

Chapter 4

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

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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 975¹ 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, 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)². 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^oVT/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 concerned³.

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 others⁴. 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 agreements⁵. 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 other⁶. 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 organisation⁷ provides an indirect definition of such competent parties (Art. 5). Apart from employers' representatives it includes workers representatives⁸. In a

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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 negotiations⁹.

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' representatives¹⁰. 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.

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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)¹¹. 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'¹². 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 (...)’.¹³ 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 EWCs¹³ 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’¹⁴. 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 specifications¹⁵.

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.¹⁶ 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 viewpoints¹⁷ 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 bargaining¹⁸. 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 bargaining¹⁹.

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*'²⁰, it identified the need to improve consistency of social dialogue outcomes and transparency²¹.

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*²² 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 circumstances²³.

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 following²⁴:

- 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’²⁵. 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

²⁵. 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 EWCs²⁶. 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.

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