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Romuald Jagodziński*

Involving European Works Councils in Transnational Negotiations – a Positive Functional Advance in their Operation or Trespassing?**

Abstract – This paper aims at discussing some facets of the emerging European level of collective negotiations. The paper argues that in general the acquis communautaire and other international acts can already accommodate this new category of agreements. At the same time it finds out that lack of a specific legal framework may have negative implications for the binding force of the agreements in question and for their enforcement. The existence of those agreements beyond or parallel to law causes hence confusion in regard to roles that the social partners at the national and the European level should play. Thus, in order to put some structure into the debate, it is argued that a differentiation between, on the one hand, national collective bargaining and transnational collective agreements or negotiations, and, on the other hand, consultation and negotiation powers should be applied. Consequently, the author provides an answer to the title question by stating that even though the growing engagement of European Works Councils into transnational collective negotiations represents a functional development of their practice, it is an example of transgressing their information and consultation competences.

Die Einbeziehung Europäischer Betriebsräte in grenzüberschreitende Verhandlungen – positive Weiterentwicklung ihrer Funktionsweise oder Überschreitung ihrer Kompetenz?

Zusammenfassung – Dieser Artikel setzt sich mit verschiedenen Facetten der entstehenden europäischen Ebene von Kollektivverhandlungen auseinander. Es wird argumentiert, dass der *acquis communautaire* im Allgemeinen dieser neuen Kategorie von Vereinbarungen bereits Rechnung trägt. Gleichzeitig wird festgestellt, dass der Mangel an einem spezifischen rechtlichen Rahmen negative Auswirkungen auf die Bindungskraft dieser Vereinbarungen und auf ihre rechtliche Durchsetzung haben kann. Die Existenz der Vereinbarungen in einer rechtlichen Grauzone bzw. parallel zum Rechtsrahmen sorgt für Verwirrung in Bezug auf die Rollen der sozialen Partner, sowohl auf der nationalen als auch auf der europäischen Ebene. Um die Debatte besser zu strukturieren, wird deshalb argumentiert, dass zwischen nationalen Tarifverhandlungen und grenzüberschreitenden Kollektivvereinbarungen bzw. -verhandlungen auf der einen Seite und zwischen Anhörungsrechten und Verhandlungskompetenzen auf der anderen Seite unterschieden werden sollte. Der Autor stellt abschließend fest, dass, obwohl die Einbeziehung der Europäischen Betriebsräte in grenzüberschreitende kollektive Verhandlungen eine funktionelle Weiterentwicklung ihrer Arbeitsweise darstellt, dies gleichzeitig ein Beispiel für die Überschreitung ihrer Informations- und Anhörungskompetenzen darstellt.

Key words: **European Works Councils, Transnational Collective Bargaining, Employee Representation, International Labour Law**

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Introduction[1]

Over a decade after the entry into force of Directive 94/45/EC, European Works Councils (EWCs) are a well established dimension of European industrial relations and have become the most deeply rooted instrument of transnational employee representation. With some 830 (EWC Database of ETUI-REHS, 2007) EWCs currently in active operation, they are by far the most numerous supranational forum for transnational dialogue at the enterprise level, contributing actively to the development and reinforcement of the European Social Model. Their emergence in the 1980s in the form of the French *comité de groupe* led to the adoption of the EU-wide legal framework in 1994, setting the path for other multinational companies and their employees. In consequence of this unprecedented experiment in introducing elements of democracy into a workplace on the Community level and into the practice of corporate governance, information and consultation rights for employees in multinational companies are now an intrinsic feature of the economic reality of the EU. The fruits of the positive experience with specific bodies dedicated to safeguarding employee rights of information and consultation in an enterprise include further directives strengthening this entitlement on various levels: on the national level, by introducing works councils at plant level (Directive 2002/14/EC); at the transnational level in the form of works councils and board-level representation, embodied by non-executive employee directors in Supervisory Board (e.g. MAN Diesel SE, Allianz SE, Strabag SE), in a *Societas Europea* (SE); again, securing an organized structure for information and consultation rights at the transnational level in a European Cooperative Society (SCE). Even though workers' rights to information and consultation, or even co-management on board level in SEs, are currently secured in many provisions of the *acquis communautaire*, it is EWCs that have accumulated the most experience of all.

Development of transnational collective negotiations in Europe as a functional development of EWC performance

Indeed, there are currently 406 active EWCs (ca. 50% of all active EWCs) which have a record going back ten years or more. This signifies a collective experience and expertise of EWC members participating in these bodies, EWC coordinators from European Industry Federations (EIFs) assisting them, and trade union officers supporting their work. These 406 EWCs represent a powerful potential developed over years in many challenging situations such as restructuring, collective redundancies, mergers and take-overs. Obviously, not all EWCs live up to the reality and challenges of the contemporary economy ridden by intense globalisation and transnational competition that lead to severe and constant cost-saving, restructuring and social-dumping with serious implications for the employees of the companies facing these phenomena.

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1 This paper represents reworked version of an article first presented during a conference „Perspectives of employee participation in Poland in conditions of EU membership" (Perspektywy rozwoju partycypacji pracowniczej w warunkach Unii Europejskiej) in Łódź (Poland), 23-24.04.2007, published in a book by Prof. Stanisław Rudolf „Perspektywy rozwoju partycypacji pracowniczej w warunkach Unii Europejskiej", University of Łódź, 2007.

Traces of such an understanding of the knowledge-based economy are not uncommon nowadays, which is reflected also in the EWC practice. A recent survey, conducted by Professor Jeremy Waddington (ETUI-REHS)[2] among more than 400 EWC members coming from 24 countries and sitting in more than 200 EWCs, shows that information and consultation are a rare luxury enjoyed by no more than 28.1% of EWCs; the very basic right to information was reported to be satisfied in some 44.5% of cases. This information shows that many EWCs do not live up to the expectation of EU legislators, who, already in 1994, recognised transnationalization and restructuring as the most powerful factors shaping economic reality in the years to come and, who anticipated that *"if economic activities are to develop in a harmonious fashion undertakings operating in two or more Member States must inform and consult the representatives of the affected employees"*.[3]

The other side of the coin is, however, that there are also numerous companies which do allow for information and consultation of employees and accept the active role that EWCs aspire to undertake. In such entities the efficient performance of EWCs is, on the one hand, a result of adoption of a modern system of corporate governance that supports or, at least, accepts employee involvement in the handling of change and restructuring. In these enterprises employee representatives are recognised as stakeholders having a direct interest in a company's good performance and as counsellors, whose expertise and contribution can be profitable for the management in terms of shaping restructuring in a socially responsible way. On the other hand, such positive cases of efficacious functioning of EWCs stem from the many years of experience they have managed to accumulate. Active functioning for a decade or more not only gained the EWCs, as collective bodies, broad knowledge and experience, but also enabled them to acquire the confidence indispensable in demanding information, expressing opinions or negotiating with company management. This potential coincided partially with – and, on the other hand, derived from – economic challenges ranging from transnational mergers and acquisitions, restructuring processes, intensified operation of businesses on an international scale, increased mobility of production factors, as well as development of CSR.

Due to the various characters of the challenges that fuelled the advance of capacities of EWCs towards bargaining partners, the characteristics of the agreements (co)signed by the EWCs are assorted. By this token, some researchers, on a general level, categorise the various transnational texts in question as CSR-type accords, restructuring agreements and joint texts referring to various employee rights (Carley/ Hall 2006: 34-35).

Transnational collective agreements – some facts and figures

A result of this accretion of experience combined with economic factors are approximately 95 joint texts signed in some 60 multinational companies, dealing with certain issues of transnational work organisation on the company level. I deliberately did not

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2 Results of the survey "Cross-border Networks of Worker's Participation in Transnational Enterprises" completed by Waddington (2005).

3 Preamble to the Directive 94/45/EC, Consideration no. 10.

use the term 'transnational collective bargaining' (TCB) here, since it causes some political controversy among the various actors concerned by this matter. The most neutral terms for this kind of document are *transnational agreements,* or *transnational texts,* or *transnational negotiations,* or *joint texts*. 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 TCB as a valid term – are somewhat remarkable and will be discussed later in this paper.

The aforementioned 95 texts were, in the majority of cases, signed at big multinational companies, employing high numbers of staff, active in many countries and headquartered predominantly in France, Germany, the Nordic countries or the US. We have observed their proliferation since approximately 2000, although some were signed in the 1990s. For the most part, the agreements were concluded in the metal, food and drinks, chemical and construction and woodwork sectors (in the latter 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 subjects such 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 other (Pichot 2006). In some two thirds of cases they were co-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 signed by national trade unions. The range of multinational firms that have engaged in collective negotiations on the transnational level and signed agreements of the type described comprises major international players like: 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).

Legal capacity of *acquis communautaire* to accommodate transnational collective negotiations

It is obvious at first glance that the issues covered by these transnational agreements are wide-ranging, while the scope of their application is restricted to certain specific 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, looking at supranational, European institutions and structures through national glasses often leads to confusion and can be misleading. The European system is not a simple copy of national reality; it is governed by its own supranational rules, so that the EU is, much more, a structure *sui generis*. Thus, national measures, ideas and concepts may well be inappropriate if used as gauges for European ones.

Being aware of these differences, although useful in analysing the issue, does not resolve it. At this stage the question whether those agreements are indeed linked to collective bargaining, and if yes, what is the character of this link, naturally arises. On the one hand, the specific areas referred to and regulated in these joint texts do undoubtedly represent fragments of the coverage of collective bargaining on the national level. What is more, they do meet the criteria of collective bargaining as defined by the International Labour Organisation: *"Voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by collective agreements."*[4] This 'voluntary negotiation' indeed took place in the case of some of the abovementioned agreements. It was voluntary in the sense that there is no legal obligation or general framework for such negotiations on the European level within a company. Similar negotiations on the European level are known only on a sectoral or inter-sectoral basis in the context of the European social dialogue. In search of an answer to the question of whether the transnational agreements signed in some companies by EWCs can be labelled collective agreements, one can again resort to ILO conventions and recommendations. In Collective Agreements Recommendation, 1951 ILO defines collective agreements as *"all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other."*[5] This definition, while useful and adopted by a commonly acknowledged organisation, is, first of all, rather general and, secondly, implemented on a global, supra-European level. Both these features make it vulnerable to criticism on the grounds that views presented by ILO do not refer precisely enough to the latest developments in European industrial relations. Following this indication, one may set out on a quest for specific EU provisions. The first relevant source would be Art. 12 of the Community Charter of Fundamental Social Rights for Workers but, 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'. Neither does one find a satisfactory legal basis in the Art. 28 of the EU Charter of Fundamental Rights which, in regard to the right to negotiate and conclude collective agreements, stipulates that "*Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels (…).*" Nonetheless, the mention of an appropriate level for conclusion of collective agreements may be a sufficient legal basis for the emergence of the European level of collective bargaining, if social partners deem this dimension necessary and apposite to fit the economic reality. Such an interpretation is found also in the Explanations of the European Convention on the EU Charter of Fundamental Rights[6]: *"The reference to appropriate levels refers to the levels laid down by Union*

4 The ILO Right to Organize and Collective Bargaining Convention (No. 98), 1949.

5 Section II, Article 2 Collective Agreements Recommendation (No. 41), 1951.

6 See: http://register.consilium.eu.int/pdf/en/03/cv00/cv00828-re01en03.pdf.

law or by national laws and practices, which might include the European level when Union legislation so provides.". This opinion shows that Art. 28, once the Constitutional Treaty is adopted, might indeed be considered a sufficient legal basis for adopting a framework for transnational collective negotiations in the EU. This capacity of Art. 28 is, in my view, not lessened by the indication included in the Explanations of the European Convention that this level of collective bargaining might emerge if '*Union legislation so provides'*. This is too a narrow interpretation, as the very 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, which, by the way, are in line with 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*. A corroboration of this view may be found also in Art. 139 of the Consolidated Version of the Treaty Establishing The European Community[7] (ECT) which 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 an element of collective agreements would be the Working Time Directive[8], which in a sense encourages social partners to negotiate working time on a sectoral basis. Summing up, it may be established that transnational collective negotiations are already possible within the current legal frames of general (EC Treaty, EU Charter of Fundamental Rights, Charter of Social Rights) and specific (directives) acts of the Community law.

Establishing that there is legal capacity in the current legislation on the EU level does not, however, mean that all criticism of the concept of transnational collective bargaining is overruled. Some 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. Each member state has its own traditions of collective negotiations which differ in respect to the level on which parties bargain collectively (national, sectoral, inter-sectoral, individual works), 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, binding force of collective agreements, etc.[9] Of course, since the 1990s, trade unions and their organizations have been developing coordination of European collective bargaining, albeit via a different approach aimed at synchronization of national collective bargaining policies as well as at elaborating common viewpoints (Clauwaert et al. 2004). Coordination of collective bargaining is thus oriented more to introducing the European dimension into the local, regional and national level of bargaining (Clauwaert/

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7 C 352/33, 24.12.2002.

8 Council Directive No. 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time. See e.g. Art. 2 and Art. 15.

9 For more details on differences in national collective bargaining systems see Keune (2006, 2004).

Warneck 2006). Despite the difference in approach, the coordination of collective negotiations on the European level might be a good point of departure for the emergence of their EU-wide echelon.

Stepping down from the treaty level to EU directives one finds some further hints regarding transnational collective negotiations. Directive on collective redundancies 98/59/EC, business transfer 2001/23/EC and framework directive on information and consultation 2002/14/EC all provide for information and consultation for 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 a gate to transnational negotiations processes and the European level shall be the most appropriate in a given situation.

At this stage, it seems useful to summarize the above arguments and draw some conclusions. Taking account of the arguments developed above, it becomes clear that the said accords co-signed by EWCs represent a form of transnational collective agreements. This thesis is based on the above conducted analysis of the following aspects of the new transnational collective agreements in comparison to their 'classical' form. From this evaluation the following inferences can be drawn:

a) in terms of matter and content of those joint texts regulating core employee rights and working conditions the substantive agreements resemble collective agreements of traditional type. The level of exactitude might still be different, the national collective accords going more in depth and regulating certain issues more precisely, though the similarity remains untarnished. The core difference, however, is that the core of national collective agreements remain working-time and wages, whereas this is still not the case of transnational collective agreements;
b) the collective quality of the transnational agreements is identical with the one that their national counterparts have: both regulate rights, working conditions, etc. of a generally identified group of employees, who by the mere fact of being employed in a given company are covered by those agreements. It is not important, whether this collective quality of an agreement is based upon the fact of being employed in a company (predominantly transnational agreements) or in a branch of national industry (on national level collective agreements are in some countries concluded mainly on the sectoral level; however, on the European level we also observe the sectoral social dialogue that has been functioning and developing for years now, and which can be viewed as a harbinger of the company level of transnational collective bargaining);
c) as regards conformity with assorted international legal regulations referring to labour market, industrial relations and corporate governance such as acts of ILO or the *acquis communautaire* of the EU, it has been argued that they do include space (or at least do not exclude the possibility of) for accommodating, without any major adjustments, transnational collective negotiations. This statement, however, states only that the condition *sine qua non* has been fulfilled and does not mean that the regulatory framework is sufficient. In other words, the transnational collective agreements are a legal category that is not contrary to any regulation and is

not explicitly excluded by any act. At the same time, precise regulations describing the functioning, binding force, judicial resort, etc. are not sufficiently developed.

Pursuing the review of legal sources including mentions of capacities for European collective bargaining, one finally arrives at the EWC Directive 94/45/EC. This act guarantees employees' representatives the right to information and consultation, defined as an exchange of views, on the level of transnational enterprises. At this point one probably reaches the core of the question, namely, whether this EU act is a sufficient basis for EWCs to engage in transnational negotiations or whether they are already trespassing by exceeding the mandate originally given to them by the European legislator. On the one hand, Directive 94/45 sets no limits on the negotiating powers of EWCs, while on the other hand defining them clearly as bodies or procedures for information and consultation and thereby somewhat restraining the scope of their functioning. At the same time, the European legislator does not set clear boundaries on the consultation competence of EWCs. Arguably, the management and EWCs might opt for consultation leading to conclusion of binding agreements concerning working conditions.

This competence of EWCs and management to conduct consultations whose effect is embodied in collective agreements is, nonetheless, inferred and not explicit. As can be deduced from the above argumentation, even though it may be argued that collective bargaining on a European level can be fitted into the current legal system of *acquis communautaire*, it is clear that there is currently no single act at hand to regulate this issue. For this reason, a study group including renowned researchers in European industrial relations was commissioned in 2005 by the European Commission DG for Employment, Social Affairs and Equal Opportunity to prepare an analysis and assessment of the possibility of introducing an optional legal framework for transnational collective bargaining (Ales et al. 2006). Legal grounds for such a proposal are the provisions of Art. 94 of the Treaty Establishing European Community (ECT; competence to issue laws necessary for the functioning of the internal market) and Art. 28 of the EU Charter of Fundamental Rights. Introduction of such an optional framework might also be anchored in Art. 137, paragraph 1 point (f) ECT stipulating the Community's competence to support and complement the activities in the field of '*representation and collective defence of the interests of workers and employers including co-determination, subject to paragraph 5'*. Some adversaries of the concept of collective transnational bargaining argue, however, that the mentioned paragraph 5 of the same article rules out the possibility of the Community legislator issuing laws in this field. The later reservation is, however, an excessive interpretation which, as the European Court of Justice (ECJ) ruled in the Albany case[10], is hardly defensible under the circumstances in the context of Art. 94 ECT. In concrete terms the ECJ's verdict in the Albany case means that Art. 137 (5) does not exclude the right of collective bargaining from the regulatory scope of the Community[11]. In any case, once the Constitutional

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10 ECJ Case C-67/96

11 "55. In that connection, Article 118 of the EC Treaty (numeration of ex Articles 117 to 120 of the EC Treaty was changed into Articles 136 to 143 EC Treaty) provides that the Commission is to promote close cooperation between Member States in the social field,

Treaty is adopted the regulatory scope of Art. 137 (5) will be modified by Art.28 of the EU Charter of Fundamental Rights, which provides capacity for collective bargaining on EU level. Nonetheless, possibly with the aim of avoiding any unnecessary polemics stemming from paragraph 5 of Art. 137 ECT, the abovementioned report of the study group indicates Art. 94 ECT as its legal basis rather than Art. 137 which is more specific and refers to social partners and their rights. Another reason for this choice might be the consideration that at the present time there is a more frequent tendency for the emergence of negative phenomena of competition between the Member States in terms of social standards. This kind of rivalry often leads to a downward spiral and replaces competition based on quality of products. In this way it may endanger or hamper a harmonious development of the common market and hence Community countermeasures may be more justified if anchored in Art. 94 ECT, which has the function of safeguarding a coherent and sustainable functioning of the internal market. Nonetheless, in view of the above argument, it seems that coupling a reference to the more general goals stipulated in Art. 94 with the specific instruments provided for by Art. 137 ECT would represent a more rational and coherent approach.

From the above analysis of the legal conditioning of the matter one undisputable inference can be drawn: currently all the transnational agreements signed by EWCs (and by other actors as well) are concluded without a legal framework. A consequence of being deprived of a proper legal anchoring is their legal ambiguity: they are neither against the law, nor in line with binding provisions. Seeking to characterise their existence in legal terms one could say that these accords subsist in parallel with the law. The corollary is a situation in which there are no means or procedures for a legal enforcement of these contracts, no possibility to seek legal redress or recourse to labour courts on an appropriate level, etc. Having stated that, one can legitimately ask whether, in view of this lack of a legal background, it is still justified to call these accords of assorted nature (declarations, joint texts, common positions, etc.) agreements? Agreements assume an equal footing between the parties and their reciprocal obligations, whereas in case of the transnational joint texts it might occur that in a situation of conflict they could turn out to be unilateral declarations by management, signed out of sheer 'generosity' or the will to be perceived as a socially responsible employer. This is of course a worst-case scenario, yet it should not be deemed impossible, especially if compliance with one of these agreements were about to entail substantial financial burdens for a company.

In order to handle some of the questions mentioned above, it seems necessary to put some structure in terms of terminology and criteria applied to describe the phenomenon of transnational collective negotiations. Hitherto, a lot of confusion was aroused due to the lack of agreement upon categories and terms used in the debate. Various actors, such as the European Commission, trade union organizations, European Industry Federations and researchers have been using diverse terms, which often

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particularly in matters relating to the right of association and collective bargaining between employers and workers."

brought about confusion. In my view, for the sake of better understanding, it could be useful to differentiate between, on the one hand, 'collective bargaining', exercised traditionally by trade unions as organizations mandated and legitimated to perform this role, and, on the other hand, transnational collective agreements, discussed in this paper. It appears worthwhile to keep applying the term '(national) collective bargaining', since it represents a specific kind of agreements that have working time and wages at its core. On the other hand, since it seems rather distant that these two issues will become a subject of collective negotiations on transnational company level it seems useful to apply the term 'transnational collective agreements' to this category of texts. Such texts falling into the category of 'transnational collective agreements' must, however, represent real agreements in the legal sense, i.e. they must be accords between equally positioned partners that bind themselves contractually to respect the provisions agreed upon. The latter condition, in consequence, excludes documents such as codes of conduct, joint statements, CSR declarations, etc. that are unilaterally adopted by company management or that do not fulfill formal criteria of agreements. Furthermore, agreements are contracts produced as a result of negotiations. By this token, 'negotiations' should not be confused with 'consultation', which is currently defined by the EU legislation as an exchange of views. Arguably, and in line with the wording of EU Directives on employee participation, consultation capacity of employee representation bodies such as EWCs is not equal to bargaining competence and mandate to enter into binding collective contracts.

In conclusion, however, it needs to be mentioned that this line of argument is just a proposal of looking at the issue. In reality, after applying these criteria, it is possible that the scale of the phenomenon, i.e. the number of agreements which indeed fit the pattern of 'transnational collective agreements' will turn out to be much smaller than one assumes now. In my view, however, the fact of differentiation between national collective bargaining and transnational collective agreements neither invalididates the thesis that the latter represent a new, transnational counterpart of the former ones, nor does it diminish the significance of this development. Despite the fact that they are not identical in scope (which might obviously change in future) they both seem to follow the same pattern, though on various levels.

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

The European Commission, recognising this legal ambiguity, noticed the problem already back in 2004, when, in its communication '*Partnership for change in an enlarged Europe'* (COM 2004) in the section '*Preparing further developments'*, it stated:

> '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.

Already then the Commission envisaged introduction of a proposal for the requisite legal structure and consultations on this subject with European social partners. Formally, the aim of development of an optional legal framework was included in the Social Agenda 2005-2010 one year later when the *Communication on the Social Agenda* (COM 2005) was announced. In this document the Commission argued that:

> '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, introduction of a legal framework for transnational collective bargaining[12] represents a further step towards completion of the common market. It is difficult not to agree with this reasoning. If one glances at provisions regulating various aspects of international operation of companies, their trans-border mergers, taxation, etc., and compares it with existing legislation regarding rights of workers in their transnational dimension, it becomes clear that there is some imbalance to the detriment of the latter at stake here. A reason for this might be the fact that at European level social aspects have long been regarded as residuals of policies of free competition and free movement of economic subjects (Schoemann 2006: 299). It seems thus that the emergence of transnational collective agreements is a token of bringing employee strategies on par with business acting globally. Hence, arguably, it represents a natural consequence of globalisation and an obvious development in industrial relations.

As the Commission rightly observes in the *Communication on Social Agenda 2005-2010*, the lack of such an option to negotiate collectively on transnational level could be an obstacle to achievement of 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 the achievement of the goals of the Lisbon Strategy. With this information in the background, the Commission assigned a group of academics, led by professor E. Ales, the task of preparing a study on transnational collective bargaining. Specific reasons and objectives for initiating this research into the matter were the following (Ales et al. 2006):

- 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;

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12 The term 'transnational collective bargaining' is used here (and in further paragraphs discussing the European Commissions position) in line with the original terminology applied by the European Commission in the '*Partnership for change in an enlarged Europe', 2004* and not in line with the postulate of differentiation between '(national) collective bargaining' and 'transnational collective agreements' formulated in this paper.

- 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 entrusted with this task adopted a research method based on the analysis of instruments and experiences in the field of transnational dialogue on the 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 level of collective negotiations at the European level. Firstly, an examination of the contemporary transnational tools at European level was carried out and, in this respect, the research team positively appraised the European sectoral dialogue. Secondly, a similar analysis was conducted in regard to transnational tools at corporate level, notably those deriving from the EWC and SE regulations. Concerning the second part, the study group arrived at the conclusion that the company echelon of the transnational instrumentarium reveals, alongside some strong points, considerable weaknesses. At the end of the analytical section of the report the research team inferred that there is a need for an institutional acknowledgement and development of a European level of transnational collective bargaining that would complement 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, which were quite often involved in these collective negotiations and whose members often signed the final agreements, thereby go beyond the original function designed for them; from information and consultation bodies supposed to obtain information on a company's performance and employment trends, they go on to undertake negotiations and codetermination functions on matters of skills and training, health and safety, equal opportunities, (vocational) training - topics that usually constitute the main issues for the European sectoral dialogue committees. Trade unions, on the other hand, often feel threatened in their traditional domain of employee representation by the enhancement of the EWCs' areas of activity; at the same time, the legislator in the EWC Directive did not provide for any tools minimising the risk of a clash between the 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 overlap and even conflict between these two forms of employee representation; additionally, the aforementioned European social dialogue committees are also directly concerned by the developments. It is legitimate to expect that, since the transnational agreements are often signed on the occasion of restructuring processes or restructuring is their common theme, the potential for their emergence will grow as restructuring intensifies further 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 rubs between the actors of the labour world. Moreover, adopting institutional frames for

such agreements could help develop their anticipatory character instead of a reactive approach in cases of restructuring, which dominates nowadays.

Lacking legal framework for transnational collective negotiations – a case for the European Court of Justice

In the near future, we are probably not going to witness an EU legislation on this matter. Thus, an apposite positioning of transnational collective negotiations in the system of European industrial relations will probably be determined by the European Court of Justice (ECJ). The reason for this is the fact that it seems that the lack of a legal framework for a valid conclusion of transnational collective agreements is already generating serious legal problems affecting not only employees but also companies carrying out international business activities. Presently before the ECJ, the case of a Latvian company Laval (Vaxholm)[13] is being ruled with an outcome expected soon (for details refer for instance to Clauwaert/Warneck 2006). In this case the European Court needs to answer the question of whether, in the absence of relevant legislation at the EU level, national industrial relations systems allowing application of different standards set by collective agreements to different groups of employees do not infringe the prohibition of discrimination on grounds of nationality on the one hand, and the freedom to provide services on the other (ibid.). The second question raised by the Laval case concerns the predominance of domestic collective agreements over foreign ones applicable to employees of foreign companies working in another state (for further reference see Ahlberg/Bruun/Mamlberg 2006: 155). The ECJ will have to clarify whether such a situation is or is not contrary to the EU prohibition of discrimination on grounds of nationality. Questions of similar importance referring to the hierarchy and balance between EC social policy and EC economic policy (freedom of establishment and freedom to provide services) were raised in the Viking case. This lawsuit, also pending ruling by the ECJ, will provide very important impulses and guidelines for the future shape of an equal footing between economic freedoms and employee rights of workers (for further reference see Blanke 2006: 251).

EWC Directive 94/45/EC and EWCs' entitlement to engage into TCB

The central problem with the concept of an optional legal framework supplementing existing levels of collective bargaining seems to be its proper positioning in various respects. There are many practical questions that need to be decided by the Commission before any consultation with the social partners takes place. Seemingly, the most important one has already been touched upon in this paper and concerns the actors eligible to conduct transnational collective negotiations and conclude the relevant agreements. A reading of EWC Directive 94/45/EC, especially Art. 1 (a) of the Annex 'Subsidiary requirements', will lead to the immediate discovery that *"The competence of European Works Councils shall be limited to information and consultation (…)"*. 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 ignores, however, the teleological inter-

[13] C-341/05.

pretation of the Community legislator's intention, namely that the competence of EWCs should remain confined to these two explicitly mentioned functions. As has been argued earlier in the paper, consultation is not identical with negotiation. Regarding the latter, as far as EWCs are concerned, the question of their sufficient mandate emerges, too. Firstly, as already mentioned, they were intended to perform information exchange and consultation and it was for these purposes that the delegates at individual sites were elected. If now the same delegates sign agreements modifying working conditions and sometimes even the work contracts of individual employees, the reproach of a lack of legitimacy for such actions automatically arises. This charge becomes even more serious and valid in a situation where such EWC members approve accords with company management that, in consequence, have binding effects on employees of the company who were not involved in the election of these EWC delegates, or where EWC composition is not based on the principle of proportionality. Such a situation takes place in cases where a certain subsidiary is not made part of the information and consultation procedure in the company (no entitlement to send delegates to EWC), or is only passively (receptively) participating 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 effect which an announcement of elections for delegates to an information and consultation body would have on their turnout compared to the impact that would be exerted by a similar announcement, but about voting for members of a body with co-determination competencies. Arguably, the turnout in the latter case could be much higher than in the former situation.

Secondly, EWCs are not trade union bodies and collective bargaining, as we know it on the national level, has always been a domain of trade unions. The reason for exclusive mandate of trade unions has always been their specific authorization which they possess entitling them to represent the interests of employees, especially in situations which require involving into binding commitments recognised by law. In the EWC Directive 94/45/EC, however, there is no recognition of either trade unions or their organisations on the European level (e.g. EIFs), which strengthens the arguments of opponents of extending EWCs' rights to a mandate for conducting transnational collective negotiations. A way of breaking this deadlock and adding legitimacy to the existent transnational agreements could be an imposition of a requirement to have them ratified or co-signed by national trade unions in countries in which they are implemented.

Yet EWCs are not the only 'problematic' actors in the whole set up. It is also unclear who shall negotiate on the side of labour world: the European Industry Federations (EIFs) who have a mandate in the European sectoral dialogue, or maybe the already mentioned national trade unions who were hitherto involved in negotiations on company echelon? EIFs seem better equipped to perform this function due to their European background and resources; yet national trade unions have been traditionally involved in collective bargaining on the corporate level in individual Member States. One of the big questions is how to reconcile these stakeholders and appoint the one likely to be best equipped to perform these functions. Recognising this overlapping of competencies and its significance for the success of the introduction of

transnational collective bargaining, the study group's proposal for an optional legal framework recommends establishment of joint negotiating bodies; these organs could consist of representatives of various parties or even stakeholders, including EIFs, trade unions and EWCs.

Similar questions apply to the side of management. Confusion about who should negotiate such transnational collective agreements for employers, with all its 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 which supplied a clear definition of the roles of the parties concerned. According to this concept EWCs would have the task and competence of assisting in triggering off procedures for collective bargaining, though without the mandate to unilaterally start and engage in transnational negotiations with management. EWCs, after obtaining a mandate from European trade union organisations which would be involved in transnational negotiations from their very beginning, would initiate talks with the 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 initiate transnational negotiations unilaterally.

Turning to legal facets of the proposed supplementary framework, one needs to ask about the hierarchy and status of these acts. Shall they have predominance over national collective agreements? If not, then another question emerges concerning, notably, whether it will be possible to guarantee that these transnational accords respect national collective agreements in all the countries to which they apply. 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 study group, such agreements would be deprived of the quality of automatically binding power and would be granted this attribute indirectly via an implementation by unilateral managerial decisions adopted by all national subsidiaries. From the perspective of a balanced footing of contractual parties, such an approach discriminates against the labour side parties by putting them below par in comparison to managers. As such, the proposal of this particular solution 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 good quality of application of these agreements, questions of legal enforcement, monitoring, dispute resolution and recourse to independent courts at the relevant level must be clarified. First of all the monitoring mechanism, which would help identify malfunctions and abuses or breaches of transnational agreements, should be defined. Further, in case of legal conflicts, procedures for their resolution before courts would have to be laid down. At this point the question of court jurisdiction concerning a choice between either the competence of national labour courts or the ECJ (at least as a last instance

for interpretation) would have to be answered. All these questions still remain unanswered (except for the unquestionable general competence of the ECJ to decide in cases involving interpretation of the *acquis*). Similarly, the report of the study group includes no clear concept of enforcement measures. This question has to be addressed, most importantly, in 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 commission for a study (Clauwaert/ Warneck 2006).

Conclusions

From the above analysis several inferences can be drawn. Firstly, the answer to the leading question whether EWCs' involvement in conclusion of transnational collective agreements should be viewed as a positive functional development or rather as illegitimate trespassing on the turf of trade unions or their organisations is in both aspects affirmative. EWCs' engagement in this form of co-determination or co-management should indeed be perceived as a positive advancement of the efficacy of their work. EWCs have often been criticised for their reactive mode of operation and hence, if they try to move on to the active side, they should not be condemned again, so that they are not confronted with contradictory signals. At the same time, if they enhance the scope of their work, they should not do so without an appropriate legal basis and mandate from their constituencies, i.e. employees. As long as there is no legal framework for transnational collective negotiations, EWCs, when engaging in this field of activity, will be running on the verge of legality, as they were created and designed to perform information and consultation functions. At the same time, this advancement of EWCs' operation stemming, on the one hand, from their extensive know-how accrued over many years and, on the other hand, from the permanent process of restructuring characterising the current economy, should be seen as a functional development aiming at filling a certain vacuum. In this context, it should be clearly stated that EWCs do have an important role to play in supporting transnational collective negotiations. This drive at creating a new level of collective negotiations can be viewed from the perspective of the concept of neo-functionalism known in political science by the motto *'forms follow functions'* (See for instance Haas 1976; Mitrany 1975: 25-37). According to the logics of neo-functionalism, once the practical development has taken place and become established, an institutional superstructure should follow in order to accommodate the change. Therefore there is a need for a legal framework for transnational collective bargaining/negotiations. As has been argued, one finds ample ties for anchoring such a legal frame in the current *acquis* .The bonds currently available are, however, insufficient to avoid: *a)* overlapping of transnational collective negotiations with their national counterpart, company level bargaining and the European sectoral social dialogue; *b)* consequent overlapping of competence between actors, thereby generating a potential for clashes between various social partners. Similarly, current legislation is deficient in terms of proper enforcement, imple-

mentation, hierarchy and conflict settlement of the transnational collective agreements. Since, due to contradictory opinions of the labour world and the employers' organisations, there is little chance that they will be able to settle this issue by means of self-regulation, the European Commission should carry out the initiative of establishing the European echelon 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. This should not happen, however, before the review of the EWC Directive 94/45/EC has been completed and amendments aimed at closing the loopholes and securing the correct exercise of information and consultation rights in their proper form have been implemented[14]. Only then will all EWCs have the necessary capacities guaranteed by law enabling them to support national trade unions and their European organisations in efficacious collective negotiations across the borders.

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