

Introduction

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‘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 TCAs¹ – 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.

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