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

Book: ‘Transnational collective bargaining at company level. A new component of European industrial relations?’

Romuald Jagodziński, European Trade Union Institute CRIMT Conference 25-27 October 2012 Montreal
Agenda

1. Introduction: basic facts about TCB and EWCs
2. EWC related reasons and motives for emergence of TCB in Europe
3. THE LEGALITY OF EWCs’ involvement in TRANSNATIONAL COLLECTIVE BARGAINING
   - 4.1 ILO Provisions referring to (transnational) collective bargaining
   - 4.2 Parties eligible to bargain collectively
   - 4.3 EU acquis reference to TCB: THE TREATY LEVEL
   - 4.4 EU secondary acquis’ and EWCs’ entitlement to engage in TCB
4. QUESTIONS PRESSING FOR ANSWER
5. CONCLUSIONS
Traditional exogenous pressures

- Pressures from employers (also crisis)
- Pressures from governments/lawmakers

Collective bargaining and trade unions:
- Traditional competence / stronghold
- Crucial tool
- Central topic

NEW internal DUAL challenge:
- level: Transnational CB
- actor: Non-union representatives of workers interests
Issue’s relevance

- E. Pichot’s mapping document 2006
- EC commissioned study by Ales et al. 2008
- **European Commission** invites stakeholders to submit their views on the future of transnational company agreements
  - staff working document 10/09/2012
  - Views on challenges and opportunities faced by TCAs
- ETUC Executive discussing the issue now
  - Many internal tensions and controversy
What capacity and role do EWCs have in building a new transnational level of collective bargaining?

- Two dimensions of extension of EWCs roles:
  
  1. development of EWC practice + increasing efficiency + the **horizontal functional extension** of their scope of competence
     
     (‘colonisation’ of new areas of competence beyond those originally defined directive 94/45/EC)

     → **ambiguity concerning the roles and expectations** towards EWCs have arisen: the thin line between effective consultation and co-determination (signing TCAs)

  2. **Vertical** power-related spill over: a **transition from information and consultation to negotiating competences**

1 + 2 = **functional spill-over in EWC roles**

+ are EWCs competent to negotiate? (negotiation capacity + mandate)
+ where’s the line between (effective) consultation and negotiations?
Introduction: background facts

- Transnational Company Agreements (TCAs) are an emerging feature of social dialogue in multinational companies.
- Provide for voluntary solutions agreed between the management and trade unions, workers' representatives.
- Cover issues such as:
  - Anticipation of change and restructuring,
  - Training
  - Mobility
  - Health and safety at work + working conditions
  - Sustainability and governance
  - Equality + diversity + discrimination
  - HR policies
  - Frameworks for transnational bargaining and global works councils
  - Wages
  - Subcontracting
  - Environment
  - CSR
The reason for the stir-up: EWCs involvement in TCAs

- TCAs have gained significance over the last decade.
  - By early 2012, approx. 215 of such agreements had been recorded
  - covering more than 10 million employees in multinational companies
  - most of them with headquarters in the EU
- Signatory parties vary:
  - at least 80 (co-)signed by European Works Councils
    - In some two-thirds of cases TCAs were signed by both an EWC and an international/European trade union organisation (Pichot 2006)
  - At least 66 (co-)signed by national trade unions
  - At least 41 (co-)signed by European trade union organisation
  - At least 108 (co-)signed by global trade union organisation

Transnational Collective Bargaining – are we quite there yet?

- **issues** covered by these TCA are **wide-ranging**, while the **scope** of their application is **restricted to certain specific aspects** of working conditions (soft topics)

  - → they are still far from having achieved the status of collective labour agreements signed at national level
  - But looking at supranational institutions through national glasses → confusion
    - *Sui generis* construction / development
    - Supranational ≠ national institutions
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1. QUESTIONS PRESSING FOR ANSWER
2. CRITICAL VIEWS ON THE EMERGENCE OF TCB
3. CONCLUSIONS
EWC related reasons and motives for emergence of TCB in Europe: **quantitative developments**

- **Quantitative**: steadily increasing number of EWCs
  - EWC Bodies ever created: **1243**
  - EWC Bodies still active: **1017**
  - Multinationals having an EWC: **944**
  - Multinationals with EWC negotiations ongoing: **61+**

- the most numerous supranational forums for transnational dialogue at the enterprise level in Europe

- **Institution building capacity**
  - One of the pillars and inspirations for the EU legislation in the area of workers’ representation
  - symbiosis and mutual reinforcement with SEs (spill-overs) (Jagodzinski 2012 forthcoming)
Development of EWCs over the years

Source: ETUI database of EWCs, 2012.
EWCs’ growing experience as transnational actors

- one of explanations of the reasons for EWC involvement in TCAs is, arguably, their growing experience as transnational actors
  - currently 434 (44,5%) active bodies (EWCs and WWCs) existing for 10+ years
  - experience in dealing with restructuring
  - confidence in demanding information, expressing opinions and/or negotiating with company management
  - Pragmatic advantage: custom tailored solutions on company level
    - EWCs (naturally) becoming invited by MNCs to elaborate contractual solutions to the social challenges
TCAs and EWCs: dismissing criticism of being a burden

- **EWCs do not create any competitive disadvantages** and, are present among companies scoring best in stock exchange markets (Vitols 2009)
- **Socially responsible MNCs** prove the opposite: 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 (restructuring)
Basic data on TCAs (Pichot 2006 and other)
- Signatory parties
- Number of companies
- Content

Goals:
- demonstrate the object of analysis
- Demonstrate similarity/comparable quality/character of TCAs to national collective agreements
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   4.2 Council of Europe *acquis* on consultation and CB
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Questions with regard to TCB in international law

- Responses sought
  - Collective bargaining vs. consultation
  - Levels of CB
  - Parties eligible
The ILO defines collective bargaining as
‘*Voluntary negotiation* between *employers or employers’ organizations and workers’ organizations*, with a view to the regulation of *terms and conditions of employment* by *collective agreements*’

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

**Collective Agreements Recommendation of 1951**

‘*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’
Question of the appropriate level of collective bargaining

‘(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.’

Art. 4 of ILO Recommendation 163 on the promotion of collective bargaining
What levels can TCB take place on? – ILO and CoE

- **the ILO catalogue of levels** is NOT a closed one
  - rather a more detailed exemplification and definition of the phrase ‘collective bargaining is possible at any level whatsoever’ which covers perfectly the TCB (sensu largo: company level and ESD)

Art. 4 of ILO Recommendation 163 on the promotion of collective bargaining

- **European Social Charter** recognises
  - ‘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)
  - lack of any further specification of CB
    - *unresolved* whether the transnational level is also included alongside the traditional national level.
    - HOWEVER: Art. 22 no specification of level BUT a reference to an undertaking, i.e. a company.

- Implied powers: MNCs operate transnationally → Art. 22 + Art. 6 allow to infer that **CB can take place in all companies, independent of their scope of operations.**
4.1 ILO Provisions referring to (transnational) collective bargaining - conclusions

- TCAs do **meet the criteria of collective bargaining as defined by various acts of the International Labour Organisation**
  - following ILO acts analysed:
    - the 1951 Collective Agreements Recommendation;
    - the ILO Right to Organize and Collective Bargaining Convention (No. 98, 1949);
    - ILO Convention No. 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 No. 154 of 1981 on promotion of collective bargaining;
    - the ILO Recommendation no 163 of 1981 concerning the promotion of collective bargaining
Council of Europe acquis on TCB

- European Social Charter (revised version):
  - includes the right to collective bargaining (Part I, point 6 and Part II, Article 6).
- Article 6 of the Charter - no definition (but references) in a list of conditions for the right to CB 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;
  4) recognising the right to collective action in case of conflicts of interest.

etui.
4.2 Parties eligible to bargain collectively

- Classical composition: social partners (employers and labour)
- Main question concerns workers’ part
  - Exclusively trade unions? - NO
    - Workers’ organizations (ILO Convention No. 154 of 1981 on promotion of collective bargaining art. 2)
    - Workers’ representatives (Collective Agreements Recommendation No. 41 of 1951, ILO Convention No. 150 of 1978 on labour administration; ILO Convention No. 154 of 1981 on promotion of collective bargaining art. 3)
4.1 ILO Provisions referring to (transnational) collective bargaining

How is CB and CA defined?

- Collective bargaining *(ILO 1949)*
  "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"

- collective agreements *(ILO 1951)*
  “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”

What levels can TCB take place on?

- the ILO catalogue of levels is not a closed one, but rather a more detailed exemplification and definition of the phrase ‘collective bargaining is possible at any level whatsoever’ which covers perfectly the TCB (sensu largo: company level and ESD)
ILO and CoE acquis analysis - conclusions

- ILO and CoE conventions and recommendations, even though sometimes only general or incoherent (e.g. with regard to parties eligible), do not prevent concluding TCAs.

- Inference: ILO and CoE norms provide a sufficient (minimum) legal framework for TCB as an eligible level of collective bargaining.

- ILO and CoE acquis does not limit the collective bargaining only to employers’ and workers’ representative organisations
  - possibility for workers’ representatives to engage into collective negotiations (inference: EWCs too)
Two questions:

1. **whether (T)CB is at all within the EU’s regulatory competence**
   
   1. debate reopened in connection with preparation of the Commissions study on TCB in 2006 (Ales et al. 2006)
   
   2. The indicated legal grounds for the proposal:
      
      1. **Art. 115 TFEU** (previously Art. 94 of the Treaty Establishing the European Community: *competence to issue laws necessary for the functioning of the internal market*) and
      
      2. **Art. 28 of the EU Charter of Fundamental Rights** (right of CB and action)

   3. 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** the activities in the field of ‘**representation and collective defence of the interests of workers and employers including co-determination(...)’**.

3. **Conclusion**: EU has the necessary capacity for collective bargaining on EU level and the possible framework
2\textsuperscript{nd} question: **What concrete provisions of the EU acquis deal with specific aspects of TCB?**

- four distinctive components of Art. 28 (Veneziani 2006)
  - The process (collective bargaining)
  - The outcome (a collective agreement)
  - The actors (workers, employers, their organisations) \(\rightarrow\) seems to cover all possible actors in collective bargaining, regardless of whether they are organised or not (i.e. workers’ representatives too \(\rightarrow\) EWCs too?)
  - The levels (the ‘appropriate levels’)

- in Art. 155 of the Treaty on Functioning of the EU (TFEU): “Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements”
What’s the legal definition of consultation and the border to bargaining?

- consultation should take place “at the relevant level of management and representation, depending on the subject under discussion”
  - Collective Redundancies 98/59/EC, business transfer 2001/23/EC and framework directive on information and consultation 2002/14/EC

EWC Directives 94/45/EC and the recast directive 2009/38/EC

- 1) can EWCs as non-trade union bodies representing workers be parties to transnational collective agreements;
- 2) is signing collective agreements by EWCs within the limits of powers conferred to them by means of existing law
EWCs competence to bargain: legalistic vs. voluntaristic views

1. Voluntaristic approach:
   1. 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 TCB
   2. full-fledged transnational negotiations (Laulom 2006): 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
     - EWC directive is not a ‘ceiling’, but rather a ‘floor’
       - = a minimum standard or a point of departure
       - the outcome of I&C arrangements is not prescribed, not limited and left to the discretion of the parties
     - no express prohibition to overstep the boundary separating consultation from bargaining
     - Key determinant: voluntarism of the contracting parties

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1. **Legalistic approach:**
   1. Focus: when I&C rights of EWCs overlap with co-determination and collective bargaining competencies?

  - consultation should take place ‘at the relevant level of management and representation, depending on the subject under discussion’.
EWC Directives 94/45/EC and the recast directive 2009/38/EC

1) can EWCs as non-trade union bodies representing workers be parties to transnational collective agreements; → YES

2) Is signing collective agreements by EWCs within the limits of powers conferred to them by means of existing law?

- European legislator did not set clear boundaries to the consultation competence of EWCs in the body of the directive
- BUT teleological interpretation…
  - 2009/38/EC: ‘express an opinion…’ BUT ALSO ‘collectively represent interests of employees’
- BUT Non-legal problems with EWCs
  - Legitimacy – elections, turnout, proportionality
EU SECONDARY ACQUIS’ AND EWCs’

- **Directive 94/45** set no limits to the negotiating powers of EWCs,
  - while defining them clearly as bodies or procedures for information and consultation: "The competence of European Works Council shall be limited to information and consultation (...)" (Annex)
  - BUT: *No limit to ‘exchange of views’*

- **recast directive 2009/38/EC** definitions I&C significantly amended:
  - Preamble: ‘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 (...)’
  - if the EU legislator would consider negotiating powers to EWCs it would shape the wording of the new definition of ‘consultation’ around the definition used in Directive 2002/14/EC → consultation is done ‘with a view to reach an agreement’ (Sachs-Durand 2010: 317)
  - representing collectively the interests of employees (Art. 10.1) → extensive interpretation possible
Conclusions (1)

- currently all the transnational agreements signed by EWCs (and by others actors as well) are concluded without a specific legal framework
- in light of the existing international and EU legal sources it is not prohibited for workers’ representatives to engage in CB on behalf of workforce
  - EWCs could be considered eligible, especially based on the art. 10.1 of the new recast directive, to sign TCA
    - BUT: specific mandate to participate in consultations
- CONCLUSION: EWCs do not have a mandate to pursue such collective bargaining
Conclusions (2)

- At the same time EWCs’ engagement in this form of co-determination is an expression of a positive advancement of the efficacy of their work
  - Contradictory signals for EWCs: more effective consultation vs. opposition to advanced forms of consultation
  - Natural development to fulfill a vacuum on transnational company level
  - Risk of a wasted resource/chance in TCB
  - EWCs should be given a prominent role in TCB
Important questions

- **Applicability of TCAs on national level**
  - What in case of conflict?
  - hierarchy and status of TCA?
  - direct applicability to all signatory parties / transposition measures necessary to ensure their binding effect?
  - Legal enforcement, monitoring, dispute resolution and recourse to independent courts?

- **Affordability/costs of NOT adopting** an optional legal framework
  - Legal certainty

- **Affordability/Costs of adopting** a legal framework
  - Infraction of trade union powers
  - who shall negotiate on the side of labour world?
Theoretical model

- Theory of integration: **neo-functionalism**
  - the motto ‘forms follow functions’
  - spill-over effects of effective consultation by EWCs (see also Bethoux 2008: 24)
  - justify the need for adopting a legal framework for TCB
    - pragmatic development functions precede the creation of institutional superstructures
- ‘**structure before action**’ (Turner 1993)
  - **on national level** ‘social movements give rise to organization and institutionalization’
  - **International level:** networking and further institution-building on the part of representatives of already established organisations (themselves being products of social movements)
  - Thus: **new structures of representation** (in our case those involved in TCB) **may precede or even occur in absence of social movements**
Conclusions

- positive functional enhancement of EWCs’ operational capacities and experience
- Currently all TCAs are signed outside of/in parallel to binding law
- there is no ban in the existing international and EU legal sources on workers’ representatives engaging in collective negotiations on behalf of the workforce
- A full reply to EWCs involvement in TCB must also take into consideration the legitimacy aspects
  - → EWCs lacking mandate to bargain (in majority of cases)
- for EWCs to participate in TCB, both the legalistic and legitimacy requirements must be fulfilled