquire the power to negotiate on more 'hard-core' working conditions such as pay, holidays, bonuses, etc. on a more common basis, local and national workers' support may be triggered, boosting the drive for TCB recognition and simultaneously legitimising it. In this way it seems that Turner's second scenario may be used to describe a possible feedback mechanism between the transnational and national/local level. At the same time however, the neo-functional theory comes in place, showing and explaining the direction of this transnational-local coupling: the creation of an institutional superstructure in the form of a legal framework. It is always hard to foresee the future and it is impossible to predict now if and when the Commission will launch an initiative to adopt a legal framework. Similarly, it is hardly possible to foretell whether transnational company agreements will indeed evolve towards covering more 'hard-core' issues and what the response of the workforce to such developments will be. In this respect I share Turner's argument on the development of the transnational labour movement in general (*ibid.*), i.e. that it has developed on the basis of networks of contacts and new structures of international representation without dependence on mass protest. One can easily apply these characteristics to the development of TCB, and probably also to its future, as a 'product of politics and strategy – on the part of both national and supranational actors (national union leaders, officials from the European Commission, institutions such as the ETUC) – in a context of growing economic integration in Europe' (*ibid.*). However, the development of TCB will to a certain degree remain dependent on national or local action or mass protest as it is the local workers' constituencies that will provide the necessary two-way feedback, expressing the need for transnational-level collective bargaining, pointing to the relevant items and providing acceptance or refusal of the outcomes of such collective negotiations.

## Conclusions

From the above analysis of the legal aspects, one undisputable inference can be drawn: currently all transnational agreements signed by EWCs (and by others actors as well) have been concluded without a legal framework. Two consequences of the lack of any proper legal anchoring are 1) the legal ambiguity of TCAs, and 2) the unclear mandate of EWCs

to continue negotiating such agreements, given that they are neither against the law (legalistic approach), nor fully in line with binding provisions (legitimacy issues). Seeking to characterise their existence in legal terms, one could say that these agreements exist in parallel to the law. The corollary is a situation in which there are no means or procedures for their legal enforcement, without any possibility to seek legal redress or recourse to labour courts at an appropriate level. The latter is only to a minor extent an obstacle to actually concluding transnational company agreements as such, being far more an obstacle in their subsequent implementation.

Secondly, we argue that there is no ban in the existing international and EU legal sources on workers' representatives engaging in collective negotiations on behalf of the workforce. The right and competence to negotiate transnational agreements is not granted exclusively to trade unions, whether at international, EU or national levels. This finding points to the view that EWCs could be considered eligible, especially on the basis of Art. 10.1 of the recast directive, to sign transnational collective agreements. These are conclusions based upon the legalistic analysis - grounded, justifiable and defensible within its reach and capacity.

To provide a reply based only upon the legalistic arguments to the initial question of whether EWCs are overstepping their competence by participating in TCB would represent an arbitrary and incomplete approach to the matter. A full reply must also take into consideration the legitimacy aspects. One should moreover not consider the legalistic and legitimacy approaches as being contradictory, but complementary. Concerns about the original specific information and consultation mandate of EWCs, with consultation defined as the expression of an opinion rather than bargaining, also harbour legalistic considerations. Taking both components into account, and under the condition that both requirements must be fulfilled to recognise an EWC's capacity to participate in TCB, I propose a differentiated approach taking into account both types of analyses (legalistic and legitimacy considerations). Firstly, I would argue that EWC involvement in TCB is justified both legally and in terms of legitimacy in cases where the SNB has reached agreement with management to equip an EWC with negotiating powers. In such cases there are no doubts about the legality aspects (as shown above, a solely legalistic analysis leads to the general conclusion that EWCs can engage in TCB under the current legal framework) and, equally

important, any responsibilities of EWC members exceeding their original consultation mandate are null and void. Secondly, I would differentiate a situation where the SNB has negotiated an agreement restricting an EWC to information and consultation competences. Here I would argue that in such situations, while it is true that EWCs can legally participate in EWCs (legalistic conclusion of general validity), the second requirement of legitimacy is not satisfied, meaning that TCB participation is beyond the EWC's mandate.

All in all we conclude that, for EWCs to participate in TCB, both the legalistic and legitimacy requirements must be fulfilled. This arguably means that, while from a legalistic point of view all EWCs already established under the current legal framework are entitled to conclude TCAs (though not resolving problems of implementation), only a limited number can do so with respect to the legitimacy requirement (an explicit mandate to pursue negotiations). As long as there is no legal framework for transnational collective negotiations clearly allowing or prohibiting EWCs to engage in this field of activity, they will arguably be operating on the verge of legality. Once again, one cannot repeat often enough that the latter conclusion is to be understood as encompassing both the legality and legitimacy requirements.

At the same time however, given the fact that EWC involvement in the conclusion of transnational collective agreements is also viewed as a positive functional enhancement of their operational capacities and experience, and in view of the fact that there is currently no framework explicitly prohibiting such agreements between EWCs and management, it can be expected that the number of such agreements will continue to grow. At the same time, since trade unions have already identified such involvement as illegitimate trespassing on their own turf and have correspondingly adopted guidelines and strategies, it can be expected that EWC involvement will be increasingly controlled and possibly mandated by ETUFs.

EWC engagement in this form of co-determination or co-management should indeed be perceived as an expression and advancement of the efficacy of their work. EWCs have often been criticised for their reactive mode of operation; they should therefore not be condemned when they try to progress towards a pro-active stance, and not be confronted with contradictory signals and expectations (Jagodzinski 2011). This advan-



cement of EWC operations stems on the one hand from their extensive know-how accrued over many years and on the other hand from the permanent restructuring characterising the current business world and is to be seen as a functional development filling a certain vacuum. In this context, it should be clearly stated that EWCs do have an important role to play in TCB, either as the key negotiating party, or, should European trade union federations dominate TCB, through officially recognising and appreciating their experience through involving them in certain subsidiary functions. The recognition of EWCs' role in either case would be an important driver for their further development in institutional terms and would certainly be another exemplification of their proven institution building capacity (Waddington 2010).

As has been argued, one finds ample grounds for anchoring such a legal framework in the current *acquis*. The bonds currently available are however insufficient to avoid: a) an overlapping of transnational collective bargaining with its national counterpart, company-level negotiations and the European sectoral social dialogue; b) the subsequent overlapping of competences between actors, thereby generating a potential for clashes between different levels of social partners. Similarly, current legislation is deficient in terms of TCA enforcement, implementation, hierarchy and conflict settlement. Due to the contradictory opinions of labour and employer organisations, there is little chance of this issue being settled by self-regulation, meaning that the European Commission needs to take the initiative in establishing a European level of collective bargaining at company level. Such legislation would indeed contribute to the improved operation of the common market and would follow the obvious need expressed by practical developments. The fact that the EWC Directive has been revised by Directive 2009/38/EC is to be welcomed, as it has introduced greater clarity and closed a number of loopholes regarding the operation of EWCs<sup>26</sup>. Yet this does not resolve the major question about TCB. It appears that (at least) two paths are possible with regard to the future development of the *acquis*: either to extend EWC rights in the direction of (collective) negotiations by

---

**26.** Regarding the self-assessment of the efficiency and quality of functioning of EWCs, J. Waddington completed a survey of EWC members in November 2005 (results published e.g. in Waddington 2010). In general, it reveals and proves many deficiencies in the operation of EWCs, depicting in particular the low quality of information provided by management and the predominant lack of consultation.

creating a framework providing legal recognition and support for TCAs (legality, execution, binding effect, monitoring, sanctions, etc.), or to expand the EU's competence to regulate transnational aspects of collective bargaining – an issue traditionally of national nature.

The most important question remaining to be answered is whether the European Commission will promote a legal framework for TCAs and which solutions will be adopted (see chapter 7 in this book). It seems that the interest in such legislation persists, as is indicated by the recent tender to build up a TCA database and analyse TCA content. Despite the fears and reservations of the stakeholders, it seems that such a framework would represent a basis for remedying a situation of TCAs existing in parallel to legislation, and of clashes over an EWC's mandate to become involved in negotiations. It seems also that there is both a need and a rationale for introducing a European-level collective bargaining framework. The necessity to regulate the emerging TCB and provide for a possibility to introduce European collective agreements has been recently highlighted by the negative implications for workers of the recent infamous ECJ rulings (*Laval/Vaxholm* and *Viking*). It is a truism to state that international enterprises operate globally and shape their strategies and policies without being constrained by national frontiers. On the other hand, though attempting to keep up with the development of industrial relations and corporate strategies, workers and their representation organisations remain outperformed in many ways by the employers. One remedy to (a part of) this imbalance of measures available to capital and labour could be an institutionalised TCB. Whatever its future shape it seems fairly obvious that in any case it will remain merely an option in the foreseeable future. It is however clear that, irrespective of its detailed regulations, such a framework must take account of the existence of EWCs, their role, their experience in representing workers at transnational level as well as the proven competence of many EWCs in transnational bargaining. The author is convinced that only a framework including and respecting both EWC and trade union roles will ultimately provide for their effective cooperation, making the best of their respective competencies and capacities, benefiting workers and reflecting the functional development of industrial relations in Europe that we have observed over the past years.

## Bibliography

- Ahlberg, K., N. Bruun and J. Mamlberg (2006) 'The Vaxholm case from a Swedish and European perspective', *Transfer*, 12 (2), 155-166.
- Ales, E., S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdes Dal-Re (2006) *Transnational collective bargaining: past, present and future. Final report*, Brussels: European Commission.
- Arrowsmith, J., P. Marginson and K. Sisson (2003) 'Externalisation and internalisation of collective bargaining in Europe: variation in the role of large companies', *Industrielle Beziehungen*, 10 (3), 363-392.
- Bethoux, E. (2008) *Transnational agreements and texts negotiated or adopted at company level: European developments and perspectives. The case of agreements and texts on anticipating and managing change*, background document for the facilitation of a meeting of the Restructuring Forum devoted to transnational agreements at company level, European Commission. DG Employment, Social Affairs and Equal Opportunities, invitation to tender No. VI/2008/022.
- Blanke, T. (2006) 'The Viking case', *Transfer*, 12 (2), 251-266.
- Blanpain R. (ed.) (2004) *The actors of collective bargaining: a world report. XVII World Congress of Labour Law and Social Security, Montevideo, September 2003*, The Hague: Kluwer Law International.
- Carley, M. and M. Hall (2006) *European Works Councils and transnational restructuring*, Luxembourg: Office for Official Publications of the European Communities.
- Clauwaert, S. and Warneck, W. (2006) 'Hoofdstuk 6. Europese collectieve onderhandelingen: de Europese sociale dialoog, de Europese CAO en andere instrumenten' in Cox, G., Rigaux, M. en Rombouts, J. (eds.) (2006) 'Collectief Onderhandelen', Reeks Collectief Arbeidsrecht, Mechelen: Kluwer.
- Clauwaert, S. and W. Warneck (2007) 'Europese collectieve onderhandelingen: de Europese sociale dialoog, de Europese CAO en andere instrumenten', in G. Cox, M. Rigaux and J. Rombouts (eds.) *Collectief onderhandelen*, Mechelen: Kluwer.
- Clauwaert, S., R. Hoffmann, J. Kirton-Darling and E. Mermet (2004) 'Social dialogue and the coordination of collective bargaining at European Level', in Comisión Consultativa Nacional de Convenios Colectivos (ed.) *Collective bargaining in Europe*, Madrid: Ministerio de Trabajo y Asuntos Sociales.

- Comisión Consultativa Nacional de Convenios Colectivos (ed.) (2004) *Collective bargaining in Europe*, Madrid: Ministerio de Trabajo y Asuntos Sociales.
- ETUC and ETUI (2007) *Benchmarking Working Europe 2007*, Brussels: ETUI.
- ETUC's comments on the Commission Communication 'Partnership for change in and enlarged Europe: enhancing the contribution of European Social Dialogue', December 2004, available at: [http://www.etuc.org/IMG/pdf/Priorites\\_2004\\_EN-3.pdf](http://www.etuc.org/IMG/pdf/Priorites_2004_EN-3.pdf) (page 173)
- ETUCO and Infopoint-ETUC (2002) *Worker representation systems in the European Union and the Accession countries*, Brussels: ETUC.
- ETUI, *EWC Database*. <http://www.ewcdb.eu>.
- European Commission (2004) Communication from the Commission, *Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue*, COM(2004) 557 final, 18 August 2004, Brussels. [http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004\\_0557en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0557en01.pdf)
- European Commission (2005) Communication from the commission on *the Social Agenda*, COM(2005) 33 final, 9 February 2005, Brussels. [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0033en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0033en01.pdf)
- European Committee of Social Rights (1998) *Conclusions XIV 1*.
- Haas, E. (1976) 'Turbulent fields and the theory of regional integration', *International Organization*, 30 (2), 173-212.
- Haipeter, T. (2011) 'Works Councils as actors in collective bargaining: derogations and the development of codetermination in German chemical and metalworking industries', *Economic and Industrial Democracy*, 32 (4), 679-695.
- ILO (1949) *Right to Organize and Collective Bargaining Convention (No 98)*, Geneva.
- ILO (1951) *Collective Agreements Recommendation (No 91)*, Geneva.
- ILO (1985) *ILO Digest of 1985*, Geneva.
- Keune, M. (2004) *Collective bargaining systems in Europe: a schematic overview*, Brussels: ETUI-REHS.
- Laulom, S. (2005) 'Le cadre communautaire de la représentation des travailleurs dans l'entreprise', in S. Laulom (ed.) *Recomposition des systèmes de représentation des salariés en Europe*, Saint-Étienne: Presses Universitaires de Saint-Étienne.

- Mearidi, G. (2006) 'Relocation of firms in the NMS: the role of EWC facing restructuring', paper presented at the International workshop on Restructuring in the new EU Member States, Florence, 1-2 December 2006.
- Mitrany, D. (1975) 'A political theory of the new society', in A. J. Groom and P. Taylor (eds.) *Functionalism. Theory and practice in international relations*, London: London University Press, 25-37.
- Pichot, E. (European Commission) (2006) *Transnational texts negotiated at company level*, presentation for the ETUC Summer School, Seville, 2006.
- Rehfeld, U. (2000) *European Works Councils and international restructuring: a perspective for European collective bargaining?*, Actes du GERPISA, 30. <http://gerpisa.org/ancien-gerpisa/actes/30/30-9.pdf>
- Ryan, B. (2003) 'The charter and collective labour law', in T. Hervey and J. Kenner (eds.) *Economic and social rights under the EU Charter of Fundamental Rights*, Oxford: Hart.
- Schoemann, I. (2006) 'Transnational collective bargaining: a tool in the service of the Lisbon strategy?', *Transfer*, 12 (2), 297-301.
- Traxler, F. (1994) 'Collective bargaining: levels and coverage', in *OECD Employment Outlook*, Paris: OECD, 167-194.
- Traxler, F. and M. Behrens (2002) *Collective bargaining coverage and extension procedures*, EIROOnline. <http://www.eurofound.europa.eu/eiro/2002/12/study/tn0212102s.htm>
- Turner, L. (1995) *The Europeanization of labor: structure before action*, paper prepared for presentation at the annual meeting of the European Community Studies Association, 11-14 May 1995, Charleston, South Carolina. [http://aei.pitt.edu/7025/1/turner\\_lowell.pdf](http://aei.pitt.edu/7025/1/turner_lowell.pdf)
- Veneziani, B. (2006) 'Right of collective bargaining and action', in B. Bercusson (ed.) *European labour law and the EU Charter of Fundamental Rights*, Baden-Baden: Nomos, 291-336.
- Waddington, J. (2006) *Survey 'Cross-border Networks of Worker's Participation in Transnational Enterprises'*, completed in November 2005 with subsequent updates, presented during the 7<sup>th</sup> International Conference of the Otto Brenner Stiftung, Bratislava, 30 May-1 June 2006.

## **Chapter 5**

### **Transnational company agreements: towards an internationalisation of industrial relations**

**Isabelle Schömann**

Over the last decades, the growing political debate on international working standards and the necessary accompanying norms has been greatly influenced by the globalisation of the economy, with the liberalisation of trade and capital movements challenging established national industrial relations structures, and leaving MNCs and labour to frame their European and international bargaining demands in a legal no mans' land. At the same time, a large number of MNCs are being urged to pay more attention to the social, environmental and societal impact of their activities, mostly in response to concerns raised by trade unions, NGOs and consumer groups. First attempts tended to focus on corporate social responsibility (CSR) policies. Coming from the US, CSR is defined as a voluntary response to social and environmental concerns enshrined in a company's business operations and its interaction with stakeholders. Rapidly and quite erratically a large range of initiatives were launched by MNCs, first unilaterally in the form of so-called codes of conduct, declarations, etc., then in a more coordinated and bargained way (so-called international or transnational framework agreements, global agreements, transnational company agreements, etc.). The common feature of all these agreements was they were the result of negotiations between trade unions and MNC management. This is reflected in the European Industrial Relations Dictionary (Eurofound), where the term international framework agreements (IFAs) has been adopted as a means of clearly distinguishing between negotiated agreements and voluntary and unilateral codes of conducts.

Recently, there has been a major rise the quantity and the quality of such agreements, attracting the attention of both international and European institutions and calling for more research. Studies have been

looking into whether IFAs may pave the way towards an internationalization of industrial relations, spotlighting worker involvement as a way of strengthening international social dialogue between labour and management in MNCs (Schömann 2011; Schömann *et al.* 2008). In the same vein, recent research projects tend to highlight the European dimension of certain framework agreements, fathoming out whether there is a need for an institutionalised European-level legal and/or contractual, optional framework (Telljohann *et al.* 2009; Ales 2006). Transnational framework agreements, whether international or European (also known – as we will see later – as transnational company agreements), are increasingly forming part of our contemporary understanding of what constitutes cross-border or transnational social dialogue. In doing so, they have a major impact on the European industrial relations system.

## **1. Transnational company agreements as the latest development in transnational collective bargaining?**

### 1.1. Brief historical perspective

Transnational company agreements (TCAs) are not a totally recent phenomenon (Béthoux 2008, Telljohan *et al.* 2009: 15-17), initially appearing as global or international company agreements. In the wake of the growing internationalisation of companies in the early 1960s and 1970s, debate centred on the theoretical and practical consequences of globalisation on industrial relations, looking in particular at ways of responding to the challenge posed by the new MNCs with regard to working and employment conditions, the organisation of employee representation and the expression of collective action. In this context, two forms of answer were explored: regulation of MNCs through international public agencies (OECD 1976 and 2000; ILO 1977 and 2001) and “private” regulation via international trade unions (essentially the IMF and ICF) aimed at establishing global worker representation bodies (in the form of world works councils) for the purpose of facilitating the exchange of information between MNC employees and coordinating trade union activity (da Costa and Rehfeldt 2008: 43-62). Although failing to lead to international collective

bargaining, these experiences did lead to the birth of transnational collective negotiations.

The first such transnational negotiations took place in the 1980s, leading to agreements being signed between Thomson Grand Public and the EMF (1985), establishing a permanent liaison committee with the recently nationalised French multinational; and at BSN-Danone (1986), with the IUF identifying four joint work areas: the promotion of relevant social and economic information, professional equality between men and women, training, and right of association within the companies making up the group. The 1986 BSN Danone/IUF agreement was soon followed by four further agreements implementing the 1986 agreement: two on social and economic information and professional equality in 1989, one on training in 1992 and one on the right to organise in 1994. Aimed at harmonising social measures and employment status within the subsidiaries of these MNCs, they were basically designed to promote negotiation at local level and ease the negotiation of agreements between the parties. An interesting characteristic of the early development of IFAs was that, ‘although IFAs were a logical outcome of international negotiations, they were not the principal objective of trade unions’ (Gallin 2008: 26-31). Of far greater importance was the aspect of international coordination, with this being viewed “as a tool for unions to build up countervailing power comparable to that of the MNCs’. The ICF has since developed a Code of Labour Practices considered as a guide for unions negotiating with MNCs. This guide urges companies to respect the fundamental labour rights defined in the 1998 ILO Tripartite Declaration and to impose the same obligation on their subcontractors. It is used by GUFs as a reference for negotiating IFAs and as a basis for their own model framework agreements (IMF model framework agreement).

These developments clearly influenced the first voluntary European-level negotiations in a number of MNCs. In the early 1980s, in response to the difficult debate on the European Commission’s proposal on information and consultation in multinational enterprises (Vredeling Directive), European industry federations and in particular the EMF led the way, launching negotiations with MNCs based in the European Union. These served as precedents for negotiations between MNCs and trade unions at transnational level, influencing the nascent institutional arrangements on EWCs (Telljohan *et al.* 2009: 18-20) that were to lead



to the 1994 adoption of the EWC Directive. In this case, practice preceded EU legislation. One of the major contributions of the EWC Directive was the establishment of rules identifying and legitimising the parties involved (Laulom 2007: 46). This particular European contribution to transnational collective bargaining has clearly influenced the development of transnational negotiations between MNCs and trade unions since then, with EWCs serving as facilitators in two-thirds of the IFAs and with more than half of all IFAs signed by MNCs having their headquarters in Europe.

Though a number of GUFs (the IUF for instance) question EWC involvement in negotiating and concluding IFAs, others (the IMF and BWI for instance) agree to such, as long as the GUF concerned is kept informed and remains involved in a coordinating role. One of the main criticisms is that an EWC is a European body and as such does not have any mandate to negotiate a global agreement that affect workers outside the EU. Another important criticism is that EWCs are not trade union bodies, possibly composed of non-unionised delegates.

At European level, EWCs play a much stronger role in initiating, negotiating, signing and implementing European framework agreements. They are commonly identified as facilitators in transnational procedures, providing an institutional structure of information and consultation for MNC workforces. In this respect most European industry federations have developed strategies related to transnational company agreements involving EWCs, whereby most of them face the dilemma that the EWC Directive does not confer on EWCs the legal capacity to engage in collective bargaining. The ETUC expressed its concerns regarding the European Commission proposal for a measure to give legal underpinning to transnational company agreements, addressing the more general issue of the emerging bargaining role of EWCs. In a resolution adopted in December 2005, while underlining the need for such a legislative measure, the ETUC called for the right to sign transnational company agreements to be confined to the trade unions. In the ETUC's view, EWCs 'are not the appropriate bodies for negotiations given the current state of legislation'. With reference to the recast EWC Directive 2009/38/EC of 6 May 2009 ([http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/social\\_dialogue/c10805\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/social_dialogue/c10805_en.htm)), the ETUC welcomed in particular the better recognition of trade unions and the improved definition of information and consultation rights in a

transnational context, thus strengthening genuine transnational dialogue between workers and management (<http://www.etuc.org/a/6102>).

In the late 1990s, the European Commission (European Commission 1996) emphasised the growing need to support the development of new levels of dialogue, referring specifically to social dialogue in transnational companies at regional level, particularly in cross-border regions. In the conclusion to its communication on ‘Enhancing the contribution of European social dialogue’ in 2004, the European Commission announced its intention to consult the social partners on the need for a Community framework for transnational collective bargaining (European Commission 2004: 11). This represented a further step in the development of and debates on transnational negotiation at company level. Included in the 2005 Social Policy Agenda (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0033:FIN:EN:PDF> on page 8), the idea was backed up by a European study, ‘Transnational collective bargaining. Past, present and future’, coordinated by E. Ales (Ales *et al.* 2006). Put in a nutshell, the study provided a comprehensive overview of the developments in transnational collective bargaining in Europe and identified the main trends, one of them being the development of transnational company agreements. It further dealt with practical and legal obstacles to the further development of transnational collective bargaining, going on to suggest ways of overcoming existing obstacles and promoting and supporting further development in the field of company agreements as part of transnational collective bargaining. The study was conducted in the context of the European Commission’s objective to support the European social dialogue, with the conclusion of transnational company agreements seen as a key factor in the development of the European actors’ future capacity to conduct a social dialogue taking into account “the increasingly transnational nature of company organisation and the need to anticipate change and have strategies to deal with it’ (European Commission 2008). In the face of fierce opposition on the part of the European employer associations, the European Commission launched a series of studies to map the development of transnational texts negotiated at corporate level (European Commission 2008a; Béthoux 2008). In addition, it set up an expert group on transnational company agreements whose mission was to monitor developments and exchange information on how to support the ongoing process.

## 1.2 Main characteristics of transnational company agreements

According to the European Industrial Relations Dictionary (<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/internationalframeworkagreement.htm>), international framework agreements (IFAs) are “negotiated between transnational enterprises (TNEs) and Global Union Federations (GUFs). IFAs are a form of transnational framework agreement that are different in scope and content from European Framework Agreements (EFAs). While IFAs are a global instrument with the main purpose of ensuring the international labour standards in all of the target company’s locations, EFAs are limited to the European context and cover a broader range of topics. In general, EFAs also contain more concrete and focused arrangements.” Initial attempts to refer to 'European framework agreements' have now been abandoned, as these led to confusion with existing instruments stemming from institutionalised European social dialogue (See chapter 'European framework agreements' of Stefan Clauwaert).

The European Commission currently uses the term ‘transnational company agreements’, defining them ‘as agreements comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers’ organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives’ (European Commission 2008). This choice of terminology takes into account the fact that the distinction between the international and the regional dimensions of such framework agreements is difficult to define. This can explain the attempt to 'go regional' at least in the terminology. However, we will show that a more generic term appears to be more appropriate when comparing the two dimensions of the agreements,

In general, IFAs differ in scope and content from framework agreements with a European dimension, whereby this distinction is slowly disappearing. IFAs are becoming more detailed, whereas framework agreements with a European dimension may include international aspects. The current terminology used by the European Commission no longer refers to a territorial (i.e. European) scope, due to the difficulty of distinguishing between IFAs and EFAs. Instead the Commission

prefers to use the generic term of ‘transnational company agreements’, omitting the ‘framework’ character of such agreements and thus possibly avoiding confusion with the so-called European framework agreements signed by the ETUC and BusinessEurope in the context of Art. 154 and 155 TFEU. However, this preference is not reflected internationally, with the term used remaining ‘international (or global) framework agreement’, as such agreements are seen to set a ‘general’ framework to be applied at the different levels within MNCs and their suppliers/subsidiaries.

Looking at the content of transnational company agreements, IFAs – in contrast to EFAs – tend to be based on ILO core labour standards<sup>1</sup>, though they may also be used as instruments for ensuring decent wages and working conditions as well as occupational health and safety and/or sustainable development (mainly in the form of environmental issues), thus including issues usually found in EFAs. In a few cases, IFAs are being used as a way of extending labour and industrial relations policies to company locations outside corporate control, including subcontractors and suppliers. Some IFAs contain clauses encouraging subcontractors and suppliers to respect the principles laid down in the IFA, whereby such provisions vary in detail from a mere mention to concrete provisions obliging suppliers to comply with the terms of the IFA, with the MNC assuming full responsibility.

IFA implementation and monitoring processes are based on joint trade union and management responsibility. To organise the monitoring, either *ad hoc* global worker representation bodies (such as WWCs) are set up or existing ones adapted. Implementation on the other hand requires the involvement of national and local trade unions. However, experience varies considerably. While in some instances employees have merely been informed about the existence of an IFA, in others, concrete steps have been taken to build international union networks and to develop

---

1. The majority of the IFAs refer to Conventions No.87 on the freedom of association and No. 98 on the right to collective bargaining. A number of IFAs also refer to Convention No. 135 on the non-discrimination of labour representatives. Most of the IFAs explicitly recognise ILO conventions No. 29 and No.105 on the abolition of forced labour, No. 100 and No. 111 on the prevention of discrimination in employment and equal pay for work of equal value, as well as No. 138 and No.182 on the elimination of child labour.

action plans to make fullest use of the IFAs to ensure that complaints are acted on. In various cases, annual meetings are organised to monitor the application of the agreement. Occasionally the monitoring is supported by non-governmental organisations (NGOs). With no legal enforcement mechanisms existing at either global or European level, enforcement of both IFAs and EFAs relies on management readiness to cooperate and on the capacity of trade unions to compel companies to resolve complaints. To date, there have been relatively few instances of complaints being raised under an IFA. Complaints are usually dealt with internally, with information rarely disclosed.

Clearly IFAs and EFAs (jointly termed 'transnational company agreements' or TCAs) are cross-border agreements negotiated in cross-border social dialogue (Papadakis 2008). They are based on a twofold approach: (1) a bottom-up approach, in many cases initiated by national trade unions, of national social dialogue aimed at a social regulation of MNC activities, thus without any legal framework at national, European or international level; (2) a transnational negotiation approach, (a) including more than one European Member State and usually other non-EU states (depending on where the multinational operates), and leading to (b) the signature of negotiated texts between an MNC and the GUF, EIF and/or national trade unions and/or workers' representatives (EWC). In some cases, negotiations and signing procedures are based on internal rules of procedure, guidelines or policies (model agreements) issued by a GUF or an ETUF; in other cases a mandate is foreseen, specifically defining a trade union's capacity to conduct negotiations. Undoubtedly, TCAs can be seen as a way of fostering industrial peace through strengthening social dialogue between MNC management and trade unions. They also play a clear role in MNC risk management.

All these features qualify TCAs as tools for achieving better working conditions throughout an MNC, with TCA negotiation being seen as the start of collective bargaining at transnational level (<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/internationalframeworkagreement.htm>). Generally speaking, trade unions consider TCAs as an opportunity to involve MNCs in a process of private standard-setting for the purpose of improving the conditions of workers and trade unions worldwide. How far a TCA meets the requirements of a collective (bargaining) agreement is still a pending

question (see chapter on the legal questions), though no doubt exists with regard to their impact on industrial relations.

### 1.3 TCAs as transnational collective bargaining instruments?

Essential features of any system of industrial relations are linked to current economic, political and social developments. At European level, the Charter of Fundamental Rights, now part of the Lisbon Treaty, supports an EU system of industrial relations by including the right of association (Article 12), the right of collective bargaining and collective action (Article 28), and the right to information and consultation (Article 27). Further features of the EU system of collective industrial relations (Alongside the European Employment Strategy, the Charter of Fundamental Rights of the European Union, the macroeconomic dialogue (euro: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/eusystemofindustrialrelations.htm>) include the European Social Dialogue, transnational coordination of collective bargaining, and workplace employee representation and participation structures.

In its report of March 2002, the Commission's High-Level Group on Industrial Relations (European Commission 2002) identified globalisation as one of the new challenges for industrial relations in Europe. In a working document of 2008 (European Commission 2008), the European Commission emphasised the role and potential of transnational company agreements to manage the process of globalisation in a balanced way. In its 2008 report on industrial relations in Europe (European Commission 2008b), transnational negotiations between MNC management and workforce representatives were analysed as a recent form of transnational collective bargaining, part of developing transnational industrial relations arrangements (Marginson 2008, with a focus on the facilitating role of EWCs, 'in a manner which de facto extends their remit beyond the provision of transnational employee information and consultation as specified in the 1994 EWC Directive, p. 32).

Rooted in a social dialogue, understood as the interaction between social partners at various levels and as such as a developing form of collective industrial relations in Europe, TCAs conform to the European social model (Daugareilh 2006: 116-135). However, scholars (Sobczak

2007: 466-488) agree that TCAs cannot be termed as ‘collective agreements’ as they are not concluded in accordance with the collective bargaining rules of an individual Member State. In particular, the lack of rules in the case of TCA does not confer any legitimacy on the party at stake. Neither are TCAs framed by international or European rules of procedure. One of the consequences of the lack of any legal TCB framework, whether at international, European or domestic level, is that no actors are actually empowered to negotiate such agreements. An alternative currently often used to circumvent this legal vacuum is to transform TCAs into a series of national collective agreements, each signed by at least one national union and local MNC management. Doing this changes the ‘sui generis’ nature of a TCA into a national collective agreement applying in the country of the MNC’s headquarters, insofar as the agreement complies with the national labour legislation in the country in question. In such a process, the involvement of national trade unions in negotiations varies from the participation of trade unions from all countries in which the MNC in question has major subsidiaries, to their being informed on the status of negotiations, thereby giving them the feeling of being involved and enabling them to sign the final agreement. Recourse to a specific mandate is also a legal technique used by the GUFs and the ETUFs. This may range from a general political mandate to promote TCAs to a specific mandate given to negotiate a TCA with a specific MNC. The strategic choice of a trade union actor positioned on the same transnational level as the MNC helps to avoid the main obstacles of company-level transnational collective bargaining, the first being the legal personality of subsidiaries and sub-contractors, and the second being potential conflicts between different national laws on workers’ representation and collective bargaining.

Nevertheless, both the process of negotiating TCAs as well as the parties involved qualify TCAs as being valid outcomes of a collective bargaining process<sup>2</sup>, i.e. negotiations between unions and employer on the terms and conditions of employment of employees, and on the rights and responsibilities of trade unions. It can be seen as a rule-making process,

---

2. On this last point the European Commission’s position is that, ‘the process (...) cannot usually be considered equivalent to ‘collective bargaining’ as practiced at national level, such as that covering wages and salaries’ (see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2155:FIN:EN:PDF> (page 5)).

leading to joint regulation. Indeed, the increasing number of MNCs adopting TCAs gives additional impetus to European-level collective bargaining, especially when such agreements are initiated by ETUFs and/or European Works Councils (European Commission 2008b: 32).

While TCAs do not qualify as collective agreements *per se*, due in most cases to both the limited scope of application of collective labour law and the lack of European and international legal initiatives to fill the gaps in the existing legal framework of European collective bargaining as defined in Art. 152-155 of the Lisbon Treaty, this does not prevent TCA signatories from considering them similar to collective agreements in practice, declaring a TCA to have direct (conventional) binding effect and providing for its direct application (Schömann *et al.* 2008). These attempts reveal the need for a regulation responding to the challenges implicit in the transnational relationships between MNCs and worker representation bodies at global and regional levels. In most cases, MNCs, especially those based in the European Union, and international/European trade unions make use of existing TCB structures such as EWCs, as these already have significant experience in the field of transnational collective labour relations. As such, TCAs are contributing to the evolution of transnational bargaining, ‘setting a (conventional) framework for global industrial relations in each company and each sector’ (Higgs 2000).

## **2. Impact of TCAs on European industrial relations**

In many cases TCAs aim to maintain and improve relations between management and labour at MNC level and to ‘disseminate’ such relations to MNC subsidiaries and, whenever possible, to suppliers and subcontractors. Earlier studies (Bourque 2005; Hammer 2005; Schömann *et al.* 2008) have shown that successfully negotiating TCAs depends on the trust signatory parties have already built up at national and sectoral levels. TCAs can be seen to have an impact both on corporate governance and on the development of social dialogue at transnational level (Schömann 2011: 32-35).



## 2.1 TCAs: a new form of governance in MNCs

'The concept of governance is based on the recognition that the state is not the sole authoritative source of regulation, and stresses the multiple interactions between public structures, economic actors and civil society' (Léonard *et al.* 2007; Eurofound a). While the territoriality of national labour law and national industrial relations systems makes it impossible to adapt to global challenges, private actors may take the initiative to develop norms in their own sphere of activity. Such initiatives also tend to compensate the incapacity of international and European institutions with respect to transnational regulation.

This notion implies (at least for academics and for public authorities. See Léonard *et al.* 2007: 7) a broader recognition of the regulatory attributes of private actors and a shift away from public authority and the state as the sole source of regulation. Applied to an increasingly globalised industrial relations environment, governance is characterized by an increasing reliance on soft law tools, as well as a multiplication of levels of governance. In such a context, new aspects of transnational governance emerge, including TCAs.

Corporate governance refers to a company's apparatus and control structures that may influence management decision-making (Eurofound b). Corporate governance is twofold: while it usually focuses on the pattern of corporate ownership and the exercise of power by a company's shareholders over management decision-making, corporate governance in the area of employment and industrial relations implies the participation of workers, as stakeholders, based on their direct interest in the company's activity. The initiatives taken by international, European and national trade unions to address MNCs as a whole and to convince MNC management to embark on negotiation and sign TCAs to promote core labour standards in MNC operations worldwide, are the result of the search for a new regulation responding to the specific features of the dominant MNC model (Moreau 2008: 253-259). TCAs are thus one of the key trade union responses to the growth of corporate power, for the most part building on existing good relationships within the company (usually at corporate level). TCAs contribute to developing social dialogue between management and trade unions and employee representation bodies at regional and local level (Schömann *et al.* 2008: 77). They also help raise the legitimacy of

trade unions and worker representation bodies at lower levels within an MNC, thus allowing for a better acceptance of workers' representation as a growing part of corporate identity and principles.

The impact of TCAs on the micro-level of social dialogue and corporate governance can be witnessed by the role trade unions and workers play in drafting TCAs as well as in monitoring and implementing them (Schömann 2011: 21-37). Trade union involvement is seen in regular reporting exercises, as a forum for exchanging information on the dissemination and appropriation of TCAs within an MNC, its subsidiaries and sometimes its suppliers and subcontractors. Unions also provide a consultation forum on possible difficulties encountered in implementing an agreement and a means of identifying joint solutions, as an alternative dispute resolution mechanism (Schömann *et al.* 2008: 40). The issue of conflict resolution is of particular relevance, as TCAs tend to set rules to deal with implementation disputes at all levels, thus providing existing international (labour) standards with enforcement mechanisms (Kocher 2008: 198-204). Although in differing ways, TCAs create procedures to deal with any breach of its clauses in the form of a series of dispute resolution steps, rather than to have recourse to a system of mediation (ombudsman). Compliance requirements can also be found in purchasing contracts with suppliers and subcontractors (Telljohann *et al.* 2009). In general, grievances are first dealt with at local management level on the initiative of workers' representatives. If no solution is found locally, then the complaint will be forwarded to the next higher level, usually the national level of workers' representation and management. The ultimate level involves the GUF informing MNC corporate management. The main objective is to make TCAs effective (Sobczak 2008) by creating internal (to the MNCs) grievance mechanisms that allow for internal solutions in close cooperation between workers' representatives and management. Data on resolved or pending conflicts is quite difficult to find, as both management and trade unions are reluctant to disclose such information. It seems that confidentiality is part of the 'in-house' resolution mechanisms of most TCAs, thus supporting the initial findings that TCAs are part of any MNC's risk management strategy. Studies do however show that complaints often relate to breaches of TCA provisions on freedom of association and the right to bargain collectively. Although TCAs are designed to be useful in countries where labour legislation is insufficient or poorly enforced,

case study research shows that TCAs also find application in old and new EU Member States.

Clearly, TCAs are means of promoting industrial peace by way of meaningful social dialogue with trade unions. But they are also to be seen as instruments helping MNCs to gain a positive public image, thereby avoiding potentially damaging public campaigns, and helping to gain access to capital and product markets (Eurofound). For trade unions, TCAs are seen as an opportunity to involve MNCs in a process of private standard-setting for the purpose of improving the conditions of workers and trade unions worldwide, as well as for strengthening the rights of local unions and workers' rights. Interestingly, one general trend is that TCAs signed recently include more specific implementation provisions, thus helping to resolve conflicts even in a context of highly institutionalised industrial relations, based on coordination between GUFs, ETUF and local actors.

## 2.2 TCAs: impact on trade unions strategies

Cross-border trade union cooperation (Eurofound c) may involve national confederations, sectoral federations, regional trade union structures or local unions. Such cooperation is understood as a precondition for cross-border social dialogue with employers and their organisations. One of the interesting outcomes of the surge in TCAs is the growth in relationships between different levels of trade unions within one or several sectors. Initiated by GUFs, ETUFs and national trade unions, as well as in many cases by EWCs, TCAs help deepen relations between trade unions. Once TCA negotiations begin, information starts flowing between the trade unions and workers' representatives involved. The implementation and monitoring phases foresee information and training being provided to guarantee a better understanding and implementation of the TCAs at local level. From a strategic perspective, the main interests of trade unions in developing TCAs, next to urging MNCs to comply with labour rights wherever they operate in the world, are threefold (Schömann *et al.* 2008: 41): to foster international solidarity and so lend support to unions throughout the world; to increase trade union membership; and to promote trade union rights and core labour standards. One of the most advanced examples of cross-border trade union cooperation at company level so

far involves the coordination approach pursued by the EMF, based on two sets of guidelines: the EMF policy approach towards socially responsible company restructuring and the Internal EMF procedures for negotiations at multinational company level ) (<http://www.emf-fem.org/Areas-of-work/Position-Papers/English/Company-Policy>).

The latter were adopted in response to the increased negotiating activities of EWCs in ensuring the national implementation of European framework agreements concluded at company level, thereby compensating for the lack of a transnational legal framework. These procedures guarantee close cooperation between the EMF and national trade union structures in all phases of the negotiation process. In the same vein, a number of GUFs have developed model agreements (BWI, IMF) as well as a range of initiatives including recommendations for the negotiation, implementation and enforcement of IFAs in order to 'build strong industrial metal unions', to quote the IMF 2006 guidelines (<http://www.imfmetal.org/index.cfm?c=7786>).

Furthermore, TCAs are windows of opportunity for trade unions to be recognised as legitimate social dialogue and bargaining partners. They should push for the conclusion of TCAs at global company level, as a second best option to political regulation (Telljohan *et al.* 2009: 44. See also Moreau 2008). Indeed, when evaluating the IFA-related strategies of the GUFs<sup>3</sup>, most of them – BWI, IMF, ICEM, ITGLWF – see IFAs as a strategic priority enabling them to develop a worldwide social dialogue with management, including the establishment of permanent transnational dialogue structures (for instance WWWs). Furthermore, the effect of such global strategies filters down to the local level, as IFA implementation requires the involvement of local trade unions. This in turn helps them to gain recognition and engage in a dialogue with local MNC management and at the MNC's suppliers and subcontractors. Moreover, the capacity of trade unions at national and local levels to organise workers and to conduct collective bargaining is, according to the BWI, a precondition for the full implementation of IFAs targeting core labour standards (Telljohan *et al.* 2009: 48). In addition, TCAs can help to 'soften up' MNCs with strong anti-union records and promote trade union recognition, possibly in combination with other

---

3. GUFs tend to refer to IFAs instead of TCAs. TCA is a term recently adopted by the European Commission.

such tools as global union networks and campaigns (as planned by the ICEM). Clearly TCAs provide trade unions with organising and bargaining opportunities at local, European and international levels (Rossman 2001).

GUF and ETUF strategies have now shifted from a quantitative approach focused on concluding as many TCAs as possible to a qualitative approach focused on strengthening the effective implementation and enforcement of agreements, giving rise to a wealth of best practices for use in pressuring companies and international and European institutions. However, a basic difficulty likely to limit trade unions' ambition is the issue of the financial and human resources needed to secure the negotiation and subsequent implementation and monitoring.

Finally, TCAs allow trade unions at all levels to better develop ownership of globalisation issues, being a 'key trade union tool for addressing the growth of corporate power' ([http://www.tuc.org.uk/globalisation/tus\\_in\\_action.htm](http://www.tuc.org.uk/globalisation/tus_in_action.htm)). The territoriality of labour law, where trade unions' collective bargaining rights are anchored, does not allow for transnational bargaining. Furthermore, MNCs operate globally, while workers are employed in a national context. This shifts the balance of power, as workers do not enjoy commensurate transnational collective bargaining rights. The elaboration of TCAs enables this legal vacuum to be overcome, thus creating a hybrid form of collective agreements between trade unions and MNCs, and promoting a transnational culture of legal compliance and respect for core labour standards - including trade unions rights. As the example of EWCs shows, practice may precede legislation. The theoretical debate on the possible recognition of a transnational legal order generated by the social actors themselves focuses on the interaction between public and private norm-setting, where the European Union has shown constructive originality in creating transnational social norms as a response to globalisation. As M.A. Moreau stresses, 'the example of the EU demonstrates that transnational social norms can emerge from a legal order and draw legitimacy from an institutional framework (...) as transnational regulation within a regional legal order. From this perspective the EU legal order has no equivalent in the world' (Moreau 2008: 266). Though regulating TCAs would probably slow down the use of 'normative self-service' (Supiot 2004: 541-458) on the other hand it

would bring more transparency and legal security for MNCs and trade unions.

## **Conclusion**

TCAs represent new instruments of industrial relations at global level, bringing formal recognition of transnational social partnerships. As such, this instrument enhances the quality of transnational industrial relations, providing workers with a contractual framework for promoting core labour standards and social dialogue with a view to fostering trade union and workers' rights at local level. Furthermore, TCAs provide procedural frameworks, whereby trade unions and management jointly develop implementation and monitoring procedures, and in the case of conflict, can rely on internal joint resolution mechanisms. TCAs thus represent new forms of private social regulation at the transnational level (Moreau 2008; Telljohann *et al.* 2009: 46-47). Spill-over effects cover the promotion of social dialogue and cooperation based for the most part on highly institutionalised and more cooperative national industrial relations traditions, the development of mutual trust and providing existing international labour standards with enforcement mechanisms, thereby facilitating conflict resolution.

From the very outset TCAs have led to the establishment of information and consultation structures for trade unions and workers' representation bodies in MNCs and in their subsidiaries – such as world works councils or similar bodies, inspired by the EWC concept. In some cases TCAs are leading to the introduction of global information and dialogue structures between corporate management and the GUFs, thus developing a legal no-man's land. Yet, this process takes place within a legal environment, particularly with the involvement of EWCs as facilitators for negotiating and supervising TCAs. TCAs can secure compliance with binding international labour standards and foster transnational networking among employee representation and trade unions. They also reflect the growing transnational interdependence of trade unions and of MNCs and their national based operations, raising awareness of and compliance with core workers' rights at local level.

TCAs are important not so much for what they do as for what they expose, i.e. the need for new organisational forms on the part of workers and trade unions to facilitate transnational cooperation, as trade unions are at present ill-equipped to deal with globalisation (Ewing 2008: 205-223). As outcomes of autonomous processes of transnational bargaining, TCAs contribute to the internationalisation / Europeanisation of industrial relations, i.e. the development of a complementary layer of private and public actors, structures and processes at international / European level, interacting with national institutions and actors (Hoffmann *et al.* 2002: 45). One of the main issues at stake is the interaction between different levels of regulation (company, sectoral, national, regional, and international) and between different natures of regulation, i.e. between public and private norm-setting. TCAs reflect actor-based responses to the challenges of globalisation, prodding (European) institutions to act.

## References

- Ales, E. *et al.* (2006) *Transnational collective bargaining: past, present and future*, Brussels: European Commission.
- Béthoux, E. (2008) *Transnational agreements and texts negotiated or adopted at company level: European developments and perspectives*. Background document for the facilitation of a meeting of the Restructuring Forum devoted to transnational agreements at company level, Brussels: European Commission.
- Bourque, R. (2005) *Les accords-cadres internationaux et la négociation collective internationale à l'ère de la mondialisation*, Geneva: IIES.
- da Costa, I. and U. Rehfeldt (2008) 'Transnational collective bargaining at company level: historical developments', in K. Papadakis (ed.) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: ILO, 42-64.
- Daugareilh, I. (2006) 'Les accords-cadres internationaux: une réponse européenne à la mondialisation de l'économie ?', in B. Saincy and M. Descolonges (eds.) *Les nouveaux enjeux de la négociation sociale internationale*, Paris: La Découverte, 116-135.
- European Commission (1996) *Communication of the Commission of concerning the development of the social dialogue at Community level*, COM (96) 448 final, 18 September 1996, Brussels.

- European Commission (2002) *Report of the high level group on industrial relations and change in the European Union*, Brussels.
- European Commission (2004) *Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue*, COM(2004) 557 final, 12 August 2004, Brussels.
- European Commission (2008) Staff working document. *The role of transnational company agreements in the context of increasing international integration*, SEC (2008)2155, 2 July 2008, Brussels.
- European Commission (2008a) *Mapping of transnational texts negotiated at corporate level*, EMPL F2 EP/bp 2008 (D) 14511, 2 July 2008, Brussels.
- European Commission (2008b) *Industrial relations in Europe 2008*, Luxembourg: Publications Office of the European Union.
- European Foundation for the Improvement of Living and Working Conditions (Eurofound) *International framework agreement*. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/internationalframeworkagreement.htm>
- European Foundation for the Improvement of Living and Working Conditions (Eurofound a) *Governance in European industrial relations*. <http://www.eurofound.europa.eu/areas/industrialrelations/governance.htm>
- European Foundation for the Improvement of Living and Working Conditions (Eurofound b) *Corporate governance*. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/CORPORATEGOVERNANCE.htm>
- European Foundation for the Improvement of Living and Working Conditions (Eurofound c) *Cross-border trade union cooperation*. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/crossbordertradeunioncooperation.htm>
- Ewing, K.D. (2008) 'International regulation of the global economy - The role of trade unions', in B. Bercusson and C. Estlund (eds.) *Regulating labour in the wake of globalisation: new challenges, new institutions*. Oxford: Hart Publishing, 205-226.
- Gallin, D. (2008) 'International framework agreements: a reassessment', in K. Papadakis (ed.) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: ILO, 15-41.
- Hammer, N. (2005) 'International framework agreements: global industrial relations between rights and bargaining', *Transfer*, 11 (4), 511-530.



- Higgs, F. (2000) 'Global companies need global unions', *Financial Times*, 2 April 2000.
- Hoffmann, J. et al. (2002) *The Europeanisation of industrial relations in a global perspective: a literature review*, Luxembourg: Publications Office of the European Union.
- ILO (1977) and (2001) *Tripartite declaration of principles concerning multinational enterprises and social policy*, Geneva.
- Kluge, N. and I. Schömann (2008) 'Corporate governance, workers' participation and CSR: the way to a good company', *Transfer*, 14 (1), 13-26.
- Kocher, E. (2008) 'Corporate social responsibility – Instrumente zur Gestaltung transnationaler Arbeitsbeziehungen', *WSI-Mitteilungen*, 61 (4), 198-204.
- Laulom, S. (2007) 'Passé, présent et futur de la négociation collective transnationale', *Droit Social*, (5), 623-629.
- Léonard, E. et al. (2007) *New structures, forms and processes of governance in European industrial relations*, Luxembourg: Publications Office of the European Union.
- Marginson, P. (2008) 'Box 1.4: Transnational collective bargaining in Europe', in European Commission *Industrial Relations in Europe 2008*, Luxembourg: Publications Office of the European Union, 30.
- Moreau, M.A. (2008) 'The originality of transnational social norms as a response to globalisation', in B. Bercusson and C. Estlund (eds.) *Regulating labour in the wake of globalisation: new challenges, new institutions*. Oxford: Hart Publishing, 253-269.
- OECD (1976) and (2000) *OECD guidelines for multinational enterprises*, Paris.
- Papadakis, K. (ed.) (2008) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: ILO.
- Rossmann, P. (2001) 'The IUF, Chiquita and union rights', *International Union Rights*, 8 (3), 13.
- Schömann, I. (2011) 'The impact of transnational company agreements on social dialogue and industrial relations', in K. Papadakis (ed.) *Shaping global industrial relations. The impact of international framework agreements*, Geneva: ILO, 21-37.

- Schömann, I. *et al.* (2008) *Codes of conduct and international framework agreements: new forms of governance at company level*, Luxembourg: Publications Office of the European Union. <http://www.eurofound.europa.eu/pubdocs/2007/92/en/1/efo792en.pdf>
- Sobczak, A. (2007) 'Legal dimensions of international framework agreements in the field of corporate social responsibility', *Relations Industrielles-Industrial Relations*, 62 (3), 466-488.
- Sobczak, A. (2008) 'Legal dimensions of international framework agreements in the field of corporate social responsibility' in K. Papadakis (ed.) *Shaping global industrial relations. The impact of international framework agreements*, Geneva: ILO.
- Supiot, A. (2004) 'Du nouveau au self-service normatif : la responsabilité sociale des entreprises', in *Analyse juridique et valeurs en droit social. Etudes offertes à Jean Pélissier*, Paris: Dalloz.
- Telljohann, V. *et al.* (2009) *European and international framework agreements: practical experiences and strategic approaches*, Luxembourg: Publications Office of the European Union.



## **Chapter 6**

# **Transnational collective bargaining: in search of a legal framework**

**Isabelle Schömann**

Over the last two decades, international and European social dialogue in the form of transnational company agreements or TCAs (using the European Commission's terminology and also find referred to as transnational or international framework agreements) between MNCs and global and/or European trade unions federations has steadily increased, with a peak in the late 1990s and early 2000s. This has all been done without any legal framing. At first glance the lack of legal support seems logical, as TCAs were originally rooted in corporate social responsibility (CSR), being unilateral MNC management initiatives based on voluntary action usually inspired by philanthropic or public relations motives. However, CSR initiatives lacked legitimacy and credibility. To transform their unilateral involvement into more committed actions, MNCs therefore began taking part in transnational negotiations initiated by global and European trade union federations as well as by national trade unions. This gave trade unions involved in TCAs the opportunity to become actively involved in dealing with the social consequence of globalization, well aware that negotiated tools could complement existing domestic and international labour standards as well as increasing trade union representation.

As in the case of national collective bargaining, practices precede law (Daugareilh 2005). Consequently a new regulatory framework is needed. This is particularly true for TCAs, which do not fit into any of the different legal categories of either domestic or international labour law. They have developed in an international, European and national legal "no man's land", from which they gain inspiration and which they reciprocally influence. On the other hand, TCAs represent a new form of collective, social (private) regulation raising a number of questions with respect to their legal nature, legal value and legal impact.

## **I. Do TCAs fit into any existing categories of domestic and European collective labour law?**

Currently no legal order has explicitly conferred any power on MNCs and trade unions to create such a norm as TCAs, whereby the legal nature of any norm is dependent on the powers given by (labour) law to its actors (their legal capacity). In the absence of any legal framework, trade unions and management have established new mechanisms for transnational framework agreements, inspired by domestic and European collective labour law. However, whether on the part of management or of labour, the solutions developed by the parties give rise, from a legal point of view, to a number of difficulties, if TCAs are to be classified according to existing legal categories of collective instruments.

### **1. Parties at stake**

ILO Convention 87 on freedom of association and the right to collective bargaining confers a domestic right to collective bargaining, but not an international one (Daugareilh 2005: 71). At European level, Art. 152 TFEU, while referring to the social partners, cannot be interpreted as involving trade unions and employers' organisations in European social dialogue other than the ones recognized as being representative by the European Commission<sup>1</sup>. The conclusion of the 31 October 1991 Agreement and its incorporation in Articles 138 and 139 of the Social Chapter of the Treaty (now Art. 152 TFEU) was initiated by the European social partners and marked a crucial step in the development of the European social dialogue, enshrining the role of the social partners in the EC Treaty. Though the TFEU provides for the mandatory consultation of the social partners on Commission proposals in the area of social affairs, and an option for negotiation between social partners on framework agreements, this can be interpreted as implicitly excluding MNC

---

1. The term 'European social partners' specifically refers to those organizations at EU level which are engaged in the European social dialogue, as provided for under Article 154 and 155 of the TFEU. In its 'Communication concerning the application of the Agreement on Social Policy' (COM (93) 600 final, Brussels, 14 December 1993), the Commission set out criteria for the representativeness of employers and trade union organizations and these are still valid today. This does not include multinationals. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeansocialpartners.htm>

participation. This is particularly true as, at that time (the late 1980s and early 1990s), the first international frameworks agreements were negotiated (Thomson Grand Public and Danone). The European level framework therefore provides no explicit support for TFAs.

At national level, certain pieces of legislation related to transnational issues recognize, though in a very limited way, the existence of transnational collective bargaining (e.g. the French 'convention de groupe' 1982<sup>2</sup>). Furthermore, there is no transnational trade union representation exclusively targeting specific MNCs. This is one of the reasons why at present TCAs are signed by global / European trade union federations representing one or more specific sectors of MNC activity, yet 'external' to it. The involvement of EWCs and national trade unions in TCA negotiations raises, amongst others, legal questions in terms of representativeness of the workforce at stake.

On the management side, while the solutions adopted reflect the hierarchical reality of the corporation (Sobczak 2008), they contravene the legal autonomy of subsidiaries in terms of their legal personality, meaning that corporate headquarters have no legal liability for the social consequences of a subsidiary's activities. Collective agreements concluded at corporate level are not binding for subsidiaries. There are two legal alternatives possible for overcoming this difficulty and forcing subsidiaries to apply TCAs. First, recourse to the legal mechanism of a mandate would allow an MNC to sign a TCA at corporate level which is legally binding for its subsidiaries, and possibly for subcontractors and suppliers. This would clarify the legal status of a TCA and its binding effect on subsidiaries. A second alternative, already used in certain TCAs, is recourse to clauses in commercial contracts concluded between an MNC and its subcontractors. Such clauses oblige subcontractors to respect the agreement signed by the MNC.

On the workers' side, the issue of the representativeness of the signatory party (given that three groups of actors are involved: trade union federations, EWCs and national trade unions) throughout the holding, its subsidiaries and subcontractors is at stake.

---

2. French code du travail, Art. L2232-30 on Conventions ou accords de groupe.

The choice of sectoral worker representation as a party to a TCA appears to be the most appropriate in legal terms. It solves the issue of representativeness through the fact that trade union federations represent workers in all companies operating in the sector(s) in question, given that the MNC belongs to the relevant economic sector(s). Furthermore, this option allows legal conflicts over the representativeness of workers' representatives or collective bargaining procedures to be overcome. However, TCAs signed by (global or European) trade union federations cannot be classified as sectoral agreements (following traditional divisions of collective bargaining outcomes at national level), as there is no corresponding collective representation on the management side. TCAs are signed by individual employers and not by employer associations. Furthermore, global union federations' bargaining power is not backed up by domestic, European or international labour law provisions (Sobczak 2008: 119). This legal difficulty is usually overcome by the involvement of domestic trade unions, with their co-signature under TCAs currently one of the most pragmatic ways of ensuring TCA compliance with national labour legislation and thus giving them the legal status of national collective agreements insofar as national collective bargaining procedures have been respected.

The involvement of EWCs as signatory party is more problematic. EWCs have been playing a facilitating role in TCA negotiations, clearly due to their 'transnational' legal status as workers' representatives within transnational companies accorded to them by EWC Directive 94/45/EC. They are increasingly being seen by management as legitimate partners in transnational discussions possibly leading to agreements. On the part of trade union federations, some even allow EWCs to be TCA co-signatories (IMF strategy), whereby this is not all too common, as in many Member States trade unions have a monopoly on collective bargaining. The intention of both EWC Directive 94/45/EC and its recast version (2009/38/EC) is to establish European Works Councils and a procedure for informing and consulting employees in Community-scale undertakings and Community-scale groups of undertakings. The Special Negotiating Body provided for in the EWC Directive is the one (albeit temporary) body explicitly mandated to '*negotiate with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.*' (Art. 5.3). While the *recast*

*EWC Directive 2009/38/EC* does not explicitly rule out an EWC having bargaining competence, it remains a rather contentious point whether the Directive gives extensive negotiating power to EWCs covering aspects other than information and consultation. Whereas EWC involvement as (co-) signatory party could solve the issue of asymmetry between management and workers representatives, the legal issue of its representativeness remains open in respect of workers employed in subsidiaries located outside the European Union.

## **2. Scope and content of TCAs**

Analysing the scope of application of a norm allows us to evaluate its impact. Reviewing CSR initiatives, the European Commission stated (European Commission 2002, 2006) that they went beyond legislation and collective agreements that were already compulsory for companies. The scope of application of such initiatives remained at the discretion of management, making it practically impossible to assess their impact.

In a TCA, the parties usually indicate the scope of its application, though in varying ways. This leads to a host of legal questions arising with regard to the definition of an MNC and its subsidiaries, given that national legislation in EU Members States is generally very vague, leading to different interpretations and consequently to legal insecurity. In addition, the issue of internal restructuring within an MNC is rarely dealt with. However, such changes can have major legal consequences for the workforce and its representation, not least at corporate level, and may impact the implementation or even the existence of a TCA (see the *ArcelorMittal case*<sup>3</sup>). In the same vein, subsidiaries are usually mentioned as falling within the scope of application of a TCA. Yet, they are rarely defined as such, with the same being true for subcontractors and suppliers. Do TCAs apply to new MNC subsidiaries? In the opposite case, what happen to TCAs when a subsidiary is sold by the MNC? In the case of subcontractors or suppliers, the legal construct gets even more complicated, with a study of TCAs coming up with 3 types of references: (1) a vague mention of subcontractors or suppliers, without

---

3. <http://www.eurofound.europa.eu/pubdocs/2007/922/en/1/ef07922en.pdf>



further MNC commitment to actively promote the TCA; (2) subcontractors or suppliers are invited to apply TCA provisions, though with no further specific obligations foreseen in respect of monitoring and sanctions in the case of violations of the provisions; (3) compliance with TCA provisions is a criterion for selecting and retaining subcontractors or suppliers. Such vagueness in defining the scope of TCA application leads to greater uncertainty and diverging interpretations when difficulties arise. Interestingly, the most recent TCAs tend where possible to use more precise provisions.

Evaluating the content of norms gives indications of their expected impact. Compared to the vagueness of the scope of application, TCA content is generally much more precise. In addition, the systematic reference to existing legal standards - in most cases tripartite ILO (core) conventions - reinforces TCA legitimacy and can be seen as 'progress insofar as these conventions only impose obligations on the States that have ratified them and not on companies (...)'. Furthermore, the companies agree 'to apply ILO conventions not only to their own workers but also to those of their subsidiaries or even of their subcontractors' (Sobczak 2008: 123-124). Thus, the promotion of compliance with core labour standards by such private actors as MNCs can complement state action and increase the effectiveness of norms. Nevertheless, such private initiatives are no substitute for state intervention and compliance with ratified international norms. References to European (in very rare cases) and national legislation already applying to MNCs operating in the geographic scope of application of the respective laws do not in principle provide any additional help in classifying TCAs within one of the existing labour law categories. However, reference to international law may be of added value in terms of defining the legal order applicable to a TCA, as will be dwelt upon later on. On the other hand, references to international standards and national legislation may lead to legal conflicts where domestic law is not in line with international standards. Finally, reference to additional norms going beyond the ILO labour standards and / or beyond norms enshrined in labour law (e.g. environmental norms), may lead in some cases to a question-mark being put over the legitimacy of trade unions to deal with issues long abandoned to NGOs. Although rare, NGOs may be involved in TCAs. A TCA including an NGO as a signatory party would chart new bargaining paths in a field which remains a trade union monopoly at national and European level.

Furthermore, environmental issues may include health and safety related topics traditionally falling under the remit of trade unions. In this latter case, the legitimacy of NGOs to deal with health and safety issues could be questioned.

### **3. Implementing TCAs: the 'efficiency test' of private norms**

Examining the implementation clauses of a private norm reveals the willingness of the parties to make it effective. Comparing unilateral CSR initiatives (codes of conduct, declaration, etc.) with TCAs, the contrast is striking. Whereas only very few of the former have implementation clauses, the majority of TCAs have precise ones, varying according to the issues covered, the sector(s) involved, but also dependent on the scope of application. Four main phases can be identified. (1) The establishment of a monitoring body is the first step in ensuring TCA implementation. Though various models are available, most of them are modelled on existing workers' representation structures such as (European) works councils and are usually composed of representatives from trade unions and/or management. (2) TCA dissemination includes its publication usually on global / European trade union federation websites (often more difficult to find on the website of the MNC in question), with relevant translations reflecting the scope of the MNC and its worldwide operations, and information sessions including training trade unions and local management. This is of great importance, as the involvement of national and local trade unions in the implementation is essential: the impact of any TCA can be best assessed at local / national levels. (3) TCA monitoring includes regular annual meetings between management and trade union representatives to evaluate TCA dissemination and impact, frequently on the basis of performance indicators defined by management and/or trade unions. Monitoring allows discussions of potential or existing difficulties ranging from TCA implementation to violations of rights enshrined in the TCA. (4) To deal with violations, a step-by-step complaints procedure is installed, allowing workers to first address local management, then to gain trade union support at local and national level, right up to corporate level. The underlying idea is that TCA violations should be solved via 'in-house' solutions based on joint management / trade union decisions, thus preventing social conflicts and the disclosure of violations

to the outside world. This is reminiscent of peace provisions often found in labour legislation. Such internal reviews appear to be the option currently used in most TCAs and help avoid judicial (external) scrutiny.

These characteristics are a great help in bringing TCAs closer to existing implementation procedures found in domestic collective agreements, as well as European framework agreements signed in the context of Lisbon Treaty provisions and building on the existing models of social dialogue and workers participation already in place in many EU-based MNCs. Yet, the lack of any domestic and/or international legal framework including for example the 'transnational' aspects of such collective bargaining, together with the specific TCA features (asymmetry of actors, specific features of the signatory parties, scope of application including commercial partners) prevent any legal classification of TCAs in existing labour law categories, thus leaving TCAs as *sui generis*, hybrid agreements, with their only legal anchoring found in private international law.

## **II. TCAs: legal grounds in private international law and domestic legislation**

The 2009 study commissioned by the European Commission dealt with the key issue of TCA enforcement (Van Hoek and Hendrickx 2009). Its aim was to look into solutions provided for in private international law in terms of (1) applicable legislation and jurisdiction in the case of any dispute arising from TCA interpretation or application; (2) practical and legal obstacles to the way TCA-related disputes can be settled in court; and (3) any measures for overcoming these obstacles and allowing for TCA-related disputes to be resolved.

The wide variety of content, commitments and implementation clauses characterizing TCAs does not permit them to be categorized under a single criterion. However, TCAs are by nature civil and commercial contractual agreements, thereby falling under the broader concept of contract law (including any unilateral commitments). Consequently, private international law regulations are applicable: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (the so-called Brussels I regulation), Regulation (EC) No 593/2008 of the European

Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the so-called Rome I regulation) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the so-called Rome II regulation).

The Rome I Regulation allows parties to define the law applicable to contractual obligations. Rome I is based on the autonomy of the parties, with management and trade union in principle able to select which law applies to the TCA and in its commitments (in an existing system of law), thereby removing any uncertainty. Which law is applicable will depend on whether there is a party performing the obligations. Where this cannot be determined, Rome I refers to the law with the closest connection, thus necessitating the facts of the case to be weighed up. Although in general the law of the country in which the MNC has its headquarter is the most obvious, other criteria may prevail, leading to the choice of a different law and therefore uncertainty.

The normative effects of TCAs, as previously mentioned, are best secured through recourse to national instruments such as domestic collective agreements. However, differences in procedures and requirements for example for ensuring the horizontal effects of collective agreements or determining the division of power between trade unions and works councils to qualify TCAs as collective agreements vary so much between EU Member States that legal uncertainty is unavoidable.

The Brussels I Regulation proposes three solutions: first, that jurisdiction be given to the defendant's country of domicile, thus providing parties with legal certainty and predictability (Art. 2). However, this solution might not offer efficient protection due to the great variability of domestic legal systems, especially where workers' rights and representation are concerned. Second, exclusive jurisdiction over certain matters is granted to the court most closely connected to the issue (Art. 22). This solution however prevents the consolidation of proceedings when several subsidiaries (located in several countries) of the same corporation are involved. A third solution is to introduce a claim against the parent company in the jurisdiction of the court where the obligation on which the claim is based is to be fulfilled (Art. 5 (1)). This last solution could however lead to unpredictable results, as the place of fulfilment of TCA obligations might be difficult to determine,

especially when the parties have not specified such. Finally, recourse to interim measures may be an alternative, when there is a sufficient link between the obligation and the court to which the case is referred (i.e. when the obligation is to be fulfilled within the court's jurisdiction, even though the court might not have competence to decide on the contents). In a case of breach of TCA (for example when management imposes a decision contrary to the agreed TCA procedure), this alternative would give unions the possibility to suspend the management decision until the agreed procedure has been respected. In such a case, the court's decision will be based on local law. Thus, the significant differences between EU Member States and between non-EU legal orders with respect to the legal capacity of unions and workers' representation to go to court hinder legal certainty and predictability of TCA enforcement.

As previously mentioned, recourse to domestic law could at present be an appropriate solution. An alternative way of giving legal force to a private norm is to integrate it in another legally binding norm - in the case of a TCA either in a commercial contract or in a national collective agreement. This has been done with some TCAs, either by involving national unions in the TCA negotiation and signature phase or by (re)negotiating and signing a TCA as a national collective agreement, or by using the legal mechanism of a mandate. Where domestic rules and procedures for collective agreements are fulfilled, a TCA qualifies as a national collective agreement, thus allowing recourse to national enforcement rules and mechanisms. This alternative is currently under scrutiny, with the European Commission looking at solutions provided for by domestic law. The first results of this study (Prof. R. Rodriguez and team) on the characteristics and legal effects of agreements between companies and workers' representatives is extensively dealt with in the next chapter by Prof T. Jaspers. One of his major conclusions is that the European Union should intervene, adopting a Directive allowing for the uniform application of a TCA.

The current lack of a legal framework at national and international level, as well as the solutions provided for under private international law, do not ensure legal certainty and predictability for TCA signatories. A potential solution to TCA enforcement issues would clearly be for the parties to the agreement to specify which commitments are binding or non-binding, the scope of application, and the law applicable to their obligations. Such an option has been developed by certain European

and global trade union federations in the form of model agreements. However, these model agreements are not mandatory and TCA parties can choose to apply them or not, or to conduct a selection of the items proposed in the model agreements. The flexibility as to whether or not to follow a model agreement works against ensuring legal certainty. This issue could be resolved by making such model agreements or a similar procedure mandatory for the parties, possibly based on European experience in creating procedures for the transnational information and consultation of workers.

### **III. Why do TCAs need a contractual and/or legal framework?**

In a nutshell, TCAs cannot be classified in existing labour law categories. They appear to be an autonomous category needing to be clarified. TCAs fall under the category of private norms, i.e. norms set by private actors and not public authorities. Private norms may create rights and obligations for the signatory parties, if they so agree. In the case of TCAs, parties' intentions may range from a pure declaration of intent without any clear commitments to more binding commitments (Schömann *et al.* 2008), yet without being expressly mentioned in the agreement or, where mentioned, subject to variable interpretation. In the case of a dispute, the lack of a specific legal framework obliges the parties to depend on a court decision, whereby a domestic court might potentially not be well acquainted with transnational social dialogue customs, yet forced to apply national law. In doing so, domestic courts may favour customary rules when TCAs have been applied over a certain period of time. In continental legal orders, customary rules usually provide for the maintenance of the rights in question until a defined procedure has been respected.

Alternatively, domestic courts might favour the concept of unilateral commitments used against misleading advertisements in consumer law. As the famous Supreme Court of California case *Kasky v. Nike* (2001) shows, the protection of core labour standards (in this case child labour) might find a (better) solution in recourse to a branch of law other than labour law (here consumer protection legislation), thus performing a rather awkward legal *volte-face*. The legal protection foreseen is for consumers and not for workers, thus changing their

status (Sobczak 2008: 126). Such a shift can lead to additional tension, for example between consumers and workers, as certain labour rights might not be perceived as a priority by consumers, or as sufficiently important to file a case. Clearly, neither recourse to customary rules nor the use of the theory of unilateral employer commitments (via consumer law) match the spirit of TCAs as an instrument providing worldwide protection to MNC workers and guaranteeing the promotion of (core) labour standards independent of their acceptance by the public at large.

The current legal no-man's-land creates insecurity not only in terms of the legal outcomes of potential conflicts between the parties, or in cases of (hierarchy) conflicts of norms. Much more, and despite the efforts invested by certain global and European trade union federations in developing model agreements including basic provisions, TCAs develop erratically, leaving a large number of legal questions open and potentially stopping management and trade unions from reframing their social dialogue to better cope with economic globalisation. A legal framework would for example offer legal answers to such issues as the legitimacy of the parties and their representativeness. It would clarify the scope of application and would identify the addressees of the TCAs. It would particularly help parties to shape TCA implementation provisions for a broader and more efficient impact (Ales *et al.* 2006). Though an international norm embracing the global reach of TCAs would obviously be the best solution, European law appears to be well-equipped and already acquainted with regulating transnational collective labour law aspects of industrial relations, in particular in the field of workers' information, consultation and participation. A European legal act would in particular enhance the transparency of the whole process and support the momentum already created by management and trade unions. In addition, a legal framework would boost protection of labour rights enshrined in international, European and national legislation and reaffirmed in TCAs, providing for additional monitoring procedures aimed at making these labour standards effective.

## Bibliography

- Ales, E. *et al.* (2006) *Transnational collective bargaining: past, present and future*. Brussels: European Commission.
- Daugareilh, I. (2005) 'La négociation collective internationale', *Travail et Emploi*, (104), 69-84.
- ETUC, Syndex and Sustainlabour (2010) *Occupational health and safety and environmental clauses in international framework agreements*, Brussels.
- European Commission (2002) Communication from the Commission concerning *Corporate social responsibility: a business contribution to sustainable development*, COM(2002)347 final, 2 July 2002, Brussels.
- European Commission (2006) Communication from the Commission *Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility*, COM(2006) 0136 final, 22 March 2006, Brussels.
- European Commission (2008) Commission staff working document. *The role of transnational company agreements in the context of increasing international integration*, SEC(2008)2155 , COM(2008) 419final, 2 July 2008, Brussels.
- European Parliament (2006) *Report on Corporate Social Responsibility: a new partnership*, Rapporteur: Richard Howitt, FINAL A6-0471/2006, 20 December 2006. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT REPORT A6-2006-0471 0 DOC XML Vo//EN&language=EN>
- Kluge, N. and I. Schömann (2008) 'Corporate governance, workers' participation and CSR: the way to a good company', *Transfer*, 14 (1), 13–26.
- Kocher, E. (2008) 'Corporate social responsibility – Instrumente zur Gestaltung transnationaler Arbeitsbeziehungen', *WSI-Mitteilungen*, 61 (4), 198-204.
- Pichot, E. (2006) *Transnational texts negotiated at corporate level: facts and figures*. Study seminar "Transnational agreements" 17 May 2006, Brussels: European Commission.
- Schömann, I. *et al.* (2008) *Codes of conduct and international framework agreements: new forms of governance at company level*, Luxembourg: Publications Office of the European Union.



- Sobczak, A. (2007) 'Legal dimensions of international framework agreements in the field of corporate social responsibility', *Relations Industrielles-Industrial Relations*, 62 (3), 466-488.
- Sobczak, A. (2008) 'Legal dimensions of international framework agreements in the field of corporate social responsibility', in K. Papadakis (ed.) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: ILO, 115-130.
- Telljohann, V. *et al.* (2009) *European and international framework agreements: practical experiences and strategic approaches*, Luxembourg: Publications Office of the European Union.
- Van Hoek, A. and F. Hendrickx (2009) *International private law aspects and dispute settlement related to transnational company agreements*. Study undertaken on behalf of the European Commission (Contract number VC/2009/0157), Brussels.

## Chapter 7

# Effective transnational collective bargaining Binding transnational company agreements: a challenging perspective

Teun Jaspers

### Introduction: the binding nature

International or transnational (collective) agreements have become increasingly common in our globalising world, with their number rising to more than 130 (Schömann 2011: 129)<sup>1</sup> within the last two decades. Nearly half of them have been concluded at company level and they cover more than 6 million employees.<sup>2</sup> A great variety of transnational collective agreements currently exists, ranging from Agreements to Codes of Conduct, Charters and Commitments and Guidelines, with “International Framework Agreements” used as the generic term. An important issue is the effectiveness of these agreements in terms of their actual application and I will focus on this aspect in my contribution, discussing the conditions under which transnational agreements can have a (legally) binding effect.

This focus on the issue of whether such agreements have a binding effect implies that I will be looking at agreements that could have this kind of effect, i.e. they are binding not only for the signatory parties but also for the management of subsidiaries and the employees employed in the various constituent companies of the multinational company (MNC) in question. We are talking here about *agreements* subject to private

- 
1. Agreements concluded with European Works Councils are as such not included in this figure. If we include them, the numbers would be much higher. For figures on EWC Agreements, see the ETUI database: <http://www.ewcdb.eu/index.php>
  2. Source: ICT, 3th May 2011.

law, implying firstly that they are concluded between entities subject to private law – an employer or an employers' association on the one hand and trade unions on the other - and secondly that they can be applied directly to the parties bound by them on the basis of a contractual commitment of the signatory parties. Taking this focus allows me to steer clear of all kinds of transnational (framework) agreements (TFAs) lacking this effect. By implication I do not include European-level agreements concluded on the basis of Articles 154-155 TFEU.<sup>3</sup> Within the broader category of transnational (framework) agreements I restrict myself to those most suitable to gain this effect, i.e. transnational company agreements (TCAs), agreements concluded between the board of an MNC and trade unions<sup>4</sup> at transnational level and specifying the rights and responsibilities of both parties.

The effectiveness of TCAs in the sense defined above can be approached from several angles. The legal approach is not the only one. A TCA is seen to be respected when an MNC acts according to what has been laid down in the TCA, even without a strict legal obligation to do so.<sup>5</sup> Codes of conduct or similar regulations usually dealing with core labour standards set forth in ILO Conventions or with specific human rights (such as equal treatment) are often respected by MNC management as part of their corporate social responsibility policy even when a legal obligation to do so is lacking (Schömann 2011: 129).

The effect of a TCA does not necessarily have a legal basis. The legal approach to the subject of the effectiveness of a TCA chosen in this contribution means that I look solely at the provisions of a TCA that can have legally binding effect. I do not talk about a TCA as a whole since as such a TCA has no legally binding effect. Whether a TCA provision has such effect is dependent on certain conditions being fulfilled. First and

- 
3. These agreements need an implementation measure or an implementing legislative act or an additional collective agreement to transpose the content of the TFA. Besides agreements based on Articles 154-155 TFEU I also do not address sectoral-level agreements concluded between the European social partners.
  4. More in particular the focus will be on transnational framework agreements at European level (EFAs).
  5. The potential effect of adverse publicity on a company's reputation can for instance be very effective. The Nike case is a good example. Consumer pressure is also effective, as are state actions, for instance in the field of procurement.

foremost the content of the provision must be clear. Without this it is impossible – legally speaking – to apply the provision to a concrete case.

Binding nature as I use it in this contribution means that not only are the parties to the agreement legally bound by it but also individual employees. That is not obvious at first sight because, in order to be able to be applied in a concrete case, an agreement has to fulfil certain essential requirements. Since the agreement has to be applied in accordance with the legal system of the country in which the MNC or its subsidiaries are located, it is dependent on the legal system of the country concerned and any specific features thereof. Two fields of (labour) law are involved: alongside the law on collective bargaining and its results, collective labour agreements are also subject to private international law, the various obstacles of which have been discussed by Van Hoek and Hendrickx (Van Hoek and Hendrickx 2009). In addition, for a TCA to be applied uniformly in all countries in which the MNC operates, the conditions under which a TCA can be considered as a collective agreement pursuant to the laws of any particular country have to be taken into account, i.e. it has to be recognised as a collective (labour) agreement in terms of domestic (labour) law. Since legislation on collective agreements differs from one country to the next - as is the case within the EU -, there can be no guarantee that the TCA can be applied uniformly in all countries the MNC operates in.

A last question is whether the enforceability of a TCA is an essential element of its direct legal effect (Coleman 2010). It seems logical that the requirement for TCA provisions to be enforceable is a necessary element. If not, the actual application of a TCA in the various countries is at least questionable and therefore not guaranteed, thus weakening it as an instrument for the transnational regulation of industrial relations. Therefore, when examining the direct effect of a TCA for all persons concerned, it is necessary to also look at the conditions under which the TCA provisions can be enforced in the different legal systems. Again we are faced with private law problems, in this case regarding jurisdiction. As this issue is too complicated to deal with here, I have to leave the question unanswered, merely referring to the study mentioned (Van Hoek and Hendrickx 2009).

To ensure direct legal effect several requirements have to be met. But even when the problem of the differing labour law systems is solved, other obstacles related to the TCA itself remain, the most important of which are:

1. the identification of the legitimised bargaining parties and their competences (are they in a position to conclude legally binding agreements);
2. the content of these (legally binding) agreements;
3. the nature and scope of their application.

Without a legal framework the problems seem insurmountable, as seen by the many problems in the field of private international law referred to by Van Hoek and Hendrickx.<sup>6</sup> Though the establishment of such a framework at global level is totally inconceivable, even in the EU context it would be difficult though not impossible to achieve. Aware of the future importance of such transnational arrangements, the European Commission is paving the way, searching for ways of establishing an EU legal framework. The Ales group has come up with a proposal for an optional framework on which transnational bargaining could be based (Ales *et al.* 2006)<sup>7</sup>. More recently a study was conducted exploring the possibilities of granting TCAs legal effect.<sup>8</sup> Avoiding the many obstacles from a private international law perspective, it could be worthwhile exploring the possibility of creating such a legal framework within the EU for the purpose of directly granting legal effect to a TCA or its separate provisions. The means available to achieve such a goal depend on the nature of the obstacles to be overcome. Taking into account the status of current research and the restricted scope of this contribution, I will analyse the main obstacles and outline possible solutions. For a (European) legal framework to be a possibility it has to be elaborated within the context of the legal systems of the EU Member States. This means that we need to first look into these national systems, checking

---

6. See also Isabelle Schömann in this volume, *infra* p. 226.

7. In this context other studies have also been carried out. Moreover the whole issue is under discussion within a group of experts on Transnational Company Agreements, established in 2009 with the 'mission of monitoring developments and exchanging information on the subject'.

8. The author was a member of the group of experts dealing with the question of legal effects of TCAs commissioned by the European Commission; its report has not yet been published. The author is fully responsible for the content of this contribution.

the possibilities and the main obstacles to a framework giving direct effect to TCA provisions.<sup>9</sup>

To ensure that a TCA can be applied effectively in all countries in which the MNC operates, it first has to be verified whether TCA application can be blocked by specific regulations (statutory law or case law) in a Member State in which the MNC operates. In considering the possibilities of a European framework guaranteeing the direct applicability of a TCA, it has to be investigated whether existing obstacles are insurmountable or whether and how they can be overcome.

Whether a TCA has to be provided with this kind of direct effect is essentially a political question rather than a purely legal one. Though the feasibility of any regulation aimed at attaining this objective cannot be the subject of this contribution, at the end of the day it is the most important question to be answered. One crucial element of any such answer is whether such a regulation is realistic from a legal point of view. Even if the legal obstacles are insurmountable the political question can still be put and answered, though at least part of its meaning or relevance will be lost. In such a case TCAs will probably become a tool for a corporate governance approach (Schömann 2011).

My main question is therefore: under which conditions can a TCA and its provisions be granted direct legal effect?

## **2. The bargaining and signatory parties**

In order to be able to provide a TCA with direct effect I will investigate the conditions under which a TCA is bargained and signed by MNC management on the one hand and workers' representatives on the other, and what has to be done for it to be legally recognised and accepted as a collective agreement with direct legal effect. Although the legislation in the various Member States reveals differences it can be

---

9. It is impossible to go into a thorough analysis here. I will rely on work done in the group of experts (see previous note) and on other sources such as a project led by Silvana Sciarra on *The evolving structure on collective bargaining in Europe 1990-2004*; and a project led by Fernando Valdés Dal-Ré, *Freedom of association of workers and employers in the countries of the European Union*.

stated that in nearly all Member States collective agreements can be concluded by the employer (or an employer association) and trade unions. On the employers' side there would seem to be no problems, with all EU Member States entitling individual employers to bargain and conclude collective agreements. The question could rise whether a group of enterprises has the competence to bargain and to conclude a collective agreement on behalf of the group. There is a debate going on whether an MNC's corporate management can conclude collective agreements binding (the management of) its subsidiaries (cf. Sobczak (2008), p. 117). This could be dependent on the statutes of the MNC and its formal hierarchy (Ales *et al.* 2006). It should to be noted that in a number of Member States this issue has been explicitly regulated.<sup>10</sup>

Turning to employees the situation is more complex. Where trade unions exist they are generally the competent employee representative bodies to bargain and conclude collective agreements. In some countries, such as Germany and Austria, works councils explicitly have this competence though not to an unlimited extent.<sup>11</sup> In other countries without company-level trade unions it is possible for an elected body, whether a works council or another body representing employees, to have the competence to bargain and conclude an agreement with the management of the (group of) company/companies.<sup>12</sup>

Obviously country differences will cause problems with regard to the overall legal validity of a TCA unless a remedy to this deficit can be

---

**10.** In a country like Germany additional requirements have to be met: corporate management needs to be authorised by the member companies of the group; in Slovenia and Sweden the management of the separate group members have to sign the agreement in order to be bound by it.

**11.** In Austria works councils are the exclusive bargaining parties, at least at company level. In Germany works councils may bargain, but in cases where a trade union has concluded an agreement the works council has to give precedence to the trade union(s). In countries like Greece and Lithuania where trade unions are absent at company level, the works council acts as the bargaining party. In Slovenia it is dependent on the applicable legislation, with only company agreements coming under the 'Workers' Participation in Management Act' able to be concluded by a works council; all others are concluded by trade unions.

**12.** In Poland elected employee representatives or a special negotiating body is competent and entitled to conclude an agreement with management. Since 1993 Italy has a noteworthy system at company level: workers' representatives are elected by and from the midst of all workers constitute the signatory party.

found.<sup>13</sup> Moreover in certain countries there are formal rules to be complied with, for instance the legal requirement for a trade union to be officially recognised before being allowed to bargain and sign a collective agreement. In TCA terms the party concluding and signing the agreement on the employee side – the European trade union(s) – has to be recognised under the national law of the state concerned as a legitimate party to do so. The recognition procedure (where such exists) varies from country to country, possibly even dependent on the position taken by the employer.<sup>14</sup> A (legal and possibly also a practical) problem can occur when a European trade union signing a TCA is not recognised in certain Member States as a party competent to conclude and sign a collective agreement applicable within the company in question. In that case the TCA cannot have legal effect at all.<sup>15</sup>

Apart from this formal requirement, there are other – in most cases surmountable – requirements to be met. Where a bargaining party needs to be registered, registration is generally easily done once proof has been provided that the trade union is independent. Sometimes legal personality and/or (civil) liability are required. Where national laws stipulate that only trade union(s) are competent to conclude and sign collective agreements – the case in several countries – a TCA cannot be concluded by a (European) works council or other employee representation body, at least when they fail to be endowed with legal effect. In this respect two obstacles can be identified. TCAs concluded by a European Works Council – in the majority of countries not a legitimate party to a fully binding collective agreement – can only be granted direct effect in Austria and Germany, perhaps Italy, and also Slovenia, Spain and Greece under specific circumstances. This means that if works councils (and in particular EWCs) take part or even lead TCA negotiations,

- 
13. Within the bounds of this contribution it is impossible to give a complete picture of the specific features of all 27 EU Member States. I will refer to a selection of elements found in the legal systems of Member States as a kind of illustration. Otherwise I will rely on studies and surveys conducted by others. In the context of a study commissioned by the European Commission an inventory has been made of the various core elements of the legal systems governing collective agreements in all 27 Member States.
  14. A well-known example is the UK; but in countries characterised by freedom of choice of the bargaining party such as the Netherlands and Sweden, the employer actually decides whether a trade union can function as a bargaining and signing party.
  15. One solution to this problem would be for the management of the subsidiary to unilaterally impose the TCA or its provisions (or some of them) on employees. The possible problems arising from this transcend the bounds of this contribution.



official support by a 'recognised' trade union is indispensable for the agreement to gain direct legal effect. To overcome this obstacle, it is necessary for the European trade union acting as the concluding and signing party to the TCA to be recognised as such under the national law of the country concerned. In practical terms, this is no real problem.

In summary it can be said that in most cases problems can be overcome. This does not however mean that the problems cease to exist. Where a TCA does not fit in with a Member State's national (legal) system, there is a question-mark over whether the TCA can be uniformly applied in all countries in which MNC operates. To reduce such doubt, a solution has to be found. Staying within the European Union, the best option would seem to be to leverage the EU's legislative capacity. This is however out of question on a global scale. I will come back to this aspect at the end of my analysis.

### **3. The content of TCAs**

When approaching the issue from the angle of the (legal) effect a TCA can have, it is important to take a closer look at the subjects generally addressed in a TCA. International or European Framework Agreements usually have a broad scope of possible subjects.<sup>16</sup>

Looking at these figures<sup>17</sup> we see that most agreements refer to fundamental (social) rights based on or adhering to the respective ILO Conventions on freedom of association and collective bargaining, equality and non-discrimination, forced labour and child labour. This picture is confirmed by other studies. It also reveals that more concrete issues relating to actual business developments in MNCs - such as restructuring, training and mobility - tend to be found in EFAs, whereas the IFAs focus more on fundamental rights as shown in the figure table below:<sup>18</sup>

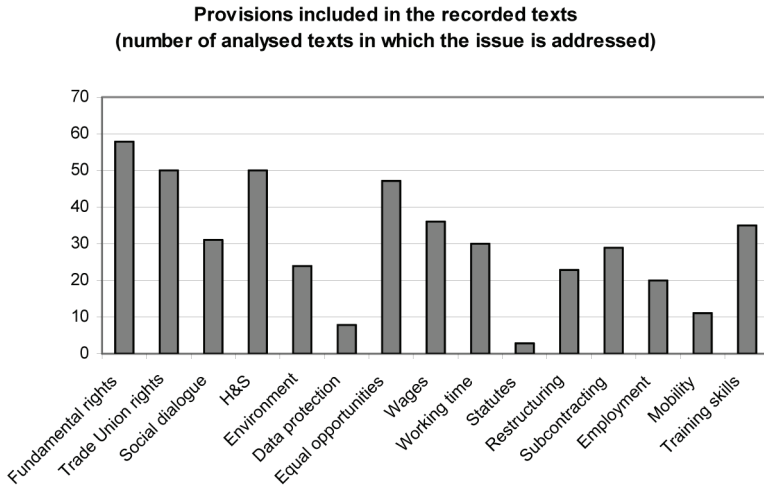
---

**16.** Within the bounds of this contribution, this is restricted to agreements at company or group-of- companies level.

**17.** An initial study by Isabelle Schömann on this issue provides an impressive – with regard to numbers – picture of developments; cf. Schömann, I. (ed.), *Corporate social responsibility: a threat or an opportunity for the trade union movement in Europe? Transfer* 3/2004, Brussels 2004.

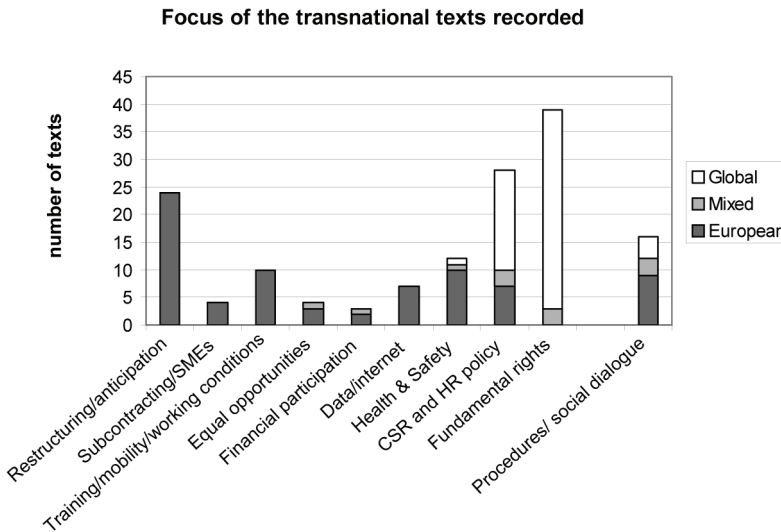
**18.** N.B. The figures in this table differ from Table 1 in respect to the number of texts. The reason is unknown.

Figure 1 Subjects covered in I/EFAs



Source: Study seminar "Transnational Agreements", 17 May 2006-Working document, European Commission (E. Pichot)(2006), p. 11

Figure 2 Subjects covered in I/EFAs



Source: Mapping of transnational texts negotiated at corporate level, Brussels 2 July 2008 (EMPLF2EP/bp2008(D)14511), p. 16

These figures show that a substantial proportion of EFAs involve subjects that – at least on paper – could be granted direct effect. To better assess this, the content of these provisions needs to be examined in greater detail. With regard to the topic discussed here, we can focus on agreements with potential direct effect, leaving aside all other types of I/EFAs without direct effect in the sense we are discussing here.

When assessing the potential direct effect of TCA provisions two distinctions have to be made. Generally speaking, the provisions of (transnational) collective agreements can be divided into what are called ‘programmatically’ rights and identifiable ‘subjective’ rights. The first category does not require concrete achievement<sup>19</sup>, having no addressee conferred with – potentially - enforceable subjective rights.<sup>20</sup> This distinction can be and has to be made to TCAs, as they generally contain both types of provisions.

A second distinction relates to the wording of the provisions in the sense that the content of a TCA provision has to be clear not only with regards to whom the provision is addressed but also in terms of concrete content. This means that the content of the provision has to be identifiable as a provision conferring a right on the addressee of the agreement or imposing a concrete duty on (one of) the parties. In other words, the TCA provision should entail a ‘subjective’ right (be it for an individual, a corporation or an organisation such as a trade union<sup>21</sup>) imposing an obligation on the other party, usually the employer. The addressee of the agreement is granted a concrete and enforceable right. To assess whether a TCA provision can be considered as such, the formula (for providing direct effect) used by the Court of Justice of the EU is helpful,<sup>22</sup> stipulating that four requirements have to be met: the provision has to be sufficiently clear and precise, unambiguous, unconditional and

---

19. In international law the objective of ‘programmatically rights’ is to impose on the party or parties a duty to “promote, encourage, and support” the issues/measures in questions.

20. ‘Enforceable’ does not imply *per se* that the addressee can automatically initiate court proceedings. A private international (procedural) law problem can still exist. Cf Van Hoek and Hendrickx in their report (Van Hoek and Hendrickx 2009);

21. In some Member States trade unions do not have a legal personality, for instance in Belgium.

22. I refer here to the first CJEU decision which was subsequently followed by many others: CJEU 5 February 1963, Case 26/62 (Van Gend & Loos)

conferring rights on individuals.<sup>23</sup> The direct effect of these kinds of provisions is more easily conceived when they concern the signatory parties. A clear example is the obligation imposed on an employer to start negotiations with the trade unions (and the works councils) in the case of major restructuring measures in an MNC and its subsidiaries affecting employees in ways explicitly listed in the agreement. In principle such a provision is enforceable.<sup>24</sup> It becomes more difficult when we talk about the direct effect of TCA provisions for individual employees employed in an MNC subsidiary. Even though the wording might meet the requirements for granting direct effect to these provisions, one wonders whether an employee of a subsidiary in a Member State can effectively have recourse to law to have it enforced. This depends greatly on the legal system applicable. This topic is discussed further in the next section.

#### **4. Nature and scope of application**

Having established the existence of a transnational company agreement (TCA) duly signed by MNC corporate management and European trade unions and specifying identifiable subjective rights in the sense explained above – obligatory/contractual as well as normative/individual<sup>25</sup> – the question remains whether this TCA has a direct effect in subsidiaries located in various Member States. This question has to be answered taking into account that no EU-level regulation to this effect exists. In our attempt to find a satisfactory answer we find ourselves faced with a variety of Member State rules and regulations governing not only the capability of the parties to conclude and sign such agreements but also the effects collective (labour) agreements have on the signatory parties and individual employees. The most striking points in respect to the subject of this contribution are which parties and persons are or can be bound and secondly which agreement will grant direct effect in the case of contradicting agreements concluded at different levels. We have to

---

**23.** The element/requirement of not being subject to further legislation can be left aside in this context as it is not relevant.

**24.** I refer to the previous remark on private (procedural) law problems reported by Van Hoek and Hendrickx (Van Hoek and Hendrickx 2009).

**25.** I use here the usual qualifications: obligatory or contractual means that they refer to rights and obligations between the parties signing the TCA: the MNC and the trade unions. Normative or individual refers to rights conferred on individual employee.

deal with these problems in order to be able to answer our main question. If no solution can be found in the sense of a provision's uniform application throughout the EU, one option would be EU intervention to provide a legally binding framework at least guaranteeing the uniform application of TCA provisions in all MNC subsidiaries within the EU. This is the challenge we are facing.

To put it in terms appropriate for this contribution, the three main obstacles to be overcome are:

1. Who will be (legally) bound by these provisions? In order to properly respond this question I distinguish between the signatory parties and individual employees.
2. How will TCA provisions affect (local) agreements to which the local management of a subsidiary and the trade unions are parties to (the obligatory or contractual effect)?
3. How will TCA provisions affect an agreement between the management of a subsidiary and an individual employee (the normative effect of TCA provisions)?

I will go into these three questions in just two sections, since the second and the third ones are strongly related.<sup>26</sup>

#### 4.1. Who is bound?

It is quite obvious that the TCA signatory parties are bound to the TCA's provisions. If the TCA has been concluded and signed by corporate management and the European (or even international) trade unions, these parties have to actively apply and respect the TCA provisions granting them rights or imposing obligations on them. Another question is whether the management of an MNC subsidiary is also bound by the TCA as similarly national trade unions will be. One may argue that national trade unions belonging to the European or international trade

---

**26.** As explained above I (have to) leave out an important, if not crucial issue in this context: enforceability. For this question of jurisdiction – i.e. which court will be competent to hear and decide on the case - see the study of A. van Hoek and F. Hendrickx (Van Hoek and Hendrickx 2009).

union organisation that signed the TCA have to respect and apply the TCA provisions applying to them. Where however this is not explicitly set forth in the statutes of the European and/or international trade union organisation, this requirement has no sure basis. One solution remedying this would be for national trade unions to explicitly mandate their European and international trade union organisation. This can be done not only by national trade unions affiliated to a European or international trade union organisation, but also by non-affiliated trade unions. The mandate would need to be precisely worded in order to avoid conflicts over the scope of the mandate. A – perhaps more theoretical – question involves whether the European or international trade union organisation can refuse to accept such a mandate.<sup>27</sup> Since the mandate is governed by private law, I assume this will be possible. On the other hand the non-affiliated (national) trade union is not bound by the TCA, retaining its ‘traditional’ trade union rights.<sup>28</sup>

Looking at the MNC, the problem is usually less complicated. Due to the (usually) hierarchical structure of an MNC, the management of the subsidiary generally has to toe the line set by corporate management (Ales *et al.* 2006).<sup>29</sup>

Whether the employees employed in the MNC subsidiaries are bound in a positive as well as a negative way is a question not so easy to answer. To start with, this is obviously dependent on the wording of the TCA provisions. But even when employees are explicitly addressed and their subjective rights (or concrete duties) are involved, national legal systems determine the legal status. Generally speaking, there are two systems:

1. only employees belonging to the signatory trade unions are bound by the agreement; the others are not - unless they have accepted the agreement as ‘fulfilling’ their individual employment contract<sup>30</sup>;
2. all employees are bound.

---

<sup>27</sup>. This question will arise when a non-affiliated national trade union is involved.

<sup>28</sup>. For instance, they retain the right to initiate collective actions, subject to national legislation.

<sup>29</sup>. An exception could be when national law imposes mandatory obligations on local management. Such obligations cannot be ignored by corporate management. This would be different under a harmonised European company code covering such issues.

<sup>30</sup>. This can be determined explicitly or tacitly, for instance via an incorporation clause in the employment contract between the employer and the employee; see hereafter.

From the point of view of being bound by a collective agreement (CA)<sup>31</sup>, the second option is the easier one, with simply all employees bound by definition.<sup>32</sup> In all other cases we have to look into the different mechanisms foreseen in the national systems. I will be looking at this question in Section 4.2.

Even more important for our analysis is the effect a TCA can have on a local CA. Can provisions set forth in the local CA be replaced by TCA provisions targeting the same issue? One of the main objectives of introducing TCAs with direct legal effect is to guarantee uniform application. This question is particularly interesting when a TCA contains a provision less favourable to the employee than the local CA is (in technical terms: *in pejus*). A related question is whether a TCA provision in violation of a mandatory statutory provision may replace that statutory provision. This question is of particular relevance in those countries where the law allows deviations from the statutory law by collective agreement, also *in pejus*.<sup>33</sup> This could mean that cases where the TCA contains a provision deviating *in pejus* (for the employee) from the statutory law could be valid in some countries and not in others.

## 4.2. Effect of the TCA on local agreements

As said before we have to distinguish between two situations: a. the (legal) effect of a TCA provision on a local agreement concluded and signed by national trade unions at the level of an MNC subsidiary; b. the legal effect the TCA has on individual employees of that subsidiary.

Both situations have in common the legal relationship between a TCA and a local CA in case they are contradictory. Is there a hierarchy

---

**31.** I use the term 'collective agreement' (or CA for short) generically, with no difference being made between transnational and national collective agreements. The issue here at stake are the general rules on the binding effect of CA provisions.

**32.** This could be either for specific TCA provisions or for all provisions. Both forms are possible in the majority of EU Member States. Another possibility for covering all employees regardless of trade union membership is the extension by law or by a government decision. This possibility exists in nearly all Member States. The UK is an exception.

**33.** To give some examples: The Netherlands and Portugal, but only in cases where explicitly allowed by law.

between the two? Since there is no general regulation at European level we have to look to the national level.

There are three general legal principles governing the possibilities: a. *lex posterior derogat lege priori*; b. *lex specialis derogat lege generali* and c. *deviation from the higher regulation is only allowed when the higher regulation admits so*. The first-mentioned principle does not give rise to misunderstanding, with the date of entry into force being decisive. The TCA does not *per se* have priority over the local CA when the latter is of a later date than the TCA. Nevertheless the question arises whether this principle can be applied in the field of collective agreements, as it is of a constitutional nature and was developed for state regulation. In this field it is logical since there is a clear hierarchy in time and in legislative capacity. But can this principle be easily transferred to the field of collective agreements signed by the social partners, where there is no self-evident hierarchy? The application of this principle to a potential collision between a TCA and a local CA is thus at most parlous.

The application of the second principle is also not simple, being dependent on which agreement, the TCA or the local CA, is to be defined as *specialis* or *generalis*. Where the TCA – being a company agreement – deviates from the local sectoral CA, it can be justifiable to state that the TCA has priority since it regulates the situation at the specific MNC level. But in cases where the TCA competes with a local company agreement, it can be argued – pursuant to the second principle – that the local CA has priority over the TCA since the local agreement applies to the lower level, the subsidiary. But applying this principle means that the objective of uniform TCA application in all subsidiaries cannot be achieved.

The application of the third principle corresponds best of all to the objective of granting direct legal effect to the TCA. It guarantees TCA priority. A similar situation exists at national level, where a national or sectoral collective agreement has priority unless it allows local deviations (opt-outs). This way of reasoning holds true when stating that the TCA is the higher level of regulation. That is the case in an MNC, where it can be assumed that, on the basis of the hierarchical structure of the transnational company, the TCA is the dominant ruling



which can only be deviated from by a local CA where the TCA explicitly allows such.<sup>34</sup>

There is no simple conclusion to this issue. If we follow our main route, the wish for uniform application of TCA provisions with direct effect, the two first-mentioned principles are clearly lacking in expediency. Adherence to the last principle, which is certainly possible, is a much better way of ensuring uniform application to all subsidiaries. But since this legal hierarchy does not actually exist and since there is no guarantee that this principle can be applied in all Member States, any solution requires EU-level intervention.

### **The relationship between a TCA and a local CA in terms of legal effect**

Assuming that the TCA has priority over the local CA, we can be sure that the TCA has to be applied in the case of contradictory provisions. In this sense the TCA has legal effect, taking precedence over the contradictory local CA provisions. This means that national trade unions, as members of the European trade union(s) signatories to the TCA, cannot reach agreements contrary to the TCA.<sup>35</sup> Even if they were to do so, the deviating provisions in the local CA would be overruled by the TCA. The national trade unions have to respect the TCA provisions insofar as they confer rights and duties on the parties. It should be noted that no collision between a TCA and a national CA can occur in countries where no collective agreement exists, either at sectoral or company level. Even so, there is no legal or *de facto* guarantee that a TCA will be applied on the basis of a legal effect accorded to the TCA. This depends wholly on the domestic law of the country concerned.

Does this necessarily lead to (national) trade unions being bound by a TCA regardless of whether they are members of the signatory parties at MNC level? The answer to this question depends - again - on the national legal systems governing collective agreements. Where the national trade

---

34. A problem exists when the TCA does not explicitly state such. Whether deviation from the TCA is (legally) possible is dependent on the interpretation of the TCA's wording in the overall context of the agreement. Here again the jurisdiction issue arises. In this respect judicial culture and a tradition of national judges using interpretation methods can be decisive. For this reason, the question of in which Member State the case will be heard can be of great importance.

35. Unless the TCA explicitly provides for such.

union is party to the local CA but not affiliated to the European trade union(s) signatory to the TCA, the question arises whether the TCA will affect its bond to the local CA in the sense that it has to accept the TCA provisions as the applicable ones, overruling the provisions of the local CA. According to Member States' national legal systems this is very unlikely to be the case, as the trade union was not party to the TCA. Consequently the local CA is the one whose application they can demand from local management. This in turn means that the TCA cannot be uniformly applied. As this contradicts the hierarchical structure of the MNC in question, the latter will find such a situation unacceptable, unless the national trade union(s) not affiliated to the trade unions signatory to the TCA - and therefore not bound by it - voluntarily accept the TCA by signing it, this binding them to it.

The question is much easier answered when the national trade union is neither a signatory party to the local CA nor affiliated to the European trade union(s) signatory to the TCA. It is free to act as a trade union representing and defending the interests of their members, irrespective of the TCA. It must however be kept in mind that this is not very likely to happen since such a trade union will have to convince the management of a subsidiary to negotiate and conclude an agreement deviating from the TCA.<sup>36</sup>

Once again the conclusion is not completely satisfying from the angle I have chosen for this contribution. This can be no guarantee that the TCA will be applied uniformly in all MNC subsidiaries in all Member States. It is dependent on the national legal systems governing collective (labour) agreements, again raising the question whether EU intervention is required.

### **Legal effect on individual employees**

The second crucial issue of the (legal) effect of TCA provisions relates to the position of individual employees. As explained earlier, the starting point is that the TCA contains identifiable subjective rights for individual employees in MNC subsidiaries. Though we have discussed

---

**36.** Whether they have the right to take collective action aiming at forcing local management to start negotiations and to conclude a collective company agreement deviating from the TCA, is dependent on the legislation of the Member State concerned.

several requirements for granting legal effect to TCA provisions, the question remains: under which conditions can TCA provisions have direct legal effect on individual employees? There are two aspects to be taken into consideration here: a) is an individual employee bound by a collective agreement and if so how; and b) by which mechanism can the content of the relevant TCA provisions be implemented in or transposed into an employee's employment contract in such a way that he can benefit from the collective agreement provisions? As this is a matter of national law, again we have to look at the national mechanisms.

The first issue is easier to deal with. In nearly all national legal systems of EU Member States an employee is bound by a collective agreement (CA). Though the ways may be different<sup>37</sup>; the result is generally speaking the same. Without going into further details, it needs to be pointed out that the UK is a special case here

More interesting and important from a practical point of view is the second question: the mechanism linking CA provisions to an employee's (individual) employment contract in such a way that the employee can benefit from them.

Generally speaking there are four different mechanisms.<sup>38</sup>

1. The law provides direct effect to employees covered by the CA in question, on the basis of their membership of a signatory party, i.e. (one of) the signing trade union(s). The binding effect results from the CA itself: the employee can depend on the CA to have it applied to him or her. This implies that only trade union members can take direct recourse to the CA. In a number of EU Member States (e.g. Bulgaria, Germany, the Netherlands and Sweden) this is the general rule.
2. The law provides for automatic transposition of CA provisions into individual employment contracts, i.e. the employee can claim application of the CA content on the basis not only of the CA itself but also on the basis of his or her individual employment contract.

---

**37.** In all Member States employee members of the signatory party are by law bound to it. The other employees are bound to a collective agreement in different ways.

**38.** Other mechanisms also exist and can be used. One of them is the transposition of CA provisions into the individual contract by i) a longstanding custom, or ii) by the employer applying the CA to his employees with their tacit consent.

*De facto*, the CA provisions become part of the individual contract. One of the few EU Member States applying this mechanism is the Netherlands.

3. The law stipulates that the CA provisions are applicable to every employee covered by the CA, i.e. the CA provisions are generally binding regardless of whether the employee is a member of the signatory party (the signing trade union). Within this mechanism we have to distinguish between two possibilities. The first is that the law itself stipulates that (parts of) the CA has to be applied to all employees (as is the case for instance in Austria, Belgium, Estonia, Greece and Poland). The second one is the extension of the CA by government decree. This is usual practice in nearly all Member States.
4. The use of a so-called *incorporation* mechanism. That could be either by a general regulation in law or by an incorporation clause in the contract of employment. In both cases the CA provisions – under the above-mentioned conditions - become part of the employment contract. This mechanism is practiced for instance in Germany, the Netherlands and the UK.

EU Member States use one or two of these mechanisms. The second mechanism and the first possibility listed in the third one are usually restricted to certain CA provisions, in particular wages.<sup>39</sup>

Since EU Member States have different mechanisms and some of them are using two of them, the direct effect of a TCA on individual employees becomes confusing. As no harmonised system exists, it is left up to national systems to determine the way a TCA –even when it has direct legal effect – is applied to an individual employee. With TCAs treated on an equal footing with national CAs, what this means with regard to possible options or scenarios for provide TCAs with legal effect will be discussed in the last section.

The conclusion here is not very encouraging when striving for the uniform application of TCA provisions in all MNC subsidiaries in all Member States. The obstacles analysed above seem to be too high to be overcome in an easy and simple-to-accept way, possibly opening the

---

**39.** France is the most striking example.

door to a need for EU intervention. I have to remind readers that at the end of the day this is primarily a political decision. My aim here is merely an analysis of legal obstacles, and what can be done to contribute to a solution. In the next section I attempt to develop options or scenarios for such intervention.

## **5. Removing the obstacles: a need for European intervention?**

In the previous sections I have gone through the obstacles to be overcome before being able to grant direct legal effect to a TCA and its provisions when applying it in all MNC subsidiaries regardless of which EU Member State the subsidiary is located in. It can be assumed that the MNC will have concluded a TCA because it expects to benefit from it in one way or another.<sup>40</sup> Another starting point for this analysis concerns the willingness of the parties to negotiate an agreement that could be effective in legal terms as well as in practical terms. That does not imply a firm standpoint in the political debate on the desirability of a TCA covering issues we are discussing in this contribution.<sup>41</sup> But one has to keep in mind that since a TCA is an agreement under private law, it is the free choice of the negotiating parties to decide on the topics to be covered by the agreement. It is part of the autonomy of social partners, guaranteed by international treaties and the national law of Member States. Moreover there is an ideological debate on the division of powers between the different levels involved in concluding and implementing a TCA. The debate on the autonomy of national trade unions and their handing over of competences and powers (maybe not voluntarily) to a higher (European) bargaining level has to be continued. This debate has direct relevance on the search for European scenarios aiming at granting legal effect to TCAs. Legal research is a stepping-stone in the development of such a strategy and – I assume – a precondition for the success of a TCA. It cannot however be ruled out that a TCA will be applied without the legal obligation to do so - i.e. voluntarily,

---

**40.** The increasing number of TCAs concluded in the last ten years as well as the number of EWC agreements that has been concluded in recent years, may give an indication of the value attached to these agreements.

**41.** That means identifiable subjective rights in the sense as has been defined.

with the management of an MNC subsidiary simply toeing the corporate line and applying the TCA.<sup>42</sup>

Having said this I now turn to the issue of possible options for EU intervention. The first question needing to be answered is how far the EU is willing to go in intervening in the autonomous system of collective bargaining and the corresponding legal and practical systems of collective agreements, as we know them in Europe. A further basic question is whether the EU has the legal competence to intervene at all. This is a very wide-ranging question, and I will keep it short by arguing that EU legislation does not *per se* rule out legal intervention in this field. However the extent of intervention has to be subjected to the subsidiarity and proportionality principles.

Though there are many options possible, I will restrict myself here to the one option that seems to be the most effective and - at least in my view - not unrealistic. This option, with its two conceivable alternatives, would grant uniform legal effect to TCAs throughout the Member States by a European ruling.

## 5.1 EU intervention providing uniform application

This option would ensure that TCAs are *uniformly* applied in all EU Member States. By uniform legal effect I mean that the TCA, or more correctly its various provisions<sup>43</sup>, will be applied uniformly in all individual cases regardless of which Member State the MNC subsidiary is located in. Studies of the characteristics of collective agreements concluded at sectoral and company level show that the systems of collective agreements (in legal and practical terms) of the various Member States differ in many aspects and particularly – from the point of view of this contribution - with regard to the legal effects of the collective agreements, meaning that there is no

---

**42.** Cf. the study of E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré (2006). There are more reasons to do so. One can be the existence of compliance mechanisms within the MNC.

**43.** Legally speaking it is always the application of TCA provisions and never of the TCA as a whole.

guarantee that they will be uniformly applied in all Member States.<sup>44</sup> Therefore EU intervention seems indispensable.

**EU legal instrument: a directive**

If the EU wants to intervene it theoretically has two options: to adopt a regulation or a directive. A regulation would provide the most certain outcome, ensuring the binding effect of a TCA in all Member States without any interference from Member States. However this option is not very likely (if at all possible) taking into account that a legal ground for issuing a regulation on this subject is at least seriously questionable. The Treaty (TFEU) does not provide a special legal ground for it<sup>45</sup> and other legal grounds such as Articles 114 and 115 and Article 308 TFEU seem not to be appropriate for this goal.

The other option is the use of a directive. But here again the problem can rise whether a solid legal ground exists for issuing a directive on this topic. This I will discuss briefly.

The role the EU attaches to social dialogue as a pillar of a social Europe speaks in favour of the existence of an EU legislative competence. According to Article 152 TFEU the EU not only recognises and promotes the role of the social partners, but also facilitates dialogue between the social partners, while respecting their autonomy. This approach is implemented in the two following provisions: Article 155 TFEU empowers social partners to conclude collective agreements on EU level.<sup>46</sup> Article 154 TFEU underlines the position of social partners even more by stating that before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action and if the social partners declare they are in favour of bipartite action, this shall have priority over the

---

44. A similar conclusion has been drawn in the Ales report ( E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré 2006).

45. Article 153 TFEU provides only for the instrument of a directive.

46. Well-known overall examples pertain to parental leave, part-time work, and fixed-term contracts. The social partners have also concluded several agreements at sectoral level. The number of agreements is increasing. Following the lead of the metal industry, other industries are becoming increasingly active in this field. Cf. Eurofound, Dynamics of European sectoral social dialogue, 2009. Agreements concluded at European Union level can gain European Law status pursuant to the procedure defined in Article 155, 2 TFEU. One could say that the social partners have a kind of legislative power.

Commission's activity. Taking this into account one can argue that the EU is supporting the option of social partners regulating their own affairs where they are in agreement. Following this path it seems logical for the EU to pro-actively promote bipartite arrangements including ones at MNC level. That could support EU intervention in the field of uniformly applying transnational agreements concluded by social partners. Article 153 §§ 1.b TFEU indicates fields in which the social partners could negotiate agreements<sup>47</sup>.

Article 28 of the EU Charter of Fundamental Rights on the right of collective bargaining supports this approach.<sup>48</sup> However whether this is a sufficient base for intervention via a directive giving TCAs direct legal effect can be disputed. Article 51.2 seems to restrict the meaning of Article 28, stating that 'This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. For any legislative intervention a legal ground has to be found in the TFEU. Is Article 153 TFEU a sufficient ground? There are two arguments against this. The one is Article 153.5 TFEU, which states: 'the provisions of this Article shall not apply to (...) the right of association (...)'. A directive providing direct legal effect to transnational agreements can be considered as an EU intervention going beyond the competence, in particular when it is explicitly excluded by that paragraph since it is or can at least be considered as an interference in the national systems of collective bargaining and concluding collective agreements, a 'prohibited access' area. From there it can be argued that a European directive granting direct legal effect to TCA provisions could possibly overrule domestic law, and is consequently unlawful. The second argument can be derived from the qualifying phrase used in Article 152 TFEU: 'The Union recognises and promotes the role of the social partners at its level, *taking into account the diversity of national systems*'. The underlined phrase could be interpreted as a requirement to respect the existing national systems. On these grounds one can argue that the EU lacks competence in this field. It is therefore questionable whether the EU can adopt legislation, *in casu* a directive, directly affecting a Member

---

47. In this contribution I focus on this specific provision (employment conditions) being related to the subjects of TCAs with direct effect.

48. The adoption of the Lisbon Treaty saw the provisions of the Charter becoming part of primary EU law.



State's national legislation on collective agreements. But if we look more carefully at Article 153.5 TFEU in relation to Article 152 TFEU a directive granting direct legal effect to TCA provisions is not necessarily contrary to these competence provisions. All will depend on the type of intervention. I prefer to argue that the EU may legislate on this, provided that legislation is limited to the transnational nature of the TCA, avoiding intervention in a Member State's legislation on collective agreements. For this reason the obstacle may not be insurmountable.

However when calling for a directive based on Article 153 TFEU, we have to take into account that Article 153 itself imposes a restriction on its use. Apart from respecting the principles of subsidiarity and proportionality a directive may not go further than setting down 'minimum requirements'. The subsidiarity rule is met since it seems obvious that, provided the objective is justified, a regulation of this subject cannot be left up to the Member States simply because their systems of hierarchy differ substantially. The proportionality rule is respected when the European legislator does not go beyond what is appropriate and necessary as to achieve the objective. In this context the objective is to give legal effect to TCA provisions, thereby ensuring their uniform application in the Member States in which the MNC has subsidiaries. The content of a directive must thus be part of any assessment as to whether these requirements are fulfilled.

In conclusion one can say that if the EU is of the opinion that TCAs need to be regulated in the sense discussed above, it is obviously first and foremost a political decision, with a directive being a real option.

#### **A directive: several modalities**

I will now look at what such a directive would need to contain. There are several options available, all of which have in common that they aim for a framework directive<sup>49</sup> obliging Member States to grant direct legal effect to TCAs or TCA provisions by law in such a way that a TCA can be uniformly applied in all Member States covered by its scope.

---

<sup>49</sup>. A frame work directive because it only will give a framework and therefore does not go into a more specific content. Its objective is creating a procedure.

1. A first option could be a framework directive calling for national collective agreements systems - obviously including the relevant legislation – to be framed in such a way that they result in the uniform application of eligible TCA provisions in all MNC subsidiaries in all Member States. This option implies that national legislation would have to be adapted in a way that the national law provides for uniform application by granting direct legal effect to TCA provisions. Since this is a far-reaching option - far-reaching in terms of the result achieved and of the possibility of getting such a directive adopted in the EU -, it does not seem very realistic. It would directly encroach on national legislation on collective agreements, a field for which Member States usually claim to have exclusive competence and in which the EU indeed lacks competence. Such a directive would have a direct influence on the hierarchical system of national collective agreement legislation by stipulating that the TCA would have direct effect – in the sense described - regardless of whether the provisions of a national collective agreement were or could be applicable. Such intervention by the EU legislator would neither meet the requirements of proportionality nor respect the requirement of being minimal by nature. I therefore regard this option merely as theoretical.
2. A second, less far-reaching and therefore more acceptable option is a framework directive granting direct legal effect through a priority rule to be inserted in the national law on collective agreements. This would mean that the directive obliges Member States to adapt their laws, stipulating that TCA provisions have priority over provisions in (local) collective agreements that deviate from the TCA provisions. Such a mechanism would leave national systems intact, instead adding a further level above the national hierarchy of collective agreements. In the (national) laws on collective agreements a provision would have to be inserted giving priority to TCA provisions. Obviously this option would have no effect when no local CA (sectoral or at company level) exists in a Member State.<sup>50</sup>

---

**50.** In a number of Member States, in particular certain new Member States but also in some 'old' Member States such as the UK, no domestic CAs exist. In such cases the priority rule would have no relevance. Another question in this respect is whether a TCA can become effective through a decision of the employer, unilaterally regulating employment conditions. I have to leave out this –interesting- issue as well.

Though this option is easier for both the EU and the Member States to accept, it is still possible that it would only receive a lukewarm welcome. This is because it encroaches on Member States' hierarchy rules regarding collective agreements concluded at different levels.<sup>51</sup> In response to this the framework directive could have an optional nature, in the sense that, once an MNC and its counterparts – the European trade union(s) - have opted for a TCA, the TCA and its provisions - insofar as they meet the requirements for having direct legal effect - have to be applied fully and uniformly in all subsidiaries covered by the TCA.<sup>52</sup> Consequently the MNC and the European trade unions that have opted for the conclusion of a TCA containing identifiable subjective rights know beforehand that these provisions will prevail over the provisions of a national or local agreement. The contracting parties have deliberately and voluntarily opted for a TCA, and have determined its scope, both substantive and with regard to the employees covered. The obligation for the Member States transposing the framework directive into national body of law involves nothing more than giving the TCA priority over a national collective agreement<sup>53</sup> in the case of a conflict between the content of the TCA and the national CA.

This solution seems to be preferable since it is clear and unambiguous. The consequences would be clear for the parties wanting to conclude a TCA including this kind of provision. The law of the Member State would guarantee that once that choice had been made, the result of the bargaining would be uniformly applied in all subsidiaries of the MNC concerned, in all Member States including the one concerned. It is to be expected that the European trade unions in particular, as confederations of national trade unions<sup>54</sup>, will be aware of the impact of the

---

**51.** These hierarchy rules differ from country to country. In certain countries there is a clear hierarchy, in others the situation is more complicated: for instance Greece, Italy, the Netherlands and Portugal. In another group of countries no hierarchy exists at all: for instance Ireland, Malta and the UK.

**52.** Since it is an agreement between two parties, they are free to decide on the scope of coverage in respect of the parties as well as the content. This provides the flexibility the parties wish to have. This can be seen as an advantage for this option.

**53.** Either a sectoral or cross-industry collective agreement where MNC subsidiaries in a Member State are covered or bound by such an agreement.

**54.** Usually an MNC does not face the same kind of problems since the MNC will be more homogenous as an organisation.

arrangements made, taking into consideration the opinions of their members, the national trade unions.<sup>55</sup>

This option is likely to meet the requirements of proportionality and of not going beyond the minimum requirements. It has a restricted objective and respects national legal systems.

In response to arguments that this option goes too far, the introduction of the *ad favorem* principle – the *most favourable* principle – could help, providing greater flexibility and avoiding collisions between the various levels of CAs. Under such a principle, if a provision in a (local) company agreement was more advantageous for the employee than a similar provision in the TCA, the local provision would prevail. All parties involved would know where they stand when they conclude a TCA. Even so, this principle would not solve all problems, as discussed below.

It is not always clear what is ‘most favourable’. Who can choose what is ‘most favourable’, at which moment and between what? It is obvious that the employee has the choice the moment the TCA is signed. The question remains open whether it is possible for an employee to change his choice when a new local CA enters into force, or does he have to stick with his original choice until the TCA expires. A further problem is whether the TCA and CA are considered as a collection of separate provisions out of which one can ‘pick and choose’, or as a ‘package deal’, to be accepted as a whole because it is the result of a negotiation process in which a balance of interests has been struck by the bargaining parties. Taking the first option implies that every single provision of a (T)CA can be taken separately and can be chosen by the employee because this provision is more favourable for the employee concerned, whereas in the second option the CA has to be taken for granted.<sup>56</sup> Analyses of the legal systems of the Member States show that in some countries (such as Poland) an agreement has to be taken as a whole

---

55. For this reason the internal decision-making procedures of the European confederations are important.

56. When the ‘most favourable’ principle is used and applied as expressed in the first option, it could actually become a disincentive for MNCs to conclude a TCA since it causes uncertainty on what will be applied and jeopardises efforts to develop an enterprise-wide human resources policy.

whereas in other countries, such as Estonia, Romania and Slovakia, it can be examined provision by provision. The Dutch example is interesting since the case law dealing with this question shows ambiguity as to the choice of one or the other option. The Supreme Court has ruled that when applying the 'most favourable' rule the comparison of the different provisions can be done on a provision-by-provision basis, whereas decisions of some lower courts have gone in the other direction.<sup>57</sup> But apart from this, differences exist among Member States as to whether a collective agreement is considered as a package deal or as a body of individual provisions. That can be an obstacle for the uniform application of TCAs. In conclusion, the 'most favourable principle' would not seem to be *the* solution. Hence a study going into greater depth on this and other related issues is necessary.

What we learn from this analysis is that a framework directive of an optional nature seems to be the most likely solution for granting TCA provisions direct legal effect. As the analysis has also shown, certain problems remain to be solved.

## 5.2. Core rules of a directive

In proposing a directive as an instrument to grant direct legal effect to TCA provisions, I will outline which rules need to be included. The *core of the directive* will be that TCA provisions - insofar as they contain identifiable subjective rights and duties - are given priority over national agreements (company or sectoral). That is the most effective and realistic way of reaching the goal of having the TCA uniformly applied in all Member States.<sup>58</sup>

However this will not be sufficient. More provisions have to be included in the directive as minimum requirements for its legal validity. In order to qualify as a valid regulation the EU framework directive has to

---

**57.** Supreme Court (HR) 14 January 2000 NJ 2000, 273. This decision has been greatly criticized in literature, because it negates the 'package deal' nature of a CA and opens the door for a 'pick and choose' approach by the employee. In a decision of 24 April 2009 (JAR 2009/130) the Supreme Court nuanced its previous decision. Lower courts took the position of the CA being a package deal.

**58.** Realistic from the point of view of being accepted as a directive at EU level.

contain certain core requirements qualifying a TCA. These are related to certain basic features of collective agreements in general which are common in nearly all Member States.

As a collective (labour) agreement, the TCA must be an agreement:

1. Based on mutual consent.
2. Between representative European parties. On the employers' side there is hardly a problem. The corporate management board of a European-based MNC is – usually – the employer party representing the MNC. There are greater difficulties defining the employee side. In European (labour) law a definition of representativity is missing. Even in the context of collective agreements based on Article 155 TFEU the requirements of representativity are absent. The Court of Justice of the EU bridged the gap in its decision on the UEAPME case.<sup>59</sup> The European Commission has developed a number of rules, considered as the main, the general requirements.<sup>60</sup> Knowing that the regulations in the Member States differ quite substantially it would seem to be necessary to include some rules in the directive, resembling the rules developed by the CJEU and the Commission.<sup>61</sup> There is a question-mark over whether existing rules are sufficient to guarantee that signatory European trade unions are – sufficiently - representative and competent to determine TCA provisions covering and binding national trade unions and MNC employees.<sup>62</sup> To avoid a running dispute over the representativity of European trade unions, certain rules will need to be developed.<sup>63</sup> In addition

---

**59.** Court of First Instance 17 June 1998. Case T-135/96 (*UEAPME*). An employers' association, representing the interests of small and medium-sized undertakings, contested the validity of the directive on parental leave (Directive ), claiming that it - as a representative employers' association - had not been involved in the bargaining and conclusion of the Framework agreement on which the directive was based. The European Court rejected the claim of the employers' association, providing certain rules for assessing whether an association was to be considered as representative.

**60.** It has to be kept in mind that the requirements for qualifying as bargaining and signatory party in some Member States differ from this set of requirements. One example is Germany.

**61.** Elaborating on this important issue goes beyond the scope of this contribution.

**62.** In the Ales report some proposals have been developed ( E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré 2006).

**63.** On this important issue see authors contribution to a book honouring Darcy Du Toits' contribution to labour law (Jaspers 2012).

the position of European Works Councils (EWCs) in negotiating and concluding agreements in MNCs in the sense of the EWC Directive can be included in a study on EWC competence to conclude legally binding agreements, including TCAs. It must also be taken into account that in a number of Member States an EWC is legally not competent to conclude a legally binding agreement.<sup>64</sup> In fact only Austria and Germany allow such. This is an important and interesting point since EWCs have become a kind of a motor for negotiations at MNC level and in a lot of cases sign or co-sign agreements with the MNC board. It is clear that *de facto* EWCs play an important role in TCA negotiations.

3. On issues with a cross-border impact: i.e. general issues important for the MNC and its subsidiaries in at least two Member States and to be applied in the subsidiaries. In this context it would be worthwhile studying the transnational nature of the content of TCAs. The discussion on this topic has been started in the context of the recast EWC directive and can be enriched by including TCAs.
4. Granting priority over national agreements either at company or sectoral level. As discussed above, the question is whether to introduce the most favourable principle for national (company) agreements, with two possibilities available:
  - a) Taking the national (company) agreement as a whole, as an indivisible ‘package deal’, i.e. either the national or local (company) agreement will be applied or the TCA. The employee has to make a choice the moment the TCA comes into force.
  - b) Applying the most favourable principle to individual provisions of either the TCA or the national or local (company) agreement.  
Since in my view a collective agreement has to be considered as a ‘package deal’, the first option is preferable and would need to be explicitly included in the framework directive, thereby overcoming the problem of differing national systems and making the TCA uniformly applicable.

---

**64.** The competence of the EWC representing MNC employees to conclude legally binding agreements is at least disputable.

5. A final requirement needing to be included in the text of the framework directive is the mandatory publication of the TCA by the signatory parties or at least by MNC management, allowing the TCA to be made known to all employees.
6. An additional requirement regarding transparency would involve TCA registration or notification with the European Commission and with the national government of the Member State concerned.

### 5.3. Outlook

Assuming direct legal effect of TCA provisions is the preferred option, the analysis shows that the realisation of this option is not simple. Apart from the political obstacles mentioned at the beginning of this contribution, there are more hurdles to be taken. An important one is of course the willingness of both parties: the multinational company and the trade unions. For the latter this may represent a dilemma, possibly jeopardising the autonomy of national trade unions in such a way that they prefer to stick to their national-level powers and competences and refuse to cooperate. On the other hand they cannot stop at their borders developments caused by the globalisation and ‘Europeanisation’ of the economy and the increasing cross-border impact of company activities.

Guaranteeing the effective application of TCA provisions uniformly in all MNC subsidiaries in all Member States through granting direct effect to ‘subjective’ rights and concrete duties laid down in a TCA can obviously only be achieved through EU intervention. All other possibilities fail to achieve this objective due to the substantive differences in the legal systems governing collective agreements in the Member States. Even when EU intervention is rejected and competences remain with the national legislators, no result can be achieved without European-level legislative coordination in the Member States.<sup>65</sup> On the basis of my analysis I have proposed developing a European path showing the direction we can take. Though not solving all problems, it

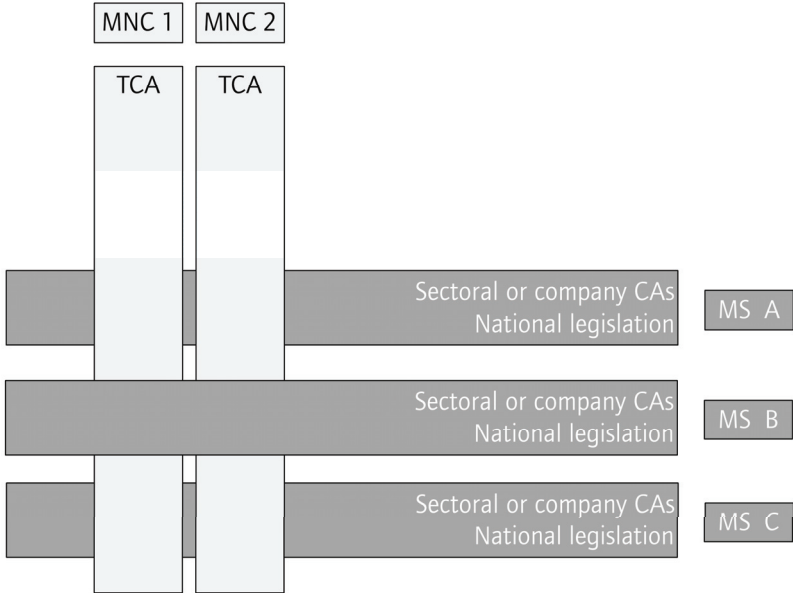
---

**65.** Even when opting for the solution of national trade unions co-signing TCAs, legislation is needed to ensure that all trade unions in the Member States with MNC subsidiaries will do so.



can be a starting point for a broader discussion aimed at the uniform application of TCA provisions throughout the EU. An effective TCA can and will appear on the horizon.

Figure 3 Uniform application of TCAs



## References

- Ales, E., S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdes Dal-Re (2006) *Transnational collective bargaining: past, present and future. Final report*, Brussels: European Commission.
- Coleman, S. (2010) ‘Enforcing international framework agreements in U.S. courts: a contract analysis’, *Columbia Human Rights Law Review*, 41, 601-634.
- European Foundation for the Improvement of Living and Working Conditions (Eurofound) (2009) *Dynamics of European sectoral social dialogue*, Luxembourg: Office for Official Publications of the European Communities.
- Jaspers, T. (2012) ‘The future of the collective labour law agreements’ system challenged!’, in K. Malherbe and J. Sloth-Nielsen (eds) *Labour law into the future*, Juta Cape Town.
- Schömann, I. (ed.) (2004) ‘Corporate social responsibility: a threat or an opportunity for the trade union movement in Europe?’, *Transfer*, 10 (3), 351-479.
- Schömann, I. (2011) ‘Transnational framework agreements: new bargaining tools impacting on corporate governance’, in M. Serrano, E. Khafa and M. Fichter (eds) *Trade unions and the global crisis*, Geneva: ILO, 129- 143.
- Sciarra, S. (2003) *The evolving structure on collective bargaining in Europe 1990-2004*, research project co-financed by the European Commission and the University of Florence (VS/2003/0219-SI2. 359910).
- Sobczak, A. (2008) ‘Legal dimensions of international framework agreements in the field of corporate social responsibility’, in K. Papadakis (ed.) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: ILO, 115-130.
- Valdés Dal-Ré, F. (2006) *Freedom of association of workers and employers in the countries of the European Union*, Madrid: Ministerio de Trabajo y Asuntos Sociales.
- Van Hoek, A. and F. Hendrickx (2009) *International private law aspects and dispute settlement related to transnational company agreements*, study undertaken on behalf of the European Commission, contract no. VC/2009/0157.



# Conclusions

**Isabelle Schömann**

The major aims of the book are to provide a better understanding and a critical analysis of the emergence and development of transnational collective bargaining (TCB) and its possible (legal) framing in the context of domestic, European and/or international industrial relations systems. This research project, conducted by a multidisciplinary team of researchers, combines the theoretical background and practical role and impact of transnational company agreements (TCAs) in the framing of industrial relations in the European Union.

Starting with the roots and content of collective bargaining transnationalisation, the research first focuses on the relationship between industrial relations, collective bargaining and social dialogue traditions in EU Member States and on emerging collective bargaining structures with MNCs in the context of a Europeanisation of collective bargaining. While coordination of bargaining processes and outcomes between different bargaining levels in the European Union remains a challenging task, the addition of an extra level of collective bargaining (i.e. with MNCs) reveals a major imbalance of power between internationally operating companies and nationally rooted trade union structures and strategies.

Furthermore, the European institutional and legal framework shaping the European industrial relations system remains incomplete. On the one hand, Art 152-155 TFEU partially define the European collective bargaining system through organizing the European social dialogue. This framework appears, however, unsuitable for addressing the effective implementation and enforcement of such agreements as the European framework agreements resulting from European cross-sectoral and sectoral social dialogue, although many problems identified and challenges to be faced are the same if not similar to the ones encountered with TCAs. On the other hand, the legal framework establishing a European works council or a procedure for informing and consulting employees in a community scale undertaking or group of undertakings (Recast

Directive 2009/38/EC) does not foresee the EWC involvement in transnational collective bargaining. This puts a question-mark over the legal capacity of EWCs to negotiate, whereas de facto they are already greatly involved in bargaining, signing and monitoring TCAs.

Although TCAs have evolved in a legal no-man's-land, they are developing in an international, European and national legal environment from which they gain inspiration, with national and European legal and contractual collective bargaining practices representing in most cases the basis for TCA negotiations between trade unions and MNCs. TCA practices influence existing industrial relations systems, for example in respect of innovative internal alternative dispute resolution mechanisms developed by the parties to ensure effective TCA implementation and monitoring.

As demonstrated by the authors of this book, TCAs do not fit into any of the existing (legal) categories of collective bargaining outcomes defined in domestic, European or private international law. Instead they represent a new form of collective, social (private) regulation, adding a new dimension to the European industrial relations system and the existing legal set-up for company-level transnational collective bargaining. These developments raise a number of questions regarding the nature, value, impact and enforcement of such agreements but also regarding their interaction with other legal and contractual instruments stemming from collective bargaining activities. Furthermore, both employers and workers, while progressively taking ownership of and responsibility for transnational collective bargaining activities, underline the insecurity caused by the lack of any legal and/or conventional rules supporting TCAs. Such rules would allow TCAs to gain in legitimacy and credibility and help dissociate them from unilateral CSR initiatives.

Attempts – as yet unsuccessful – have been made by the European Commission to pave the way towards a legal framework for company-level transnational collective bargaining, aimed at enhancing legal security in TCA practices which have been developing rather erratically. This would give the parties the necessary tools to make TCAs an effective part of transnational collective bargaining at European Union level. Recent studies carried out at the request of the European Commission have investigated whether private international law and domestic legislation could provide legal direction and solutions in

support of transnational collective bargaining. Yet neither provide for the uniform application of TCAs in all MNC subsidiaries, as either domestic legislation and courts rulings or the rules applied to domestic collective agreements in each country need to be followed. The significant differences between EU Member States and between non-EU legal orders cannot provide the required uniformity in the implementation and enforcement of TCAs, needed by the parties for legal certainty and predictability.

At the same time, certain Global / European Trade Union Federations have developed 'model agreements' to support their affiliated workers organisations in negotiating, signing, and implementing TCAs. Although such 'model agreements' are not mandatory and therefore cannot provide for legal security, they do provide a working structure and guidance based on existing TCB practices. Such 'model agreements' appear to be much appreciated by practitioners and could serve as a basis for a legal framework.

It is the search for certainty and predictability of TCB outcomes that drives practitioners, European institutions (such as the European Commission) and academia to investigate different avenues serving such purpose. Research results have repeatedly demonstrated the need for a European legal initiative in the form of either a directive (Ales *et al.* 2006, 33-41) or a 'European rule' (van Hoek and Hendrickx 2009, 95 and 109) filling the (legal) gap existing with regard to TCA implementation and enforcement, and thus rounding off the European industrial relations system (together with alternative dispute resolution mechanisms – see Valdés Dal-Ré, 2002).

Such an initiative, as the authors demonstrate in this book, would assure uniform TCA application by giving TCAs direct legal effect. Furthermore, it would remedy the undesirable development of TCAs parallel to legislation and help avoid disputes over who – trade unions and/or EWCs – has the mandate to negotiate and implement TCAs. In addition, it would clarify coordination between TCB levels and outcomes, as well as proposing a typology of TCB and European social dialogue instruments building on the experience gained so far both in the context of the European social dialogue (Art. 152-155 TFEU) and in TCB processes. Such a European legal initiative would in addition strengthen trade union capacity to act transnationally, a capacity that currently remains

limited and dependent on transnational solidarity, capacity building activities and increased resources. Finally it would address the fundamental issue at stake – the role and position of the industrial relations system – and contribute to the ultimate aim of a TCB system – to redress the unequal balance of power between globally operating management and nationally rooted labour.

With this book, the authors are contributing to the debate over the development, role and impact of a European industrial relation system from an academic, institutional and trade union perspective, focusing on a new dimension of transnational collective bargaining: transnational company agreements. The authors have shown that the concept of '*transnationality*' in European and domestic industrial relations has developed both as a concept and in practice. However, '*transnationality*' needs not only further appropriation and implementation on the part of the labour movement and employers, but also political support from the European institutions to achieve a sound and sustainable European framework in which all existing TCB-based initiatives can evolve. This would acknowledge that 'transnationality is part of European law in action' (Sciarra 2009, 21). The authors hope that this book provides valuable help for trade unions and practitioners to prepare and be prepared for action internationalising industrial relations.

## References

- Ales, E. *et al.* (2006) *Transnational collective bargaining: past, present and future*, Brussels: European Commission.
- Van Hoek, A. and F. Hendrickx (2009) *International private law aspects and dispute settlement related to transnational company agreements*. Study undertaken on behalf of the European Commission (Contract number VC/2009/0157), Brussels.
- Valdés Dal-Ré, F. (2002) *Synthesis report on conciliation, mediation and arbitration in the European Union countries*, Brussels: European Commission.
- Sciarra, S. (2009) *Transnational and European Ways Forward for Collective Bargaining*, Working Paper C.S.D.L.E. "Massimo D'Antona".INT-73/2009, Catania: Università degli Studi di Catania.

## Abbreviations

<b>AEA</b>	Aviation concluded by the Association of European Airlines
<b>CA</b>	company agreement
<b>CEE</b>	Central and Eastern Europe/an
<b>CEECs</b>	Central and Eastern European countries
<b>CEEP</b>	European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest
<b>CER</b>	Community of European Railways
<b>COESS</b>	Confederation of European Security Services
<b>COPA</b>	Committee of Agricultural Organisations in the European Union
<b>CSR</b>	Corporate Social Responsibility
<b>EC</b>	European Community
<b>ECA</b>	European Cockpit Association
<b>ECEG</b>	European Chemical Employers Group
<b>ECSA</b>	European Community Shipowners' Associations
<b>EEC</b>	European Economic Community
<b>EFA</b>	European framework agreement
<b>EFFAT</b>	European Federation of Food, Agriculture and Tourism Trade Unions
<b>EMCEF</b>	European Mine, Chemical and Energy Workers' Federation
<b>EMU</b>	European Monetary Union
<b>EP</b>	European Parliament
<b>EPSU</b>	European Federation of Public Service Unions
<b>ERA</b>	European Regions Airline Association
<b>ESSDC</b>	European Sectoral Social Dialogue Committee
<b>ESO</b>	European Social Observatory
<b>ETF</b>	European Transport Workers' Federation
<b>ETUC</b>	European Trade Union Confederation
<b>ETUF</b>	European Trade Union Federation
<b>ETUI</b>	European Trade Union Institute
<b>EU</b>	European Union
<b>EUROCOMMERCE</b>	Retail, Wholesale and International Trade Representation to the EU
<b>EWC</b>	European Works Council
<b>FENI</b>	Fédération Européenne du Nettoyage
<b>FTS</b>	Federation of Transport Workers' Unions in the European Union
<b>GEOPA</b>	Employers' Group of the Committee of Agricultural Organisations in the European Union
<b>GUF</b>	Global Union Federation
<b>HOSPEEM</b>	European Hospital and Healthcare Employers' Association
<b>HOTREC</b>	Hotels, Restaurants and Cafés in Europe
<b>HRM</b>	Human resource management
<b>IACA</b>	International Air Carrier Association
<b>IFA</b>	International Framework Agreement



## Abbreviations

---

ILO	International Labour Organisation
JCC	Joint Consultative Committee
MEP	Member of European Parliament
MNC	multinational company
NGO	Non-governmental organisation
OSE	Observatoire Social Européen
RSA	'Rappresentanze sindacali aziendali'
RSU	'Rappresentanze sindacali unitarie'
SME	Small and medium-sized enterprise
TCA	Transnational company agreement
TCB	Transnational collective bargaining
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UNICE	Union of Industrial and Employers' Confederations of Europe
UNI-Europa	Union Network International - Europa

## Abbreviations of countries

AT	Austria	LT	Lithuania
BE	Belgium	LU	Luxembourg
BG	Bulgaria	LV	Latvia
CY	Cyprus	MT	Malta
CZ	Czech Republic	NL	Netherlands
DE	Germany	NO	Norway
DK	Denmark	PL	Poland
EE	Estonia	PT	Portugal
ES	Spain	RO	Romania
FI	Finland	SE	Sweden
FR	France	SI	Slovenia
GR	Greece	SK	Slovakia
HU	Hungary	UK	United Kingdom
IE	Ireland	US	United States
IT	Italy		

## List of contributors

**Guido Boni**, a former ETUI Researcher, is a Lecturer in Law at the Royal Holloway College, University of London, and a solicitor in Italy. His field of expertise is international and comparative employment law.

**Stefan Clauwaert** is an ETUI Senior Researcher who graduated in Social Law from the University of Ghent (Belgium) in 1993 and has worked at the ETUI since October 1995. His main fields of research are European/ comparative labour law and European social dialogue. Since 1999 his work has included participation as expert to the ETUC delegation in all the EU cross-sectoral social dialogue negotiations.

**Vera Glassner**, who holds a PhD in industrial sociology from the University of Vienna, worked at the ETUI from November 2007 until February 2012 as researcher in the area of industrial relations. Before joining the ETUI she held the position of research assistant at the Institute of Industrial Sociology, University of Vienna, and is currently employed as a senior researcher at the Department of Economic and Organisational Sociology at the Johannes Kepler Universität in Linz (Austria).

**Romuald Jagodzinski** is a researcher at the European Trade Union Institute. He obtained a first degree in international relations (European studies) in Poland and completed post-graduate studies in Germany. His research area is company-level workers' representation, with a special focus on European Works Councils, and he has responsibility for the EWC database, [www.ewcdb.eu](http://www.ewcdb.eu).

**Teun Jaspers** is professor of Labour Law at Utrecht University. He has been a member of the European Committee of Social Rights of the Council of Europe. His field of research is European, international and national labour law. More recently he has focussed his research on transnational collective labour law issues including comparative studies. He is a member of the European Working Group of Labour Law.

**Isabelle Schömann** is an ETUI senior researcher and Netlex coordinator. Her main fields of research are European and comparative labour law, transnational trade union rights, and transnational industrial relations including CSR and European social dialogue.