

# BUILDING AN ENABLING ENVIRONMENT FOR VOLUNTARY AND AUTONOMOUS NEGOTIATIONS AT TRANSNATIONAL LEVEL BETWEEN TRADE UNIONS AND MULTINATIONAL COMPANIES







**“BUILDING AN ENABLING ENVIRONMENT  
FOR VOLUNTARY AND AUTONOMOUS NEGOTIATIONS  
AT TRANSNATIONAL LEVEL BETWEEN  
TRADE UNIONS AND MULTINATIONAL COMPANIES”**

**Final Report**

This report was issued by the ETUC as result of the project on “Building an enabling environment for voluntary and autonomous negotiations at transnational level between trade unions and multinational companies”. The project was carried out in partnership with EPSU, ETF, industriAll and UNI Europa.

This project was co-funded by the European Commission – DG Employment, Social Affairs and Inclusion. Grant Agreement VS/2014/0371.



## **FOREWORD**

First forms of transnational collective bargaining started developing in the 1960's but only in the 1980's, after *Val Duchesse*, did it become institutionalised and started playing a crucial role through Autonomous Agreements at cross-industry level and Sectoral Social Dialogue Committees.

In the past few decades, as a result of an even deeper integration of the Single Market, company-level collective bargaining came under the spotlight as well. However, while transnational information and consultation rights of workers were enshrined in a European legal framework, the same has not yet happened regarding Transnational Company Agreements, even though the European Commission has been showing an interest in TCAs for years.

Thus, the continuing lack of a framework of rules has hampered the effective potential of TCAs and created problems of implementation and enforcement. Being a transnational phenomenon, it seems coherent to advocate for a set of enabling rules at EU level in order to better define the playing field where trade unions and MNCs may autonomously and voluntarily mediate their interests.

In the aftermath of the conclusions of the Expert Group on Transnational Company Agreements promoted by the European Commission (November 2011), the Executive Committee of the ETUC concluded that more and better TCAs<sup>1</sup> would need a stronger cross-sector coordination and a roadmap to achieve a framework of rules for transnational negotiations with multinational companies. A few months later, in October 2012, our proposals started taking shape when the Executive Committee, answering to a public consultation of the European Commission, raised the need for an optional legal framework, which would respect the autonomy of social partners and the procedures used by ETUFs. The ETUC Position annexed a description of the procedures established by ETUFs and their qualifying features<sup>2</sup>.

The debate then entered into an institutional stage. The European Commission recognised the social dialogue potential of TCAs<sup>3</sup> and the European Parliament submitted a request to the Commission to consider the possibility of issuing a European optional legal framework to support transnational negotiations, and to set up mediation mechanisms to settle disputes linked to the enforcement of these agreements<sup>4</sup>.

In March 2014, The ETUC asked three eminent professors<sup>5</sup> to issue a Report to set the way forward for establishing an optional legal framework for TCAs. The Report identified a solid basis to support trade

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<sup>1</sup> More and Better European Company Framework Agreements: Enhancing Trade Unions in Transnational Negotiations with Transnational Companies (Discussion Note) Executive Committee 5-6 June 2012

<sup>2</sup> ETUC Position: European Commission's consultation on the Transnational Company Agreements (TCAs). Position of the ETUC adopted by the ETUC Executive Committee at their meeting on 17-18 October 2012

<sup>3</sup> Commission's Staff Working Document SWD(2012)264 final, "Transnational company agreements: realising the potential of social dialogue"

<sup>4</sup> Report of the European Parliament on cross-border collective bargaining and transnational social dialogue, (2012/2292(INI))

<sup>5</sup> S. Sciarra, M. Fucks, A. Sobczack, "Towards a Legal framework for Transnational Company Agreements", Final report of the project co-financed by the European Commission

union demands for clearer and more transparent rules for transnational negotiations with multinational companies. The ETUC, together with the ETUFs, urged the Commission to advance a proposal for a decision introducing an optional legal framework and set the way forward to achieve this objective<sup>6</sup>.

The ETUC Congress fully confirmed such positions and proposals. During this period the ETUC, in cooperation with ETUFs, organised seminars, study events and conferences which involved its member organisations and opened a dialogue with the European Commission and the employers' associations.

This is the way that the ETUC, in strict cooperation with the ETUFs, has run a new project, which led to publication of the present report, where autonomy and voluntariness are the key elements for building an enabling environment for TCAs. We are indeed advocating for framework rules aiming at supporting what already exists in practice – as designed by the European Trade Union Federations, both internally and in cooperation with the multinational companies involved in transnational negotiations – while providing bargaining agents with solutions to overcome the problems of enforcement which currently occur. Thanks to the precious help of our group of experts we better understand the topic and look at it from different points of view. This contributes to better frame the discussion on our proposal for an Optional Legal Framework for voluntary and autonomous Transnational Company Agreements.

Our hope is to continue discussing with trade unions, employers and Institutions to further improve our proposal. In such a difficult period of ongoing crisis and mistrust, it is time to take some steps forward and create tools to build Europe together. For the workers, for the citizens, for the businesses, but also for strengthening Europe itself.

Luca Visentini  
ETUC General Secretary

Esther Lynch  
ETUC Confederal Secretary

Brussels, Monday 25<sup>th</sup> April 2016

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<sup>6</sup> ETUC Resolution: Proposal for an Optional Legal Framework for transnational negotiations in multinational companies, adopted at the ETUC Executive Committee on 11-12 March 2014

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## **PREAMBLE**

In the light of:

- The ETUC Report *Towards a Legal Framework for Transnational Company Agreements*;
- The ETUC Resolution *Proposal for an Optional Legal Framework for transnational negotiations in multinational companies*, adopted at the ETUC Executive Committee on 11-12 March 2014;
- The resolution of the European Parliament on 'cross-border collective bargaining and transnational social dialogue' (2012/2292(INI)) adopted on 12 September 2013 (Rapporteur Thomas Händel);
- The contributions of the legal experts in the First and Second Expert Meetings of the ETUC project on 'Building an enabling environment for autonomous and voluntary negotiations at transnational level between trade unions and multinational companies';

The ETUC Secretariat has published this report "Building an enabling environment for voluntary and autonomous negotiations at transnational level between trade unions and multinational companies", including a proposal for an Optional Legal Framework for negotiating and managing Transnational Company Agreements (referred to below as OLF) signed by one (or more) European Trade Union Federation(s) on one side, and by the management of a multinational company on the other.



## **1. AN ENABLING ENVIRONMENT FOR TCAs FROM THE STANDPOINT OF EU POLICIES**

*What are the advantages to the European Union in terms of policy implementation?*

There is no doubt that any act decided by the European institutions must be developed within the framework of mainstream EU policies. Such an act must correspond to the objectives of such policies and provide advantages to citizens, workers and businesses within the Union.

In the ETUC's opinion, the benefits to be expected from the establishment of an enabling environment for TCAs, including a legal framework, would satisfy European policy from at least two different perspectives:

1. The completion of the Single Market;
2. The implementation of the EU 2020 Strategy;

### **TCAs TO ENHANCE THE SINGLE MARKET**

*A flexible regulatory technique for a more resilient economy and a stronger social dialogue at company level*

Deeper integration to exploit the full potential of the Single Market is one of the objectives of the European Union. This is particularly true for the euro area, as recently recalled in the so-called Five Presidents' Report<sup>7</sup>.

The effectiveness of the Single Market can be measured by the number of exchanges and contractual arrangements that take place within it. Another qualitative indicator is the degree of freedom that agents enjoy when operating in the Single Market. Laws and policies set the scene: even the most neoliberal theories consider the rule of law to be a prerequisite for a free market.

What is the European legislator expected to regulate when 'setting the scene' of a single-market economy?

- Legislative frameworks which increase transparency and compensate for the natural tendency of a free market to concentrate available resources (i.e. removal of dominant positions, standards, labels, etc.);
- Legislative frameworks which remove obstacles that hamper the development of cross-border relationships (and the real mobility of capital, businesses and workers).

This second point is of particular interest in the case of Transnational Company Agreements. Several regulatory techniques can be used to shape the cross-border dimension of the Single Market. They often mirror the techniques used at national level. Over and above traditional means (primary and

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<sup>7</sup> European Commission, *Completing Europe's Economic and Monetary Union*, pdf version available at: [http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report\\_en.pdf](http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf)

secondary legislation by the EU, acts issued by market authorities), other significant techniques deal with mutual recognition of national systems, the setting of private standards, self-regulation (codes of conduct, i.e. rules on corporate governance of listed companies), and co-regulation. These techniques should be extremely interesting to market regulators, particularly the social partners, as they are an alternative to binding legislation, which is often perceived as stifling the economy, and can reduce administrative burdens on institutions and companies at a single stroke.

In this respect, TCAs could be advantageous for the EU institutions and satisfy the social partners as well. In a nutshell: the more the social partners are able to self-regulate relationships between labour and management, the less regulators have to interfere in market dynamics with binding legislation. The greater the social partners' capacity to engage in cross-border agreements, the more the legislator can use the co-regulation option to integrate binding legislation and collective agreements.

This multi-source approach is not unknown to the EU legal order. One needs only to think about the Directive on collective dismissals, which relies on the capacity of social partners to manage crises through collective agreements. The EWC Directive gives the social partners the task of agreeing on how to exercise information and consultation rights, while the Working Time Directive considers collective agreements as completing binding EU standards, to mention just a few examples. For that reason, the Treaty encourages the European Commission to promote social dialogue and labour-management relations<sup>8</sup>. With this in mind, the ETUC advocates 'more and better TCAs'<sup>9</sup>. This is not because the negotiation of a TCA is an aim in itself, but rather because TCAs can help mediate interests while enhancing the regulatory framework of the Single Market. This requires two conditions: a level playing field and reliable contractual arrangements. In this sense, an OLF may create trust and commitment on both sides of industry with regard to cross-border, consistent and long-standing agreements. All this would be perfectly in line with the Commission's intention to re-launch and strengthen the social dialogue (in this specific case, at company level) as well.

More TCAs can surely contribute to the objective of an enhanced Single Market. They create alternatives to binding legislation and provide a source of flexible management of industrial relations which, in turn, is a factor in making the economy more resilient<sup>10</sup>. A prominent characteristic of self- and co-regulation is that they engage the issue of autonomous rules on the basis of voluntariness. A framework for cross-border legislation should have a promotional role to facilitate the work of the social partners, rather than forcing them to enter into negotiations. It should support and enable the social partners to feel free to engage in negotiations in order to self-regulate their common/divergent interests at cross-border level.

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<sup>8</sup> Art. 134 TFEU

<sup>9</sup> The relevant ETUC Resolution adopted by the Executive Committee on 5 June 2012 is available at: <http://collective.etuc.org/sites/default/files/12-EN-More-and-Better-European-Company-Framework-Agreements%20ADOPTED.pdf>

<sup>10</sup> The fundamental importance of a well-structured social dialogue – including negotiations between labour and multinational companies – in improving the resilience of the economy has been recently recognised by several sources. One example can be found in European Commission – DG Employment, Social Affairs and Inclusion (2015), *Industrial relations report 2014*, p. 10 and later on in the text. The report is available at: [http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CC4QFjABahUKEw-72cicLIAhVE9HIKHRh-Bu4&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FblobServlet%3FdocId%3D13500%26langId%3Den&usg=AFQjCNFAIZDrtkirq5\\_2fIC83xjBbRGxBw&bvm=bv.104819420,d.bGQ](http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CC4QFjABahUKEw-72cicLIAhVE9HIKHRh-Bu4&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FblobServlet%3FdocId%3D13500%26langId%3Den&usg=AFQjCNFAIZDrtkirq5_2fIC83xjBbRGxBw&bvm=bv.104819420,d.bGQ)

Furthermore, it should be noted that the Commission could take advantage of this kind of technique to continue actively pursuing regulatory convergence and wider adoption of international standards, as foreseen in the Single Market Act I<sup>11</sup>.

### ***A new impetus for the social market economy***

Thanks to the legal environment of the Single Market, MNCs can easily move their operations from one country to another; they can reap benefits from divergences in national legislations (arbitration), and they can diversify their investments and play on differences in labour costs and employment protection rules. At the same time, companies that do not operate in the higher segment of the market may be tempted to compete only through a progressive reduction of labour costs. In other words, a free market creates a highly competitive environment where competition takes shapes that are not desirable (i.e. social dumping, tax dumping, arbitration in cost allocations, etc.). Hence, it is up to the rule-maker to set minimum standards and exclude certain economically relevant fields from the competition game. These exclusions construe the concept of the 'social market economy' as enshrined in the Treaties<sup>12</sup>.

Thus, the EU is called upon to establish a level playing field to enable all enterprises to thrive for the benefit of society as a whole. In this regard, the Single Market Act itself reads as follows: 'In a social market economy (...) with no race to the bottom, (...) businesses are able to provide their services more easily throughout the European Union (...), *whilst at the same time providing more high quality jobs and a high level of protection for workers and their social rights*'<sup>13</sup>.

From the late 70s to the 90s, certain parts of the labour market and work relationship regulations were sheltered from such undesired consequences. It was established that the market competition game could not be played to the detriment of certain employees' rights. Such rights had to be protected in the event of a company being hit by a crisis (collective dismissals and transfer of undertakings). Employees had to receive consistent information concerning their employment relationships and enjoy suitable health and safety standards. According to the EU social *acquis*, women receive an 'equal' salary, employees are informed and consulted on the strategic choices made by the company, and employees enjoy minimum standards for maternity and parental leave. They are sheltered against abuses in the use of fixed-term and part-time contracts and protected against any form of discrimination in the workplace. In more recent times, fundamental rights (enshrined in the ECFR) have counterbalanced the domination of the Single Market and the EMU in EU policies. All these social standards are set with the direct involvement of labour and management in their design, endorsement and implementation.

From the existing 282 texts<sup>14</sup>, one can see that a TCA can serve several objectives in continuing to protect workers in a company or group of companies. TCAs can help promote a uniform corporate culture in transnational companies<sup>15</sup>. They can help control the supply chain. They can set specific standards for health and safety. They can even recognise and guarantee workers some fundamental

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<sup>11</sup> Single Market Act I, p. 22

<sup>12</sup> Art. 3 (3) TEU and Art. 151 TFEU

<sup>13</sup> Single Market Act I, p. 17

<sup>14</sup> Source: database on TCAs of the European Commission, DG Employment, Social Affairs and Inclusion available at <http://ec.europa.eu/social/main.jsp?catId=978>. This figure encompasses either European and global framework agreements.

<sup>15</sup> The importance of this fact should not be underestimated, since it can contribute towards improved productivity. Larger companies usually invest in Human Resources Management. Most of them usually apply HRM strategies in which the wellness of individuals is the pivotal factor. In short: such strategies are designed to create good working environments and relationships, in order to stimulate job satisfaction in the employees and, in turn, improve their productivity.

rights; elsewhere, they are useful in rebalancing interests and powers within cross-border restructuring plans by MNCs. In addition, many other fields still remain unexplored<sup>16</sup>.

Moreover, there is a specific added value for the EU in creating a level playing field on which MNCs and trade unions may decide to enter into negotiations. It is true that the EU economy is dominated by SMEs<sup>17</sup> and the profile of MNCs is evolving – while the size of companies operating across borders is falling, the number of cross-border companies is increasing – but still, econometric analysis shows that MNCs produce up to 51% of aggregate added value and employ around 43% of the European workforce in the non-financial economy<sup>18</sup>. What is the relationship between the setting up of an enabling environment for TCAs, these observations and the social dimension of the Single Market? How does this affect social standards?

Through these agreements, standards can be enhanced on a voluntarily negotiated and company-tailored basis, in which additional costs and benefits are predictable *ex ante*. It is then up to the actors to evaluate whether or not the investment is worthwhile.

Signatories to TCAs often declare that the agreement is binding upon all operations of the TC and enforceable in the countries where it operates. Furthermore, TCAs often envisage clauses through which the company undertakes to require its sub-contractors or suppliers to comply with corporate values, or even to include certain standards in commercial arrangements with business partners. This means that sometimes a TCA aspires to extending its effects to third parties as well. This could promote better working, social and environmental standards even in the lower-paid sectors of the Single Market, so the social dimension and the social dialogue may genuinely get off to a '*new start*'<sup>19</sup>.

## ***TCAs TO ENHANCE THE EU 2020 STRATEGY***

### ***Enforceable TCAs to contribute to more inclusive growth***

'The Single Market should be reoriented and boosted to serve the objectives of the Europe 2020 Strategy (...). The Single Market should contribute more to the objectives of sustainability and more effective use of resources, to innovation, social inclusion and territorial cohesion and employment strategy'<sup>20</sup>. Its 'policies must help address the roots of exclusion in our societies'<sup>21</sup>. The EU 2020 Strategy sets ambitious and important targets whose attainment all the other European policies should contribute to. Without properly involving the market actors – workers, businesses and their respective representative organisations – laws and regulatory acts alone can hardly achieve the EU 2020 targets. Indeed, one of the specific objectives of the flagship initiative 'An agenda for new skills and jobs' is to 'strengthen the capacity of the social partners and make full use of the problem-solving potential of

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<sup>16</sup> For example, just think about the possibility of agreements on uniform working conditions applying to workers in multi-employer worksites.

<sup>17</sup> Multisite and Multinational companies account for only 2% of the total number of enterprises operating in Europe. Source: Eurostat

<sup>18</sup> Source: Eurostat

<sup>19</sup> The need to enhance the social dimension of the Single Market was reaffirmed more recently by President Juncker in his speech at the 13<sup>th</sup> ETUC Congress on 29 September 2015. The complete text is available at: [http://europa.eu/rapid/press-release\\_SPEECH-15-5741\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5741_en.htm). Moreover, the College of Commissioners is taking steps forward to table concrete proposals on the so-called Social Pillar.

<sup>20</sup> Single Market Act I, p. 22

<sup>21</sup> Single Market Act II, p. 15

*social dialogue at all levels (EU, national/regional, sector, company)*<sup>22</sup>. The European Commission itself has also recognised that ‘TCAs can serve a useful purpose – to identify and implement feasible negotiated solutions tailored to the structure and circumstances of each company, particularly in the case of large restructuring processes’ and that ‘*this is consistent with the principles and objectives underpinning the Europe 2020 Strategy*’.

Looking at current practices, it can be definitely affirmed that TCAs can contribute to achieving more inclusive growth. Indeed, more than two thirds of TCAs signed since the launch of the EU 2020 strategy show an alignment in terms of topics addressed<sup>23</sup> and a contribution to such goals. In particular, TCAs have played a role in promoting investments in skills and vocational training ‘so as to help people to anticipate and manage changes’. They have supported and complemented the EU and national actions on implementing life-long learning principles by setting framework rules enabling the workforce to acquire new skills and adapt to new conditions and potential career shifts, as well as simultaneously enhancing labour market matching. TCAs have set cross-border frameworks for internal mobility (within a company or group of companies) and career development, guaranteeing gender equality and equal opportunities for all. In some cases, they have also envisaged provisions regarding the employment of young people. Moreover, through TCAs, companies have enhanced their voluntary commitments to social and environmental policies throughout their structures.

The European institutions have recognised that ‘as an emerging factor in EU social dialogue, TCAs deserve to be promoted in line with the provisions of the Treaty (Articles 152 and 153)’<sup>24</sup> as well as that ‘this would also have a positive impact on rights enshrined in the Charter of Fundamental Rights of the EU (Articles 27 and 28)’<sup>25</sup>. Nevertheless, no concrete steps have been taken. TCAs have operated so far within a framework characterised by the lack of any kind of institutional support and in a persistent situation of uncertainty regarding their legal status. Now, the setting up of an enabling environment for TCAs – including a legal framework – may represent a great, cost-free chance for the EU institutions to effectively involve the social partners, to strengthen their role, and to support the social dialogue while implementing the EU 2020 Strategy targets.

## **TOWARDS AN OPTIONAL LEGAL FRAMEWORK FOR TCAs**

It can be affirmed that a regulatory framework does not add costs to business, because it is optional and because it promotes agreements that *per se* offer a balanced return for both signatory parties.

An explanatory document on a regulatory initiative of this kind should also explain the advantages that a legal framework may offer to the main recipients of the regulatory act. This is because the promotional role of the legal framework has to be demonstrated. It is likewise important to identify

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<sup>22</sup> EUROPE 2020 – A strategy for smart, sustainable and inclusive growth, p. 18. Pdf version is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>

<sup>23</sup> For a more detailed analysis of EFAs which have dealt with EU 2020 Strategy objectives, please see: S. Marassi, ‘*European Framework Agreements at Company Level and the EU 2020 Strategy*’ (2016) Working Paper, text to be published.

<sup>24</sup> Commission Staff Working Document, *Transnational company agreements: realising the potential of social dialogue*, SWD (2012) 264 final, p. 7

<sup>25</sup> Idem. Those articles recognise workers’ right of information and consultation and the right to collective bargaining and other collective actions.

who incurs the costs and who receives the benefits (i.e. how to manage any disputes which may arise from the implementation of the legal framework).

- **Non-intervention:** currently more than 280 TCAs operate<sup>26</sup> in the EU Member States, and over 10 million employees are covered by them<sup>27</sup>. In the absence of criteria determining their legal nature, practices show that TCA enforcement needs complex procedures, placing additional undesired costs on signatory parties. Practice shows that signatory parties have to go through ‘transposition’ bargaining rounds at national level or to perform mediation processes to solve disputes stemming from the implementation of TCAs. Signatories have to bear additional costs in order to reap benefits identified when signing a TCA. TCs and trade unions may also be discouraged from entering into transnational negotiations because of the absence of rules. This absence of rules can be a reason for additional costs related to the bargaining rounds and the implementation of the bargaining outcomes, which can happen especially when bargaining procedures are not identified and their definition requires costly and time-consuming preparatory meetings. Lack of clarity about the legal nature of the bargaining outcome is also an obstacle to the achievement of stable and long-standing agreements. TCs and trade unions which identify potential gains in a TCA might thus be deterred from engaging in a negotiation. More generally, it can be said that non-intervention would lead to fewer TCAs or to shortages with regard to TCA implementation. It would result in a reason of inefficiency of the Single Market, in weakening the EU 2020 strategy and in reducing the co-regulatory option in EU policy making.
- **Soft-law option:** this option can still enable a favourable environment for more and better TCAs. Soft law acts can clarify that negotiations with multinational companies are part of the EU social dialogue. This approach can encourage European social partners, national social partners and multinational companies to exchange good practices and set their autonomous rules. Soft-law instruments can deliver guidelines to bargaining agents to enhance the quality and effectiveness of their agreements. Instruments can be created to ensure transparency and access to negotiations and agreements, as well as offering guidelines for the disclosure of mandates, helping the mutual recognition of bargaining agents and reducing costs for starting negotiations. Such soft-law instruments can trigger the setting up of mediation structures with the aim of reducing implementation costs.
- **Hard-law option 1 – A European act regulates negotiations and implementation of TCAs:** Regulating TCAs through EU binding law would imply the setting forth of rules concerning the bargaining powers of bargaining agents, their representativeness, and the relationship

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<sup>26</sup> The TCA database lists 282 texts, but only 265 are available for the users. Furthermore, 38 out of 265 have been signed by MNCs which are not based in a non-EU/EEA country even if they end up being applicable anyway to Europe itself.

<sup>27</sup> It is difficult to clearly state how many workers are employed directly and indirectly by MNCs. Data is poor and even the estimations made by the UNCTAD and the ILO are contradictory, as referred to by a report by EuroFound (available at: <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/multinational-companies-and-collective-bargaining>). Anyway, according to the European Commission’s Staff Working Document SWD (2012) 264 final *Transnational company agreements: realising the potential of social dialogue* (available at: <http://ec.europa.eu/social/BlobServlet?docId=8767&langId=en>) when it was issued in September 2012 ‘224 such agreements had been recorded in 144 companies, mostly with headquarters in Europe, covering over 10 million employees’.

between transnational and national collective agreements. It would also imply a modification in national legal orders to transpose or recognise the EU regulatory act. This option would go beyond the competences of the EU and result in excessive administrative burdens for Member States. It would also affect the autonomy of social partners which remain the main parties responsible for setting a playing field for TCAs.

- ***Hard-law option 2 – An Optional Legal Framework to promote more and better TCAs:*** A European act with promotional intents can set the scene for more effective transnational negotiations with multinational companies. A legal act can promote transnational negotiations with multinational companies by building on existing practices and dealing with regulatory issues that cannot be settled by social partners themselves. The OLF should set rules that prepare negotiations, clarify the effects of the bargaining outcomes, reinforce the transparency of the process and help solve any eventual disputes arising. It creates incentives for bargaining agents to refer to a EU legal framework while still leaving to such bargaining agents the choice of whether to negotiate outside the OLF. An optional legal framework should be the result of a legal act that does not place administrative obligations on Member States and does not interfere with the autonomy of social partners both at European and national level. It should not interfere with the collective bargaining structures at European level. An OLF can provide benefits to labour and management as follows: identifying agents that can have access to the OLF, mechanisms to disclose the mandate and help mutual recognition of representativeness, set accessory rules to regulate the relationship between transnational and other collective bargaining levels, set up a EU database of TCAs, and set up an alternative dispute settlement mechanism. The OLF can be designed within a Decision of the Council or within an autonomous agreement of the European social partners, or within a Decision of the Council enforcing an autonomous agreement of the European social partners.

The ETUC has engaged its constituency in a long debate to analyse the above options, with the support of academic experts. Two projects, co-financed by DG EMPLOYMENT, have produced:

- The Report *Toward an Optional Legal Framework for TCAs*, endorsed by the ETUC Executive Committee in 2014. Academic experts' team: Prof. Silvana Sciarra, Prof Maximilian Fuchs, Dr. André Sobczak;
- This report as outcome of the project 'Building an Enabling Environment for Voluntary and Autonomous Negotiations at Transnational Level between Trade Unions and Multinational Companies'. Academic experts' team: Prof. Filip Dorssemont, Prof. Sylvaine Laulom, Prof. Giovanni Orlandini, Prof. Lukasz Pisarczyk, Prof. Aukje Van Hoek and Prof. Reingard Zimmer, with contributions by Giulia Frosecchi, Ph.D Auriane Lamine and Stefania Marassi.

The process for achieving a level playing field for negotiations between multinational companies and their employees should be driven by the social partners. Trade unions and employer associations should be in a position to build on their own proposal, which they feel meets the interests of the EU institutions in that it fits into the mainstream policies.

The scope, the aims and the possible content of a decision establishing an optional legal framework for TCAs should thus be defined in greater detail.

The following paragraphs discuss what an EU legal act should actually regulate and to what extent. The discussion will focus on negotiations of TCAs, their implementation, and disputes which may eventually arise in the management of a TCA.



## **2. *BUILDING AN ENABLING ENVIRONMENT FOR VOLUNTARY AND AUTONOMOUS NEGOTIATIONS AT TRANSNATIONAL LEVEL BETWEEN TRADE UNIONS AND MULTINATIONAL COMPANIES'***

Report written by the academic experts' team set up by the ETUC

We would like to warmly thank Filip Dorssemont, Sylvaine Laulom, Giovanni Orlandini, Lukasz Pisarczyk, Aukje van Hoek and Reingard Zimmer who have worked closely with the ETUC for successfully carrying-out the project and drafting the report below.

We would like also to address special thanks to Giulia Frosecchi, Auriane Lamine and Stefania Marassi for having contributed to our work and supported the team during the elaboration of the final report.

## **LEGITIMIZATION: MANDATE AND SIGNATORY PARTIES – THE TRADE UNION SIDE**

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### **Introduction**

The right to bargain collectively and to enter into collective agreements can be considered one of the essentials of the right to form and join a trade union for the protection of workers' interests,<sup>28</sup> which is to be categorised as a fundamental right.<sup>29</sup> Trade unions act in their members' favour in order to protect workers' interests, and these members define the activity of the trade union. Trade union rights can, therefore, be called *enabling rights*. Collective bargaining is one of the main ways in which trade unions protect their members' interests. Jurisprudence in the EU Member States has elaborated specific criteria to define a trade union and to determine the essential elements of collective bargaining.<sup>30</sup> Nevertheless, these criteria are not part of this essay. This work deals with the legitimization of trade unions as a signatory party of European transnational collective agreements<sup>31</sup>.

Membership is the starting point for autonomous collective bargaining.<sup>32</sup> Trade unions are formed by their members and act *on behalf of their members*. They are legitimised within their work by their members and, in most countries within Europe, receive a mandate for collective bargaining from their members.<sup>33</sup> There is, therefore, a mutual influence between the represented and the representative.<sup>34</sup> Trade union confederations also act on behalf of their members: trade unions. Therefore, confederations need a mandate for collective bargaining from their member unions.

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<sup>28</sup> Jacobs, Antoine, Article 11 ECHR: The Right to Bargain Collectively under Article 11 ECHR, in: Dorssemont, Filip/ Lörcher, Klaus/ Schömann, Isabelle, The European Convention on Human Rights and The Employment Relation, Oregon, Oxford and Portland 2013, p. 310 f; Patrick Macklem, The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?, in: Philip Alston (ed.), Labour Rights as Human Rights, Oxford, Oxford University Press 2005.

<sup>29</sup> Leader, Sheldon, Freedom of Association, New Haven/London, 1992, p. 13 and 17; Veneziani, Bruno, Right of Collective Bargaining, in: Bercussion, Brian (ed.), European Labour Law and the EU-Charter of Fundamental Rights, Baden-Baden 2006, p. 313.

<sup>30</sup> Criteria include representativity in particular.

<sup>31</sup> Concerning the legal value of TCAs, see report of Giovanni Orlandini

<sup>32</sup> Waltermann, Raimund, Differenzierungsklauseln im Tarifvertrag in der auf Mitgliedschaft aufbauen- den Tarifautonomie, HSI-Schriftenreihe Bd. 15, Frankfurt 2015, p. 17.

<sup>33</sup> In Belgium, by contrast, the mandate to bargain collectively derives from statutory provisions and is not given by members upon joining the organization.

<sup>34</sup> Kollonay-Lehoczky, Csilla, How international standards can guarantee the right to collective bargaining, in: Däubler, Wolfgang and Zimmer, Reingard (eds.), Arbeitsvölkerrecht. Festschrift für Klaus Lörcher, Baden-Baden 2013, p. 154 (156).

### ***Legal requirements for the collective bargaining capacity of trade unions***

National legal orders in the European Union accept on the workers' side either trade unions or trade union confederations as partners of collective bargaining. Collective bargaining takes place primarily at the industry level, but partly also at the national<sup>35</sup> or company level.<sup>36</sup> Only in Ireland is a licence required to establish a trade union and to "carry on negotiations for the fixing of wages or other conditions of employment."<sup>37</sup> This requirement is not a common European concept. On the contrary, the Committee on Freedom of Association of the International Labour Organization (ILO) describes it as an affront to the autonomy of trade unions.<sup>38</sup> In the Member States (including Ireland and Great Britain), a ballot is not required to enter into collective bargaining.

### ***Trade unions as partners of collective bargaining***

Collective bargaining and the conclusion of collective bargaining agreements (CBAs) are defined as a central task in trade union statutes, and are generally located in the section on goals and objectives. Upon joining the trade union, members sign to accept the "rules of the organisation" — the statutes — and to mandate the organisation to bargain collectively.

### ***Trade union confederations***

Trade union confederations need a mandate from their member organisations for collective bargaining; members decide whether the confederation has the capacity to bargain collectively. The confederation may receive this mandate either by power of attorney or the conclusion of CBAs on behalf of member organisations, if this is defined as a task in the confederation's statutes. For example, this is codified in

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<sup>35</sup> A national agreement sets the key elements of pay and conditions every two years in Belgium; in Denmark, framework agreements at the national level are negotiated between the Danish Federation of Trade Unions (LO) and the Danish Employers' Federation (DA), whereas in Finland, national level agreements (the general income policy settlements) normally contain recommendations to negotiators at the industry level. In Estonia, the minimum wage is set following negotiations between the union confederations and employers at the national level. In Ireland, in the public sector, such as in the health service or the civil service, bargaining is at the national level. National level agreements also exist in Greece, Slovenia (in the public sector) and Spain, see: L. Fulton (2013), Worker representation in Europe. Labour Research Department and ETUI. Produced with the assistance of the SEEurope Network Online publication available at <http://www.worker-participation.eu/National-Industrial-Relations>.

<sup>36</sup> In the following EU countries, collective bargaining exists at the company level, mostly in addition to collective bargaining at the industry level: Bulgaria, Croatia, Cyprus, Denmark, Ireland, Denmark, Estonia, Greece, Italy, Luxembourg, Netherlands, Sweden, Portugal, Romania, Slovak Republic and Spain; partly also in Belgium and Germany, although bargaining at the industry level still dominates. In Hungary, collective bargaining primarily takes place at the company level; the same applies in Latvia, Lithuania (although the law also permits collective bargaining at the national, industrial and territorial levels), Malta, Poland, Slovenia and the UK. In Ireland, this is the case for the private sector. See: L. Fulton (2013) Worker representation in Europe. Labour Research Department and ETUI. Produced with the assistance of the SEEurope Network, online publication available at <http://www.worker-participation.eu/National-Industrial-Relations>.

<sup>37</sup> Irish trade union act from 1941, part II, section 5 ff.

<sup>38</sup> ILO, 334th Report, Case No. 2282, para 638; 332nd Report, Case No. 2268, para. 733; 329th Report, Case No. 2140, para. 295 and Case No.2133, para. 545; 324th Report, Case No. 2090, para. 200 and Case No. 2053, para 231; 318th Report, Case No. 2038, para. 530; 313th Report, Case No. 1987, para. 111; 308th Report, Case No. 1894, para. 536.

the German law on collective bargaining (Tarifvertragsgesetz, TVG) in Art. 2.2 and 3. The statutes of the various trade unions contain the corresponding provisions.

1. *Mandate by power of attorney*

If the mandate is given case-by-case by power of attorney to the confederation, the bargaining power is transferred from the member organisations. This results in the various trade unions becoming directly part of the CBA, thus binding the member organisation **directly**.

2. *Mandate by definition in statutes*

If the conclusion of CBAs is defined as a task for the confederation in its statutes, the single member unions are **not** directly part of the CBA, although they are bound by the CBA.

Both forms of mandate transfer additional competencies to the confederation. Nevertheless, the conclusion of CBAs at the lower level (by the member trade union) is still possible.

### ***Current statutes of European Trade Union Federations***

Neither European federations at the sectoral level nor the European Trade Union Confederation (ETUC) define the conclusion of CBAs on behalf of their member organisations as a task in their statutes.

#### **1. STATUTES OF INDUSTRIALL EUROPE**

**Art. 3 Statutes: Aims and means:** *“The IndustriAll European Trade Union is established to organise and enhance the collective power of working people in Europe, to defend their rights and advance their common goals with respect to both companies and States. To this end, the IndustriAll European Trade Union works on pushing forward the coordination and development of collective bargaining, industrial relations and social policies.”*

Although this shows political will, it is not a legally valid mandate to negotiate on behalf of the member organisations. The internal mandate procedures in the IndustriAll appendix clarify that *“the mandate, including the platform and negotiating team, for these negotiations shall be decided on a case-by-case basis. The mandate shall be given by the trade unions involved and should preferably be unanimous.”*<sup>39</sup> With such a case-by-case mandate by power of attorney, the member trade unions would be directly part of the collective agreement.

#### **2. STATUTES OF UNI EUROPA**

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<sup>39</sup> The former statutes of the European Metalworkers’ Federation (EMF - supplemented by the internal procedures of the EMF for negotiations at the multinational company level) contained a provision that the executive committee could decide, by a two-thirds majority, to mandate the EMF for the negotiation of a European Framework Agreement. Nevertheless, a direct mandate from the Member States, either on a case-by-case basis or in the statutes themselves, would be necessary.

**Art. 3.1 Statutes – Methods:** *“UNI Europa shall seek to fulfil the objectives as identified in Article 2 by: ... o) undertaking collective bargaining and negotiating agreements in the region upon mandate of the UNI Europa Executive Committee”.*

Also the statutes of UNI Europe demonstrate the political will, but this is not a legal valid mandate to negotiate on behalf of the member organizations, as the wording “on behalf of member organizations” or “in the name of the members” is lacking. The internal mandate rules<sup>40</sup> in the section on procedure for the negotiation of TCAs clarify, that the concrete mandate is given from case to case due to the specific necessities<sup>41</sup>. With such a case-by-case mandate by power of attorney the member trade unions would directly be part of the collective agreement.

### 3. STATUTES OF EFFAT

**Art. V. 3.a Aims and tasks:** *“Moreover, the Executive Committee has the following tasks: [...] negotiations with European employers’ associations and managements of transnational companies.”*

**Art. V. 3, par. 5:** *“Moreover, the Executive Committee will decide on the composition and the mandate of the delegation entrusted with negotiations with the European employers’ associations. The Executive Committee shall be given regular progress reports on bargaining in progress. Decisions on the outcomes of negotiations shall be taken by the Executive Committee. The decision shall have the support of at least two thirds of the organisations directly concerned by the negotiations, which shall have had the opportunity to hold internal consultations. The Executive Committee will establish the internal rules of procedure that have to be applied in case of negotiations. The Secretariat will be the spokesperson of the delegation charged with the negotiation.”*

**Art. V.3k:** *“The decision shall have the support of at least two thirds of the organisations directly concerned by the negotiations, which shall have had the opportunity to hold internal consultations. The Executive Committee will establish the internal rules of procedure that have to be applied in case of negotiations. The Secretariat will be the spokesperson of the delegation charged with the negotiation”.*

**Art. VI.3:** *“The Management Committee has in particular the following tasks: [...] to supervise and prepare the negotiations with the management of transnational companies and European employers’ associations.”*

Some people might already categorise these rules as a mandate for EFFAT to negotiate with European employer organisations or companies. To be legally on the safe side regarding these negotiations, “on behalf of the member organisations” or “the outcome of these negotiations binds the member organisations” would have to be added.

### 4. STATUTES OF EPSU

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<sup>40</sup> These procedural rules were accepted in the UNI-Europe conference 14th-16th march 2016 in Rome

<sup>14</sup> See esp. par. (17).

**Art. 4.5:** *“EPSU will develop appropriate industrial relations systems for public service workers including:*

- a) promoting and establishing social dialogue, at national and European level in companies, sectors; and at the inter-sectoral level where the Federation forms part of the ETUC delegation;*
- b) negotiating agreements with European employers at a European Level.”*

*Appendix VI: Procedures and mandates for the social dialogue*

The mandate given to EPSU refers only to negotiations in the classical social dialogue of Art 154 of the Treaty on the Functioning of the European Union (TFEU — including rules for decision-making and voting). It would be necessary to clarify that the mandate also includes the negotiation of agreements beyond the social dialogue of Art 154 TFEU and to add: *“on behalf of the member organisations”* or *“the outcome of these negotiations binds the member organisations.”*

In addition to their statutes, the European Trade Union Federations have adopted specific procedures (basically similar) to negotiate TCAs<sup>42</sup>. These procedural rules define internal criteria of the organization for the selection of the negotiating agents, how to lead the negotiations, etc.

### ***Necessary changes for European Trade Union Federations***

European trade union federations need a mandate from their member organisations, either by power of attorney, or the statutes of the European federations would have to be changed, so that the conclusion of collective bargaining agreements on behalf of the member organizations is defined as a task of the organisation. Without such a mandate arising from the statutes, a legally valid mandate can only be given as a case-by-case mandate by power of attorney (e.g. as foreseen by IndustriAll-Europe).

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<sup>42</sup> The EMF (IndustriAll) was the first ETUF which proclaimed such procedural rules for the negotiation of TCAs.

## **LEGITIMIZATION: MANDATE AND SIGNATORY PARTIES – THE TRANSNATIONAL COMPANY SIDE**

*Prof. Dr. Lukasz Pisarczyk, University of Warsaw*

### ***The Current Situation***

The existing Transnational Company Agreements (“TCAs”), vary as regards their scope of application<sup>43</sup>. As a rule, the TCAs refer to the transnational company (“TC”), which is a party to the agreement. In some cases, the agreements stipulate expressly that the provisions are binding for all subsidiaries. Such a conclusion may be also drawn from provisions to the effect that an agreement is applied to the whole group or to (all) employees. In some cases, TCAs characterize more precisely the units which are bound by specific agreements. Some TCAs refer to controlled companies or companies over which the group exercises direct (operational) control. Sometimes the control is defined in a more detailed way. Relatively rare are provisions identifying the dependent entities, in particular by means of a list (an appendix). If an agreement is to cover all the subsidiaries, it is justified to assume that it refers also to the entities that will be controlled in the future (unless otherwise provided). In some agreements the automatic extension is expressly confirmed. On the other hand, some agreements seem to exclude (at least partially) such automatism.

The central management or other bodies are sometimes obliged to inform the employees and their representatives about the content of the agreement. Some TCAs provide expressly the obligation to distribute the text to (the management of) all affiliated companies (with translation) and (annual) review mechanisms. When it comes to suppliers and contractors, the TCAs usually stipulate that the TC is obliged to familiarize them with TCAs and to encourage them to follow the standards that arise from the agreements. Sometimes they stress that the application of the standards is a prerequisite for business relationships or that the company should search for partners whose policies are consistent with their own codes of conduct.

### ***The Transnational Company as a Party to the TCA***

As already stated, it would be practically impossible to expect that the legal representatives of all subsidiaries co-sign the TCA. As a result, the agreement should be concluded by the central management (headquarters) in the name of (all) subsidiaries<sup>44</sup>. Transnational companies are composed of a parent (holding) company and its subsidiaries that are separate units (entities) with legal personality<sup>45</sup>. The organizational structures may be more sophisticated or complex. As a result, one

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<sup>43</sup> Cf. I. Schöman, *Transnational collective bargaining: in search of a legal framework*, in T. Jaspers (ed.), *Transnational collective bargaining at company level. A new component of European industrial relations?*, Brussels, ETUI, 2012, p. 223.

<sup>44</sup> S. Sciarra, M. Fuchs, A. Sobczak, *Towards a Legal Framework for Transnational Company Agreements. Report to the European Trade Union Confederation*, „Report”, p. 26.

<sup>45</sup> Cf. A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility* in K. Papadakis (ed.) *Cross-border social dialogue and agreements: an emerging global industrial relations framework*, ILO, Geneva 2008.

may draw a distinction between direct subsidiaries („first-tier” subsidiaries) and indirect subsidiaries („second-tier” subsidiaries, which are dependant on “first-tier” subsidiaries). Moreover, in some countries (particularly in Central and Eastern Europe) the employers (and consequently the subsidiaries) are not only entities with legal personality. The law recognizes internal employers, as they are known. These are units of companies or enterprises acting as employers. Internal employers must be separated (organisationally and financially), but they do not have legal personality. They negotiate working conditions at plant level but they are not real employers (who are hidden behind the wall created by the internal employers). Internal employers should be treated as a special type of subsidiaries.

The control over all types of subsidiaries is exercised by means of legal instruments wielded by the parent company. As a rule, these instruments stem from how the holding structures function and are organizational and commercial in nature. The decision will not introduce any new instruments in this area. Suppliers and contractors are entities that are in business relationships with the TCs (their internal units) but remain outside the structure of the group.

The main question is to what extent the law should dictate the requirements concerning the negotiation mandate. The right to negotiate and conclude framework agreements may be derived from the freedom of collective bargaining (particularly from the vantage point taken by trade unions) rooted in the freedom of association. The law must, of course, guarantee the certainty of legal relations but it should not be overly restrictive. The main criterion is to have a mandate to negotiate on behalf of the units (entities) to be bound by the negotiated agreement.

The initial problem is how to define dependency (control). In the first solution, central management declares that it is going to negotiate on behalf of the subsidiaries (dependent units). Neither a formal confirmation of control nor any authorizations are required. Such a flexible approach is represented e.g. by Directive 98/59/EC which refers only to the controlling undertaking<sup>46</sup>. As a result the directive does not determine detailed criteria of dependency. On the one hand, the flexible approach is fully consistent with the voluntary character of negotiations. On the other hand, it may lead to problems in communication between central management and the subsidiaries and finally to problems in application of the agreement (the issue of the negotiating mandate). The second option is the requirement to submit a confirmation of control exercised over the subsidiaries. The decision could establish its own definition of control or refer to existing concepts, e.g. to the definition stated in Directive 2009/38/EC<sup>47</sup>. Control does not *a priori* exclude an extension of the scope of application.

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<sup>46</sup> The obligations laid down in the directive are applied irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer. In considering alleged breaches of the information, consultation and notification requirements laid down in this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.

<sup>47</sup> Controlling undertaking means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation or the rules which govern it. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when an undertaking, in relation to another undertaking directly or indirectly: (a) holds a majority of that undertaking’s subscribed capital; (b) controls a majority of the votes attached to that undertaking’s issued share capital; (c) can appoint more than half of the members of that undertaking’s administrative, management or supervisory body.



A more strict approach to control gives rise to a number of questions. There is no common definition of dependency<sup>48</sup>. Control is understood differently in various branches of law. There is a variety of relationships between controlling companies and employers and there are significant differences between domestic legal systems. Moreover, control does not mean the automatic application of the agreements to subsidiaries. Last but not least it would run counter (at least partially) to the voluntary character of negotiations and agreements. The question arises why the decision should limit their scope of application? The third option is a negotiating mandate based on authorization granted by dependent units. Taking into account the current situation, the most natural solution is the application of the dependency criterion without a more detailed control test<sup>49</sup>. However, TCAs should provide that the central management has a mandate to negotiate on behalf of the subsidiaries. The bargaining power should be recognized by trade unions (that decide to commence the negotiations)<sup>50</sup>. In any case, the negotiating mandate can be based on an authorization granted by subsidiaries or other entities.

Trade unions are notified about a company's position on negotiating an agreement. The decision may establish formal notification requirements (e.g. in writing, while disclosing how control is exercised). The decision may determine the list of the documents that should be submitted. Finally, the TNC may be also required to submit a list of the controlled subsidiaries (irrespective of the definition of control). The social partners may, of course, introduce additional requirements.

The TCs are of international nature: the head company and subsidiaries are situated in different countries (in particular in different EU and/or EEA Member States). As a result, the TC could be defined as a controlling undertaking and its controlled undertakings with at least two group undertakings in different Member States. Taking into account the nature of the TCAs and their purpose, there is no need to state the number of employees employed within the whole group and by specific subsidiaries in various Member States<sup>51</sup>. It would, however, be reasonable to require central management to notify subsidiaries of the opening of TCA negotiations. The decision may in this case also introduce some requirements concerning the form and content of the notification. One can also consider whether the subsidiaries should have the rights to lodge objections against being represented within the procedure (e.g. based on a lack of dependence). Another problem would be how to handle the objections. Any judicial or *quasi*-judicial procedure would be rather out of the question. The first option entails solving the problem between parent management and opposing "subsidiaries" while the second one entails negotiating for all the subsidiaries except for the objecting entity. Moreover, the decision should require the identification of a transnational company that is a party to a TCA.

As regards suppliers and subcontractors, there are various possible solutions<sup>52</sup>. First, the decision may impose a duty to establish business relationships only with those subjects that agree to comply with the standards arising out of the TCAs. The conclusion of a contract with subsidiaries that do not follow

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<sup>48</sup> Cf. Report, p. 17.

<sup>49</sup> Trade unions should be notified about a company's position on negotiating an agreement. The decision may establish formal notification requirements (e.g. in writing, while disclosing how control is exercised). This notification will mirror the criteria adopted to define control. The decision may determine the list of the documents that should be submitted. Finally, the TC may be also required to submit the list of the controlled subsidiaries .

<sup>50</sup> Report, p. 26.

<sup>51</sup> Report, p. 27.

<sup>52</sup> See e.g. I. Schöman, *Transnational collective bargaining: in search of a legal framework*, in T. Jaspers (ed.), *Transnational collective bargaining at company level. A new component of European industrial relations?*, Brussels, ETUI, 2012, pp. 223-224.

the standards arising out of the TCA would be treated as a breach of the agreement. The main problem seems to be the verification of the compliance. To evaluate the policy of contractors it would be necessary to establish a mechanism of control and assessment. One of the possible solutions is to establish special bodies dealing with the enforcement of the agreement among external entities. Second, the TC may be obliged to inform its contractors about the standards and to encourage them to follow the rules. Third, the decision may be left to the social partners. The second solution (informing and encouraging) guarantees a level of protection and seems to be realistic. The social partners may of course strengthen the protection by demanding that the contractors apply the TCAs (fundamental rights) e.g. as prerequisite for business cooperation. In any case it would be possible to introduce the opt-in clause for the suppliers and contractors. By opting-in the external entities would declare the compliance with the standards arising out of the TCA.

### ***Composition of the Bargaining Unit***

In a typical situation TCAs are negotiated by the central management of a TC (in practice by the parent company's HR department). Other actors could be subsidiaries (represented by local management and local HR)<sup>53</sup> and internal employers. The parties may also invite experts dealing with different aspects of negotiations.

The number of representatives should be adjusted to the circumstances of specific cases and the social partners' needs. As a rule, the members of a bargaining unit on the employer's part should be authorized by parent management. As regards the requirements addressed to a bargaining unit's members (e.g. requirements concerning their positions, functions and skills), it is sufficient to guarantee that the members of the bargaining unit are duly authorized. The company may be represented by its employees (workers) as well as by other persons holding a power of attorney (e.g. an industrial relations expert). In any case, the appointment can be evaluated from the perspective of the good faith shown by the parties (which should be a general principle in collective bargaining<sup>54</sup>). The decision may regulate the formal requirements concerning this authorization.

### ***Scope of the Agreement***

When concluding a TCA it is necessary to establish its scope encompassing companies and workers. The decision may require the parties to indicate the companies (units) bound in a given group. A practical form of such a statement would be an appendix to the agreement containing the list of subsidiaries that are (or are not) covered<sup>55</sup>. Consequently, the standards arising out of the agreement apply to all workers (employees) engaged by covered entities, unless stipulated otherwise. Agreements concerning specific matters (e.g. restructuring) can be limited to affected parts of a TC<sup>56</sup>.

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<sup>53</sup> Report, p. 39.

<sup>54</sup> Cf. e.g. B. Gernigon, A. Odero, H. Guido, *ILO Principles concerning Collective Bargaining*, International Labour Review 1/2000, p. 43.

<sup>55</sup> Report, p. 28.

<sup>56</sup> Cf. Report, p. 27.

Another problem is the application of TCAs to suppliers and contractors. They depend neither on the central management nor on the subsidiaries. As a rule, central management and subsidiaries cannot wield any corporate influence over subcontractors and do not have the mandate to negotiate on their behalf. Consequently, the obligation to observe specific employment standards would be introduced (to the extent possible) through business contracts. The decision may provide that the entities entering the business relationships with the company are obliged to follow the standards arising out of the agreement (one of the possible options – see above). It would lead to the factual extension of the scope (indirect application). Sanctions (including damages and contractual penalties) may be applied to procure compliance. Subcontractors may also be obliged to report the employment standards they use with their workers (employees). One should distinguish between existing and future commercial contracts. As a rule, parent management and subsidiaries are not able to modify contracts in force. Consequently, the agreed standards would be applied in the future. The problem that must be examined is consistency with civil and commercial law (at the national level, too). There are also further possibilities to involve suppliers and contractors. They can be invited to negotiations and become a party to the agreement. They may also grant the authorization to negotiate in their name. Both solutions are rather unlikely. Another option is an opt-in clause for suppliers and contractors provided by the TCAs. Consequently, the decision could establish a voluntary procedure for subsidiaries to be involved. If the decision provides the obligation to inform and to encourage the suppliers and contractors to follow the standards arising out of TCAs they are only indirectly affected by their provisions (in fact, they are beyond the scope of application in a strict sense).

The central management may also be required to attach a list of suppliers and subcontractors bound by contractual obligations to abide by the EFA in question. The list may be confirmed by the trade unions. For subcontractors the scope of application would evolve as a consequence of concluding new contracts containing obligations to observe standards established by an EFA (or the termination of such contracts). Central management could be obliged to update its list of subcontractors and suppliers affected by this agreement. In practice, the fulfillment of this obligation may turn out to be difficult.

The question arises of how to react when the structure of a TC changes. The decision should settle whether the companies that spun off from a TC should have the right not to continue to abide by the agreement. Another problem is the extension of the personal scope of TCAs (to new subsidiaries). The decision may determine whether the extension is automatic<sup>57</sup> or requires negotiations in any specific case. The first solution underlines the will of the social partners to improve the working conditions of the employees. It would help to protect even those workers who are not represented by trade unions (the density of trade unions varies significantly from country to country). The second option emphasises the freedom of negotiations, leaving room for manoeuvre for the parties. The automatic change should be supplemented by the obligation to modify the content of the appendix (the list of subsidiaries). The alternation can be introduced by means of an agreement. It would, however, open negotiations between the social partners. An alternative is a modification carried out unilaterally by the company

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<sup>57</sup> The personal scope would evolve by virtue of the law (e.g. after a specific period following the submission of information). New subsidiaries would have a transition period to align their internal regulations to a TCA's requirements.

(central management). In case of any doubts the trade unions could be entitled to lodge a complaint. This would apply to changes caused by an elimination of an organizational unit from the group.

The decision may oblige central management to distribute the text of the agreement to all companies covered by the TCA. The decision may also establish a (voluntary) procedure of supervision of TCA enforcement. For instance, subsidiaries would be obliged to report implementation (e.g. through annual reports). On the other hand, parent management could be entitled and required to monitor how the agreement functions. Going further, it is proposed that a pre-condition for a TC to enter into a TCA would be for it to disclose the agreed mechanisms of control exercised by parent management over other entities<sup>58</sup>.

### ***The position of the employers***

The conclusion of a TCA gives rise to a number of problems for both central management and the subsidiaries. From the perspective of central management the TCAs can be seen as the next level of obligations (after company level agreements, employee involvement or sectoral level agreements). In many instances they are not interested in developing requirements connected with employment. Moreover, in some countries the legislation leaves very limited space for the social partners. Collective agreements may contain only provisions more favourable for employees (employee privilege principle) and the list of exceptions is relatively short. Last but not least, companies benefit from the differences in conditions of employment. Their activity is transferred to lower-cost countries. The subsidiaries may moreover be skeptical about the TCAs. They are negotiated at a higher level and may lead to additional costs as well as administrative obligations. In addition, significant changes have been brought about by the enlargement of the EU and the economic crises. As a result, the question arises: What is advantageous for companies and employers?

First, the negotiations concerning TCAs constitute a new platform of the social dialogue. It is particularly important in countries where collective negotiations undergo a serious crisis or even are almost non-existent (Central and Eastern European countries). It is a real chance to commence the dialogue with trade unions. Second, the negotiations may offer a system of “early warnings” exposing the problems appearing at various levels. It may help to avoid collective disputes or other forms of employee dissatisfaction. Third, the TCAs may be helpful in preparing the restructuring processes. Fourth, the conclusion of an agreement can be important for the company image (and consequently helpful in business relationships). Fifth, the subsidiaries obtain a ready set of standards that should be applied. It eliminates the allegations of unequal treatment.

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<sup>58</sup> I. Schöman, *Transnational collective bargaining: in search of a legal framework*”, in T. Jaspers (ed.), *Transnational collective bargaining at company level. A new component of European industrial relations?*, Brussels, ETUI, 2012, p. 221; Report, p. 27.



## ***DIRECT LEGAL EFFECTS OF TCAs: WHERE ARE WE AND WHAT DO WE WANT TO ACHIEVE?***

*Prof. Dr. Giovanni Orlandini, University of Siena*

### ***Foreword 1: Legal order of the State and industrial relations order***

In order to put the topic of the legal effects of a TCA into the right context, it is useful to explain the distinction between an 'industrial relations order' ('ordinamento intersindacale') and a 'legal order of the State' ('ordinamento statale'), inspired by the thinking of two Italian scholars. Indeed, Gino Giugni elaborated these concepts in 1960, starting from the theory on the variety of legal systems by Santi Romano.

The 'industrial relations order' is shaped by the rules decided by the social partners as a result of collective negotiations. The mutual recognition between social partners implies that those rules are to be considered binding by them. Therefore, the rules are applied without State intervention (there is no need for the State to intervene for the rules to be applied). Moreover, disputes are solved through extra-judiciary resolution mechanisms previously decided by the parties. However, the trade unions do retain the right to strike, as a means of last resort necessary to guarantee the authenticity of the negotiation and the respect of agreed rules.

Industrial relations orders and legal orders of the State can coexist and intersect in a virtuous way, inasmuch as the statutory norms do not limit the social partners' autonomy to create mutually binding rules, but, instead, they are able to support their autonomy. In other words, the State norms have the chance to foster collective autonomy by setting up a (procedural) legal framework which facilitates dialogue between the social partners.

The EU legal system can borrow the distinction between an industrial relations order and a legal order of the State: the EU norms (primary and secondary) can coexist with the norms resulting from the negotiation and dialogue between the European social actors. In order for the latter to be applied, no transposition into EU norms is needed (according to the model framed in Title X TFEU), especially if they deal with matters at company level.

The EU norms can have a promotional function, in other words they have the power to foster both the dialogue between European social partners and the application of the final product (the agreement resulting from such negotiations) by the national social partners.

While discussing the 'legal effects' of a TCA (in the strict sense), the order that we have to refer to is the one made by the State. On the contrary, speaking about the industrial relations order, the issue is about the 'effectiveness' of the rules (established by the social partners through negotiation), not about their legal effect. In the following pages I focus on a number of legal problems. The existing problems are to be investigated; however, they do not undermine the value of an EU act aimed at regulating TCAs. This chance has to be taken to promote collective autonomy at European level. Therefore, in this contribution, I will first assess the strictly legal problems, and secondly I will suggest adopting the perspective of the industrial relations order, which makes it possible to circumvent the legal obstacles present in the legal order of the State.

## ***Foreword 2: 'Legal' and 'direct' effects***

Let us clarify what is meant by the legal effects of a TCA. It is worth explaining the difference between (1) 'legal (and binding) effect' and (2) 'direct effect'.

1. 'Legal (and binding) effect' refers to a more general notion: it refers to a legal effect which binds (to any extent) a person, irrespective of the norms regulating the legal effect itself. Usually, TCAs already produce legal effects whether or not an Optional Legal Framework (OLF) is adopted.

2. 'Direct effect' is a concept developed within the EU legal system. It refers to the effects produced by a number of EU norms (provided for by primary and secondary sources), which are therefore binding within the Member States' legal systems (thus they produce rights and duties upon legal and natural persons). The direct effect is produced without the need for Member States to adopt national measures. Indeed, the EU measure with direct effect prevails over the relevant national legal source, which therefore ceases to apply. Regulations and Decisions have direct effect, while Directives, exclusively, have vertical direct effect (only upon Member States and public authorities) inasmuch as their provisions are unconditional and sufficiently clear and precise and when the EU country has not transposed the Directive by the deadline.

What does it mean to confer direct effects on TCAs? It means that the signing of a TCA at EU level is enough for it to be recognised as a binding collective agreement at national level, even though the TCA at issue derogates from the national collective agreements (at sector, local or company level). Therefore, because of the TCA, rights and duties exist between both the subsidiary and the workers' representatives (depending on the industrial relations system), and the management and the individual workers. As a consequence, should one of the parties not comply with the TCA, the employer, national workers' representatives and individual workers can enforce it (potentially even before a national court), even if a national agreement implementing the TCA has not been signed.

Moreover, the direct effects of TCAs need to be discussed to solve the controversial issue of the relationship between TCAs and levels of national collective agreements, especially in relation to company agreements. If a non-regression clause is provided, the direct effect may be envisaged exclusively for the more favourable provisions (see Sylvaine Laulom's report).

Most of the existing TCAs do produce 'legal effects': those with sufficiently clear provisions, which are not mere declarations of intent. Such provisions have an impact on the legal sphere of signatory parties as well as - although in a different way - on the persons represented by them. However, these effects depend on choices made by the parties at transnational level (procedure followed), and, at a second stage (after the TCA is signed), on national laws and international private rules (see Van Hoek, A. and Hendrickx, F., *International private law aspects and dispute settlement related to transnational company agreements*, Brussels, 2009). Such conditions make the TCA's effects non-homogeneous and unpredictable.

## ***The ETUFs' procedures***

The European Trade Union Federations (ETUFs) have adopted specific procedures (all broadly similar) to negotiate TCAs, which define the criteria for the selection of the negotiating agents, legitimized by a mandate given by national trade unions. The existing mandate procedures (inspired by the EMF, now

IndustriAll, procedure) are limited in that they involve the trade union side exclusively. However, they have the value of increasing the certainty of procedural rules, inasmuch as the ETUF does not negotiate unless the procedure is applied. The uncertainty would be reduced even further if this procedure were to become the basis for an agreement between the social partners at EU level, namely with the employers' associations.

Moving to consider the effects produced by TCAs, the ETUFs' procedures do not represent a solution for the lack of homogeneity among the various Member States. Indeed, the TCA needs some sort of transposition at national level by social partners. In the event that the TCA is not recognised as a collective agreement within a national legal order, it is not possible to enforce it in the event of non-compliance by one of the parties (subsidiary firm, trade unions/representative bodies, employees). On the contrary, if the TCA is transposed into an agreement at national level it produces those effects distinctive of the national legal system. If the transposition occurs, the source of parties' (both collective and individual) rights and duties is not the TCA, but the transposition agreements, which are covered by national law and practices.

In conclusion, in order to overcome the uncertainty of TCA effects, the definition of the negotiation rules cannot be left entirely to the social partners (even where the social partners widely and fully agree). The mandate procedure, although failing to guarantee the TCA direct effect, surely strengthens the legal effect because of the mandate given to the ETUFs. The national social partners should be bound to implement the TCA because of the mandate (in this sense the TCA produces legal effects). However, what happens if the national partners do not implement the agreement, or they do so by going beyond what the mandate provides for, is still an open question. Obviously, if a common mechanism of dispute resolution at transnational level were to exist, there would be fewer problems with regard to the uncertainty of legal effects.

### ***The heteronomous solution: from the Ales and Rodriguez Reports to the Sciarra Report***

To overcome the uncertainties caused by an 'autonomous' regulation of TCAs, in recent years the idea of developing a 'heteronomous' solution, based upon an EU act, has gained a foothold (supported by EU institutions as well). The EU Commission has encouraged the drafting of two proposals, which have followed two reports where the matter has been studied in depth (Ales *et al.*, *Transnational collective bargaining: past, present and future*, Brussels, 2006; Rodríguez *et al.*, *Study on the characteristic and legal effects of agreements between companies and workers' representatives*, Brussels, 2012). What do we learn from them?

A radical solution has clearly been excluded, since it would be politically unfeasible. The radical solution would consist in the adoption of a legal framework, such as a Regulation or a Directive, that would guarantee the TCA, signed respecting a given negotiating procedure at EU level, direct and uniform effects in all Member States. This solution is not foreseeable even if the legal framework is 'optional', inasmuch as it would imply a change in the structure and rules governing the collective bargaining system and workers' representation within the national legal systems. Furthermore, valid arguments exist which cast doubt on the competence of the EU to adopt such an act, since it would affect the right of association, which falls within the exclusive competence of Member States (according to Art. 153.5 TFEU).



The proposals of the Ales and Rodríguez Reports are more temperate. Both documents suggest the adoption of a Directive providing for an Optional Legal Framework. The parties wishing to engage in a transnational negotiation can decide whether to opt into the legal framework or not. The Directive places an obligation upon the Member States to adopt, in the national legal system, the procedure to implement TCAs developed at EU level. In both proposals, the legal effects of the TCA are the consequence of a transposition act at national level: a 'decision of the management' (Ales), or an 'adhesion agreement' at company level, which could also involve an *ad hoc* negotiation body (Rodríguez). Consequently, the TCA becomes legally binding, even though indirectly (because of the transposition act) and not directly (as a direct consequence of the signature of the TCA). The legal effects are not uniform, since the transposition act (or agreement) is covered by national law; therefore, it will have the legal effects provided for by the relevant national law. Which effects? According to the Rodríguez proposal, the same as national company agreements. According to the Ales proposal, the TCA's content should be transposed by a managerial decision of the employer (subsidiary); thus its effects will be dependent on national law.

According to both the Ales and Rodríguez proposals, neither the OLF source nor the TCA achieve direct effects. The less radical solutions do, however, have the advantage of making the TCA binding, while widely respecting the national legal systems: the effect of the TCA is decided by each national legal system. Why do they still represent an improvement compared to the current situation (autonomous regulation)? The TCA would produce effects in each Member State, and at the same time those effects would have a more solid legal basis (because of the transposition of the legal framework in the national legal orders). The transposition acts are simple. Indeed, no real negotiation requires to be carried out: the TCA is simply completely 'copied' in an act, recognised and covered by national law, which is binding for the parties. Since the process of transposition of the TCA (meaning the 'copy' of the TCA content) is based upon national law (that is, on the legislation implementing the Directive), transposition rules are surely binding for the national actors.

Doubts remain in relation to enforcement: how to make sure that the TCA is implemented in the national legal order. What happens if it is not implemented, or if it is implemented in the wrong way? The Rodríguez Report refers to national law remedies (including extrajudicial solutions, if present), while the Ales Report does not discuss the issue. In theory, given that the OLF is adopted through a Directive, it should be up to the Member States to make sure that the TCA achieves legal effects within the national legal systems. However, neither Ales nor Rodríguez suggests that Member States should impose such an obligation upon the subsidiary firm and/or the social partners, since this would affect the national systems of industrial relations. Hence, the question remains open.

The option to adopt an optional legal framework by means of a Directive is considered by the social partners to be too invasive of national systems. The transposition of the Directive may jeopardize the structure and functioning of national industrial relations systems, as a consequence of the need to guarantee the implementation of the TCAs (however, none of the reports mention these reasons explicitly). Moreover, the proposals make the legal effect dependent upon a national act of transposition, which does not avoid the risks of uncertainty and diversities in TCA implementation.

The proposals in the Ales and Rodríguez Reports do not solve the basic problem with the legal effects of the TCA: the OLF should achieve '*legal certainty*' with reference to the legal effects of the TCA (providing for its direct effects), respecting at the same time the principle of subsidiarity and the 'collective autonomy' of the national social partners. The Sciarra Report (Sciarra S., Fuchs M., Sobczak

A., *Optional Legal Framework for Transnational Company Agreements*, Brussels, 2014) aims at reconciling these two apparently 'contradictory' goals. How?

The idea is to adopt an OLF with a Decision based on Art. 152 TFEU '*binding in its entirety*' which '*produces obligations for MS and for bargaining agents*'; '*the obligations will result in granting a legally binding nature to TCAs, namely recognising a normative function*'. The Decision should establish the main rules of negotiation, which (as under the IndustriAll model) are based upon a full mandate given to the European actors by the national partners. The negotiating procedure does not envisage any transposition act (management decisions, agreement among the national partners, or national negotiating bodies). Therefore, there are two elements of this latest proposal that should make it possible to overcome the problems underlined so far: the EU source (a Decision and not a Directive) and the legal tool of the mandate to the negotiators (which would make the transposition act redundant).

### ***Effects of the decision and effects of the TCA***

The Decision should make the TCA directly binding (for all the national actors) in the Member States' legal orders, according to the rules proper to each national system (hence without imposing changes to both the bargaining structures and the national systems of workers' representation). Therefore, it is worth focusing on the nature and effectiveness of the Decision, in order to understand whether, and to what extent (unlike the Regulation and the Directive) this different piece of legislation can make a TCA productive of such effects.

First of all, a Decision has direct effect. Therefore it does not need any transposition act from the Member States in order to produce legal effects within the national legal systems. However, this does not mean that the TCA would automatically achieve direct effect, simply by virtue of being negotiated and signed on the basis of the procedure established by the Decision.

In order to clarify the issue further, it is helpful to discuss the framework agreements provided for by the TFEU. Framework agreements are regulated by EU primary norms, securely binding for the Member States. The agreements achieve legal effects within the national legal systems if signed consistently with the procedure (enshrined in Articles 154-155), since in that case they are transposed in a 'Decision' (in practice, a Directive) of the Council. The legal effects within the national legal systems are based upon the EU act. The 'autonomous' agreements, that is those not transposed by the Council, achieve legal effects depending on whether and how they are implemented 'in accordance with the procedures and practices specific to management and labour and the Member States' (Article 155.2 TFEU). The fact of being provided for by the Treaty does not have any consequence on their effects. In other words, given that the Treaty does not specify anything about their effectiveness, the lack of an act at national level able to provide the agreements with legal effects implies that their implementation is completely dependent on the social partners' desire to transpose them at national level.

Overall, adopting a EU source, with direct effect, framing the TCA negotiation rules does not say anything about the type of legal effects that the TCA can produce. The point is to understand whether and how it is possible to have TCAs with direct effect in national legal systems, through a Decision.

The Decision is an EU source characterized by a number of ambiguous aspects, which have increased with the Lisbon Treaty (which has improved its functions), and have been widely discussed by scholars. It has direct effect like the Regulation, but it is an individual act, therefore one addressed to one or

more specific parties. Its direct effect consists of an obligation imposed upon the recipient: this is the reason why the Italian scholars compare it to an 'administrative act' adopted by public authorities. The recipient can be a private party or one or more Member States, and the Decision has a specific binding effect only for those to whom it is addressed. When it is addressed to Member States (especially if addressed to all of them) it can be hard to distinguish it from a Regulation or a Directive. The Decision may also not specify to whom it is addressed if it relates to the establishment of EU bodies or institutional aspects (for instance Decision 98/500/CE on social dialogue committees). However, in that case, the direct effect does not relate to the effects it produces within national legal systems, being instead a 'direct effect' on the EU legal system (institutional system and bodies' activities).

Which kind of decision are we interested in for the OLF?

Option 1. A first option is clearly to be excluded: that the national social partners could be the recipients of the Decision. Among the arguments supporting this point there is the unlikelihood that the Decision could be notified to every single actor potentially involved in the negotiation of the TCA. Hence no obligation to implement and respect the TCA can be imposed upon them by the Decision.

Option 2: The second possible option is a Decision addressed to Member States imposing upon them the obligation to guarantee the TCA direct effects. This option also raises several critical elements. A) We are going beyond the proper function of a Decision. In fact, such a Decision would have the same function as a Directive. Therefore, this option would raise the same problems as the Ales and **Rodríguez** proposals. B) If a Decision is adopted, it should be clarified which kind of 'direct effect' the TCA should produce in each Member State. In order to overcome this problem, one can argue that the Decision could merely define the TCA as an agreement having direct effect, without clarifying further, that is, without explaining which kind of legal effects are produced by the TCA, but simply referring to what is provided for in each national legal system (by laws, rules and practice). This solution appears comparable to the one already used on a number of occasions by the European legislator to deal with labour-related issues. For instance, the notion of 'worker' is present in various Directives (Directive 2002/14 on information and consultation rights; Directive 1996/71 on posting of workers, etc.), but the meaning of this concept depends on national legal systems. Such an argument seems to be applicable also to the OLF, but this is not the case. Indeed, the situation is the opposite, as national legal systems do not regulate TCAs at all. A national notion of a TCA does not exist, so to simply refer to national laws and practices is meaningless. It is for the EU legislator to define which effects TCAs shall produce. As a consequence, national legal systems should be modified in order to make sure that TCAs do produce such effects.

Option 3. Following the Sciarra Report, the decision should be addressed to Member States, but the latter should not interfere with collective autonomy of 'national' social partners, as they *'would have nothing but an auxiliary role in supporting collective deliberations. States could also encourage best practices first related to signing of TCAs and then to their implementation, in particular with regard to mediation'*. Some of the obligations that could be imposed upon Member States are: the establishment of guidelines and indicators, monitoring, promoting mediation, reporting to the Commission, and exchange of best practices between Member States. An obligation for Member States to adopt acts/regulations in order to make TCAs effective and enforceable is excluded, as it is assumed to be in contradiction with the respect of national traditions and the collective autonomy of the social partners. As a consequence, in order to make sure that TCAs are implemented and respected in the national legal

order, the States should make use exclusively of soft law techniques of implementation. This option is compatible with option 4 below.

Option 4. The legal tool that seems most suitable for an OLF is the Decision without recipients. However, in this case a negotiating procedure is established instead of a body, as was the case for the committee established by Decision 500/1998. There is a further reason why the comparison with Decision 98/500 does not hold: the OLF would have a very different purpose, because the TCA rules are deemed to influence national legal systems (indeed, this kind of Decision would not remain at EU level). Therefore, it would be a 'hybrid' type of Decision, which, apparently, does not have any precedent in the EU legal system.

If a Decision with these features is adopted, the next question is: can the direct effects of the TCAs be based upon a Decision which is addressed neither to Member States nor to social partners? The answer seems to be in the negative. Such a Decision merely frames a procedure involving (European) social partners and it is not able to provide for a directly binding effect of the TCA upon national social partners. The instrument to produce such effects, of a general character, within Member States is rather the Regulation. The Decision can simply refer to the effects that, according to national law, follow the respect of the procedure described by itself.

To conclude, if option 4 (combined with option 3) is followed, as seems most advisable from a strictly legal perspective, it is pointless to state in the Decision that the TCAs have direct legal effects, since direct legal effects cannot follow from a norm enshrined in a Decision, but they are (potentially) the consequence of the procedure adopted with the Decision. At this stage, a further problem arises: the direct effects of TCAs should be based upon the negotiating procedure established by the Decision, in other words on the mandate procedure. Is this feasible?

### ***Legal effects deriving from the procedure: the mandate to negotiate***

Assuming that the legal tool chosen to guarantee direct effects is the mandate, a further question needs to be answered. If it is true that the TCAs signed respecting the ETUFs' mandate procedures still need to be renegotiated or at least transposed at national level in order to achieve full legal effects within the national legal system, why should the same not be true for TCAs signed on the basis of the OLF adopted by a EU Decision?

The mandate, not the Decision, determines the effects of TCAs. The only purpose of the Decision is to regulate the practice in a more homogeneous and rigorous way. Nonetheless, the Decision cannot modify or widen the effects of the mandate (in the same way as it cannot impose legal effects of the TCA within Member States), which remain covered by the applicable national law.

We are back at the starting point of our reasoning. The point is to clarify which legal effects stem from compliance with the negotiating procedure and, especially, from the mandate given by the national social partners to the signatory parties.

Following the Sciarra Report, we assume that the signatory parties are, on the employers' side, the legal representative from the TC's headquarters acting in the name of the subsidiaries; on the workers' side, ETUFs acting in the name of national federations. What legal effects does a TCA signed on the basis of that kind of mandate procedure produce in each Member State? Are these effects predictable? And, given their features, can they be considered 'direct effects'?

As clarified by the Rodríguez Report, through the mandate the negotiators of the TCA are legitimized to represent the national actors, but this does not make the TCA legally enforceable within Member States' legal orders (and for this reason the report suggests instead 'adhesion' as a legal tool). Both the types of TCA effects, and the chance that the TCA can produce any legal effect at all, in a Member State, depend on the State's legal order. In other words, the legal effects depend on the national rules on mandates as applied to the specific/national industrial relations systems. The goal of making the TCA binding and with direct effects, according to national laws, is not accomplished by the mandate alone, since the negotiators of the TCA may lack capacity anyway under national law.

Whatever effect is produced by the mandate in each Member State, where neither the law nor national collective agreements mention the TCA (meaning that the TCA is not recognised as a valid agreement), conflict surrounding which rule is applicable in the subsidiary firm will be unavoidable, because of the lack of coordination between the TCA and national levels of collective bargaining. If such conflicts arise, the national court will be called upon to decide them, on the grounds of national law. As a consequence, it may be that the TCA is not recognised as a valid agreement, hierarchically superior to the already existing agreements implemented in the subsidiary firm. As Teun Jaspers rightly notes, '[a] *legal hierarchy* [between TCA and local collective agreements] *does not actually exist and [...] there is no guarantee that this principle can be applied in all Member States*' (*Effective transnational collective bargaining. Binding transnational company agreements: a challenging perspective*, in Schömann I. et al., *Transnational collective bargaining at company level. A new component of European industrial relations?*, Brussels, 2012).

If this is true in general terms, a distinction should be made between the obligatory and normative parts of the TCA. The first part has to do with procedural clauses imposing obligations on national social partners (subsidiary and national trade unions). The normative part, on the other hand, has to do with clauses conferring subjective rights on individual employees employed by the subsidiary.

In principle, it can be assumed that the 'obligatory' part of the TCA binds both the 'European' signatory parties and the national social partners, given the signature of a mandate that binds them mutually and directly. However:

- their enforcement depends on national law. Even if the TCA produces effects upon the subsidiary firm and the national trade unions giving the mandate to the ETUF, this does not mean, according to national law, that national trade unions (or workers' representatives bodies) may go to court in order to enforce the agreement if the subsidiary firm is not complying with it. Moreover, it is likely that, on the grounds of the applicable national law, the mandate produces effects, which are purely 'internal' within the employers' association, and the subsidiary firm is accountable exclusively to the headquarters. In short, the legal effects of the obligatory clauses in each Member State are unpredictable, in the same way that it is not possible to predict whether these clauses could be enforced, and if so, by and against whom;
- the potential conflict between clauses in TCAs and national agreements (applied by the subsidiary firm) at sectoral, local or company level depends on the national law and practices. The mandate to sign at European level does not guarantee in any way that what is provided for by the TCA may prevail over contrasting clauses in national collective agreements (at any level), signed on the grounds of the national law of a Member State (it is indeed arguable that the courts would decide in the opposite sense);

- 'dissenting' national Trade Unions which do not give a mandate are not bound (so the TCA produces neither duties nor rights for them).

The effects of the mandate become an even more controversial topic in relation to a (possible) 'normative' part of the TCA, that gives individual rights to individual workers.

The mandate is not the right tool to produce effects upon every worker in the various Member States, as it is not able to modify the employment contract. This is possible only if the TCA is transposed into an agreement which produces such effects on the basis of national law. The normative effect depends on the rules peculiar to each collective bargaining system, which cannot be overcome by the negotiating mandate that merely links the national to the European social partners (producing legal effects between them).

It is true that (at least) subsidiary firms are bound because of the mandate, so that (one can argue) in each Member State the employer should in any event implement the TCA content unilaterally. In other words, the unilateral implementation of the TCA proposed by the Ales Report could be the natural consequence of the procedure based on the mandate. Nevertheless, this perspective also raises some insurmountable problems, partly highlighted by the Rodríguez Report. In general terms, according to the legal systems of all Member States, the company can commit itself unilaterally if that would lead to an improvement of the conditions of employment. The problem arises if the company does not implement the more favourable clauses provided for by the TCA and instead applies the less favourable conditions established by a national collective agreement or by the general provisions of labour law. Is the employer bound to implement these clauses, so that their homogeneous application within the Member State is in any case guaranteed, as suggested by Antonio Lo Faro (*Bargaining in the shadows of 'optional framework'? The rise of transnational collective agreements and EU law*, in *Journal of Industrial Relations*, 2012)? This is just an Italian perspective, since that is the argument used by the national courts to make the company agreement generally applicable, whether or not the employees are members of a trade union which has signed the agreement. Surely, this argument cannot be used for more institutionalized national legal systems, especially where company agreements are regulated by law and are not based – as in Italy – solely upon the civil law rules on mandates. Moreover, in many Member States the TCA is enforceable as a unilateral commitment only to the extent that the company does not decide to put an end to it; in other words, the enforcement of the TCA depends on the will of the employer. And even in the Italian legal system, the duty of the employer to implement the collective agreement unilaterally is a consequence of the principle of non-discrimination, in other words the company agreement is legally binding for all the workers who are members of the signatory trade union: but this presumption is missing in the TCA case.

Given what we have said so far, a TCA can be made legally enforceable at national level either by means of an act by the national social partners transposing the TCA (a new negotiation or at least an act of adhesion) or a State intervention (implementing legislation) aimed at providing the TCA, signed respecting the procedure established at EU level, with such an effect; or an EU law providing for it (directly influencing the national rules on collective bargaining).

### ***Conclusions: Effectiveness rather than direct effects of TCAs***

The purpose of the OLF should not be to confer 'direct legal effects' on TCAs. Such an objective is not achievable through an act (such as the Decision) that simply regulates a negotiating procedure at

European level. An OLF should rather be about supporting implementation of TCAs within Member States as homogeneously as possible. If that is the goal, the mandate (strictly regulated) is, beyond any doubt, very effective. However, in order to strengthen its binding effect, it would be better to include, among the parties issuing the mandate, the actors legitimized to conduct collective bargaining at company level in various Member States (therefore, also an elective body where that is the legitimate negotiating agent). The obligation undertaken by the actors receiving the mandate should be clearly defined and both its content and the addressees should be identified in a sufficiently clear, precise and unconditioned manner. This should constitute a condition to conclude the TCAs on the basis of the OLF; conversely, the parties could decide not to produce legal effects at all, thus making the TCA a simple statement of intent.

Once the negotiating mandate has been properly regulated, there is no value, from a strictly legal point of view, in an explicit provision of the Decision on the legal effects of the TCA: the TCA will produce the effects that follow from the procedure, according to the law of each Member State. Nevertheless, if the 'industrial relations order' perspective is chosen, the conclusion is different. The Decision adopting the OLF is to be considered a promotional law aimed at fostering the European level of industrial relations, through the full recognition of the European negotiating agents. The obligations following a TCA are grounded on the parties' mutual recognition (both at European and national level), and possible disputes concerning those obligations should be solved by dispute resolution mechanisms not involving courts. That is the main added value of an OLF. It is true that a proper industrial relations order cannot exist without a right to take collective actions; the sanction of last resort, necessary when the mutual recognition fails. As is well known, within the EU the strike exists neither at legal level (Article 153.5 TFEU), nor at practical level (industrial relations). However, this tool does exist at national level, where, at least in theory (and within the national legislation limits), it could be used if the subsidiary firm fails to comply with the commitments undertaken within the TCA or it refuses to make use of dispute resolution mechanisms.

In conclusion, it is appropriate to include in the OLF an obligation upon the signatory parties to both mutually recognise as fully binding the TCA clauses and guarantee the implementation in each subsidiary firm, without the need to negotiate the content afresh. As regards the effects that should be conferred on the TCA in each Member State, the option most consistent with the subsidiarity principle and with the need to respect national systems of industrial relations is to consider the TCA as a 'company agreement' according to national laws and practices. Otherwise, if the TCA is recognised as a level of its own (different from both sector and company level), the question of its effects would remain open, since every Member State would ultimately have to decide how to coordinate such a level with the existing ones and, possibly, a new level (the TCA level) would need to be provided for in the national legal orders. This last option would necessarily imply an amendment of the national collective bargaining systems. To acknowledge that the TCA produces the same effects as the company agreements would also solve from the outset the problems of coordination with the other level of national collective agreements, as the TCA would take precedence over the (possible) conflicting clauses of national collective agreements (at sector, local or company level) applied by the subsidiary, if, and to the extent that, this is provided by the law as well as practices regulating company agreements in the industrial relations system of the Member State concerned.

The provision on the legal value of the OLF could be laid down as follows:

*'The signatory parties recognise that the TCA will have the same legal value as the company agreement at national level; it will cover the same workforce that a company agreement, in the legal system in question, would cover and it will be enforced in the same way as a national company agreement. Indeed, the mandate procedure implies that, in the national legal system, national trade unions and subsidiary firms, who have given a mandate to the European social partners for negotiating and concluding the agreement, do consider the TCA as having the same effects as a company agreement signed according to national law and practices'.*

Such a paragraph, even if it is not able to guarantee direct legal effects to the TCA within the national legal systems, surely improves its 'effectiveness'. However, we have to be aware that the problems relating to TCA enforcement remain unresolved if one of the parties is willing to enforce it before a national court.



## **NON-REGRESSION CLAUSES AND THE BEST ARTICULATION BETWEEN TCAs AND NATIONAL COLLECTIVE AGREEMENTS**

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If we look at the various documents relating to an Optional Legal Framework, there is a consensus on the need for a non-regression clause. Indeed, the non-regression clause can fulfil various functions, the most important being the articulation it creates between the transnational level of collective bargaining and the national ones. However, the precise content of this clause should be clarified.

### ***The need for a non-regression clause in the discourses on an Optional Legal Framework***

If we look at the various documents relating to an Optional Legal Framework, there is a consensus on the need for a non-regression clause.

The Staff Working Document issued by the European Commission identifies the main problems in implementing TCAs in conflicts between the different levels of social dialogue: *'This may lead to interference in the application of collective agreements at national level, and the absence of non-regression clauses may become a reason for concern'*.<sup>59</sup>

The European Parliament Resolution on cross-border collective bargaining and transnational social dialogue also stresses that the inclusion of the most favourable clause and the non-regression clause is *'necessary to avert the danger that a European transnational company agreement might result in evasion of national collective agreements and national company agreements, or impair them'*.<sup>60</sup>

The Sciarra Report takes the view that a TCA *'occupies a level of its own, distinctively different from national sectoral collective agreements and company agreements. In order to support this point, we argue for the inclusion in TCAs of non-regression clauses. We borrow this terminology from secondary EU law and in particular from social policy Directives and from selected rulings of the CJEU'*.<sup>61</sup>

### ***The need for an articulation between TCAs and national collective agreements***

The granting of legal binding effects to TCAs<sup>62</sup> directly raises the question of the articulation of TCAs with national collective agreements. What should be the relationships between a TCA and a local collective agreement where they are contradictory? How can we avoid a possible regression of any national or local employment rights? How can we avoid the risk of *in peius* agreements at national level with the fact that transnational companies might be attracted by the possibility to derogate from

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<sup>59</sup> Commission staff working document, *Transnational company agreements: realising the potential of social dialogue*, SWD(2012)264 final, 10.9.2012.

<sup>60</sup> European Parliament Resolution of 12 September 2013 on cross-border collective bargaining and transnational social dialogue (2012/2292(INI), Point 8 of the resolution.

<sup>61</sup> S. Sciarra, M. Fuchs, A. Sobczak, *Towards a Legal Framework for Transnational Company Agreements*, Report to the ETUC, April 2014.

<sup>62</sup> See G. Orlandini, *Direct Effects of TCAs*.

minimum standards fixed at national level (sectoral or local) by turning to company-level transnational collective bargaining?<sup>63</sup>

Indeed, this risk can be avoided *ex ante* in the process of negotiation itself. This was the solution recommended by the Ales Report. It is also true that TCAs are dealing with specific issues and are not designed to replace national agreements. They are complementary to national collective agreements and are not intended to be a substitute for national-level bargaining. As acknowledged by the Sciarra Report, '*a TCA occupies a level of its own, distinctively different from national sectoral collective agreements and company agreements*'.

However, with the expansion of subject matters dealt with in TCAs and with the diversities in the national collective bargaining systems, the risk of conflicts between levels exists, and an OLF cannot avoid answering the question of the articulation of levels of collective bargaining. Lack of organised links between transnational company agreements and other national levels of collective bargaining can create fear and uncertainty and generate mistrust regarding the transnational level. Moreover, it can create competition between the levels, with a risk of reducing the national protection, thereby creating a disarticulated system instead of a coordinated system of collective bargaining.

Therefore, what might be the best way to create this link and these articulations between national and transnational levels? Is the non-regression clause the best way to articulate the system, and what exactly is a non-regression clause? To answer this question, it is helpful to see how national systems resolve this problem.

### ***The various ways to articulate collective bargaining levels at national level***

There are, of course, different national ways to articulate the various levels of bargaining.<sup>64</sup> First of all, the solutions depend on the bargaining structure itself and the existence of various levels of negotiation, and on the legal effect attached to collective agreements. For example, in the United Kingdom, because collective agreements are not legally binding as such, there is no vertical hierarchy of agreements, and the system is now decentralized. In some Member States there is a clear hierarchical structure with higher-level agreements (sectoral level) setting standards which can only be improved on in agreements at lower levels. The most favourable principle applies in the majority of the Member States with a vertical hierarchy of agreements, and this principle is recognised by the law. In Germany, the relationships between collective agreements and works agreements have more to do with a division in terms of the topics which can be covered.

However, even in countries where the most favourable principle applies, this principle could be challenged by recent regulations favouring the decentralization (controlled or not controlled) of collective bargaining at company level.

T. Jasper proposes three possible ways to look at the relationships between TCAs and local agreements.<sup>65</sup>

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<sup>63</sup> E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdes Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*. Final Report, Brussels: European Commission, DG Employment, Social Affairs and Equal Opportunities, 2006.

<sup>64</sup> Rodríguez, R. *et al.* (2012). *Study on the characteristics and legal effects of agreements between companies and workers' representatives*. Report for the European Commission.

<sup>65</sup> T. Jasper, *Effective transnational collective bargaining. Binding transnational company agreements: a*

- *Lex posterior derogate lege priori* (here the date of entry into force is decisive). However, while this principle could apply to State regulation, it cannot easily be applied in the field of collective agreements and it does not avoid a potential collision between a TCA and a local CA.

- *Lex specialis derogate lege generali*. The problem here is to define which agreement can be considered as general or special (depending on whether the TCA deviates from the local sectoral CA, or where the TCA competes with a local company agreement). In any event, *'applying this principle means that the objective of uniform TCA application in all subsidiaries cannot be achieved'*.

- Deviation from the higher regulation is allowed only where the higher regulation so admits. For T. Jasper, the application of this third principle corresponds best of all to the objective granting direct legal effect to the TCA. It guarantees TCAs priority.

One solution might be to define different topics to be dealt with by TCAs or national collective agreements. It could be seen as a sort of adaptation of *Lex specialis derogate lege generali*. It means that there will be no overlap or interference between the two levels as they will not deal with the same issues. However, as stated before, it is not a practical solution and it could also limit the development of TCAs.

Therefore, the third option seems to be the most practical way to articulate TCAs with national agreements. It could be seen as the application of the most favourable principle, and even if this principle is not known in every Member State, and it needs to be adapted to the transnationality of collective agreements, it could protect the national level of bargaining and favour the development of TCAs. The content of this principle with regard to a non-regression clause should then be clarified.

### ***The meaning of a non-regression clause***

The various documents referring to the non-regression clause do not always precisely define the content of this clause and when they do, some differences may exist.

In the Sciarra Report, the terminology 'non-regression clause' is borrowed from secondary EU law and in particular from social policy Directives and from selected rulings of the CJEU. According to the report *'The non-regression clause is better described as a 'transparency clause'. It puts on national legislatures, while transposing EU law into national legal systems, the burden to prove that, should legal standards be lowered, this outcome is not to be interpreted as an obligation under EU law. It is rather an expression of sovereign national parliaments, which independently choose to change the balance of legal guarantees within national legal orders. TCAs, in a similar way, cannot impose pejorative changes of labour standards and working conditions agreed upon at national level, be it sector or company. National bargaining agents are nevertheless free to enter, if necessary, concession bargaining or other forms of negotiations related to temporary measures, for example to fight the effects of economic and financial downturns'*.

Indeed, since the 1990s, European social Directives have contained a so-called 'non-regression' clause, which generally specifies that the implementation of the Directive concerned cannot constitute valid

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*challenging perspective* in I. Schömann, R. Jagodzinski, G. Boni, S. Clauwaert, V. Glassner and T. Jaspers, *Transnational collective bargaining at company level: a new component of European industrial relations?*, ETUC, 2012.

grounds for reducing the general level of worker protection in the field covered by that Directive. There have been several cases before the ECJ on the effect of 'non-regression' clauses. According to Advocate General Tizzano in his opinion in Mangold<sup>66</sup>, a non-regression clause is not a standstill clause absolutely prohibiting any lowering of the level of protection that exists under national law at the time of implementation of the Directive. It is rather 'a transparency clause', 'in other words a clause which, in order to guard against abuses, prohibits Member States from taking advantage of the transposition of the Directive to implement, in a sensitive area such as social policy, a reduction in the protection already provided under their own law, while blaming it (as unfortunately all too often happens) on non-existent Community law obligations rather than on an autonomous home-grown agenda'. This follows firstly from the letter of the clause, which does not preclude, as a general rule, any reduction in the level of protection enjoyed by workers, but rather provides that 'implementation of the Directive cannot itself constitute 'valid grounds' for undertaking such a reduction. Subject to compliance with the requirements of the Directive, a curtailing of protections at national level is therefore entirely possible, but only on grounds other than the need to give effect to the Directive, the existence of which grounds it is for the Member State to demonstrate'.

The non-regression clauses have been introduced in a very specific context where the European social Directives also contain a 'more favourable' provision. These clauses generally specify that the Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers. The provisions of the social Directives provide a minimum floor of rights beyond which the Member States cannot go and the non-regression clause means that the Member States should not use the implementation of the Directives as an excuse for a reduction.

In a very similar way, it could be argued that TCAs should necessarily include these two different clauses:

- a non-regression clause (or a transparency clause), according to which the conclusion of a TCA could not impose *in peius* changes to working conditions agreed upon at national level. And the TCA could not be an excuse for national collective bargaining to lower the level of protection;
- a most favourable clause, according to which, in the event of conflict between the provisions of a TCA and any other applicable national agreement, the most favourable provision applies to workers.

The non-regression clause and the most favourable clause are indeed very similar, but they are not exactly fulfilling the same function. The non-regression clause is important when the TCA is implemented, while the most favourable clause organises the relationships between the national and the transnational level in a more dynamic perspective, not only at the moment of the implementation but throughout the duration of the agreements. It also means that there is not really a hierarchy between the various levels, as the more favourable provision will apply in any case.

Another, similar option will be not to impose the inclusion of these clauses in TCAs but to grant these effects to TCAs even in the absence of such clauses.

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<sup>66</sup> The Mangold case was the first case on the interpretation of a non-regression clause, see C-144/04.

One important problem remains: how to compare TCA provisions with provisions of national collective agreements. The comparison might be between two provisions dealing with the same issue, or a global comparison of the whole collective agreements. It is possible to argue that the way to compare could depend on the content of the agreement itself and that there is not a unique solution.

### ***Conclusions***

- A non-regression clause and a most favourable clause are needed.
- They could be included as mandatory clauses in TCAs, or the OLF should provide these specific effects of the TCAs.
- The method of comparison should also be clarified.
- The more favourable principle does not necessarily imply a hierarchy between transnational and national levels.

## **WOULD THE PRACTICE OF COLLECTIVE BARGAINING AT EU LEVEL BENEFIT FROM AN OPTIONAL EU MEDIATION MECHANISM AIMED AT ASSISTING THE PARTIES TO A TCA IN THE RESOLUTION OF CONFLICTS REGARDING THE IMPLEMENTATION AND INTERPRETATION THEREOF?**

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This report is intended to feed into the debate on an optional framework for transnational collective bargaining, in particular with regard to the establishment of an optional mediation mechanism at EU level<sup>67</sup>. This report addresses the following questions:

- 1- What is the current situation with regard to dispute resolution in the context of TCAs and (why) is it a problem?
- 2- Should the EU play a role in solving this problem, and if so, what might be the legal base for establishing a mediation mechanism?
- 3- What role is played by other international stakeholders, and how would an EU mediation mechanism relate to that?
- 4- What might be the format of such a mechanism?

### ***Identifying the problem***

The negotiation of transnational company agreements at EU level has become an established practice. The latest update of the list of transnational company agreements and texts identified and catalogued by the ILO and the European Commission in April 2015 contains 282 separate agreements. In the absence of a European framework on TCAs, these agreements lack a well-defined legal status with regard to both their binding effect *inter se* and their normative effect in the national legal order. They are not automatically equated to national collective agreements, and may even not be legally binding at all<sup>68</sup>. The problem as regards the legal status of TCAs is exacerbated by the international character of the agreements, which leads to highly complex private international law problems (of jurisdiction and applicable law) and uncertainty as to the legal standing of the parties involved in negotiating,

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<sup>67</sup> See, on dispute resolution as part of an optional framework, *inter alia* S. Sciarra, M. Fuchs & A. Sobczak, *Towards a Legal Framework for Transnational Company Agreements*, Report to the ETUC 2012 <http://www.ucl.ac.uk/laws/lri/labour-law/content/docs/Report-TCA-towards-legal-framework-transnational-company-agreements.pdf> p. 13; S. Leonardi (ed), *Final Report EURACTA European Action on Transnational Company Agreements: a stepping stone towards a real internationalisation of industrial relations?* IRES 2012 p. 15; ETUC Resolution *Proposal for an Optional Legal Framework for transnational negotiations in multinational companies* (Adopted at the ETUC Executive Committee on 11-12 March 2014) <https://www.etuc.org/documents/etuc-resolution-proposal-optional-legal-framework-transnational-negotiations-multinational#.Vh6WpKPCTGg> p. 5; EP initiative report *Cross-border collective bargaining and transnational social dialogue* (2012/2292(INI))1, adopted by Parliament on 15 July 2013 – rapporteur Thomas Händel (GUE) and Commission staff working document SEC(2008)2155 *The role of transnational company agreements in the context of increasing international integration*, p. 11.

<sup>68</sup> R. Rodriguez *et al*, *Study on the characteristics and legal effects of agreements between companies and workers' representatives*, Final Report for the EC, DG Employment, Social Affairs & Inclusion, p. 119 ff.

signing and implementing TCAs<sup>69</sup>. These problems mean that recourse to national courts in the case of conflicts regarding the interpretation and implementation of TCAs is not a viable option in most cases. Moreover, the traditional extra-judicial conflict resolution mechanisms at national level may also not be available for the resolution of conflicts arising out of TCAs<sup>70</sup>. This is particularly true of conflicts which directly regard the TCA itself and conflicts involving the European partners.

In these circumstances, creating a European ADR mechanism may have two functions. It may be a way to give individuals and collective entities access to a remedy in cases in which the legal status of the TCA is undetermined<sup>71</sup>. There are several examples of TCAs that offer private individuals access to a complaint mechanism in the event of violation of their rights under the TCA. In these cases, the ADR mechanism replaces or complements the existing national enforcement mechanisms and creates a normative effect outside of any national or international legal framework. But a European ADR mechanism may also aim at creating a transnational enforcement mechanism for what is in essence a transnational phenomenon. In that case, the ADR mechanism specifically aims to address transnational conflicts<sup>72</sup>. The mechanism fills the present enforcement lacuna and is meant to strengthen the autonomous character of the transnational agreement. It neither replaces nor interferes with the national enforcement mechanisms. TCA practice also contains several examples of such transnational mechanisms.

The research conducted by Auriane Lamine demonstrates that social partners increasingly include dispute resolution clauses in their TCAs<sup>73</sup>. However, there is little information on the incidence of conflicts arising in the context of the interpretation and implementation of TCAs, or on the mechanisms used by the social partners where such conflicts do arise<sup>74</sup>. Hence, there is a lack of identification of the problem, in as far as only unresolved conflicts are identified as such. However, this is not the only way to approach the issue: autonomous dispute resolution plays an important role in the development and maintenance of social dialogue. This is true at national level, and even more true at European level<sup>75</sup>. It

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<sup>69</sup> Aukje van Hoek & Frank Hendrickx, *International private law aspects and dispute settlement related to transnational company agreements*, Study undertaken on behalf of the European Commission, Contract number VC/2009/0157 Final report 20 October 2009, <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageld=21>.

<sup>70</sup> Commission staff working document SWD(2012)264 - [Transnational company agreements: realising the potential of social dialogue, p. 17](#); Expert Group on transnational company agreements, Report 31 January 2012, p. 114.

<sup>71</sup> Or when legal protection at national level is deemed to be inadequate.

<sup>72</sup> Compare the position of the trade union expert from NORD in the [Minutes of the sixth meeting](#) of the Expert Group on transnational company agreements of 11 October 2011, p. 4.

<sup>73</sup> A. Lamine, "TCAs in the EU: Which Dispute Settlement Mechanisms?", Study made in the framework of the ETUC academic experts meetings, 2015, p.24. See also Stefania Marassi, *Globalization and Transnational Collective Agreements, International and European Framework Agreements at Company Level*, Bulletin of Comparative Labour Relations (R. Blanpain ed.), 2015, 172.

<sup>74</sup> Expert Group on transnational company agreements, Report 31 January 2012 p. 113; International Training Center of the ILO, *Key issues for management to consider with regard to Transnational Company Agreements (TCAs); Lessons learned from a series of workshops with and for management representatives* December 2010, VP 2009/003, p. 22.

<sup>75</sup> F. Valdés Dal-Ré, Synthesis Report on conciliation, mediation and arbitration in the European Union of March 2002 <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageld=214>; Study on the characteristics and legal effects of agreements between companies and workers' representatives - Expert Group on transnational company agreements: Sixth meeting of the Expert Group on 11 October 2011, p. 89; Green Paper on alternative dispute resolution in civil and commercial law (COM(2002) 196 final), p. 8-10; Brussels (Laeken) European Council in December 2001, para. 25 of the presidency conclusions.

is also known from research into the development of mediation mechanisms at national level that mediation needs government support in order to develop as a meaningful alternative to court proceedings<sup>76</sup>. Thus, the establishment of a mediation mechanism at EU level may be an effective way to support EU social dialogue as such<sup>77</sup>.

### ***The possible roles of the EU and their legal base***

The creation of private dispute resolution mechanisms is first and foremost a function of the private parties themselves. The EU has nevertheless been active in the field of mediation for a long time now. Most of the EU's interventions are concerned with consumer conflicts, and aim to enhance access to justice in both domestic and cross-border cases. They are based on different Treaty provisions and are diverse in character. The only EU instrument that applies to labour disputes is the Mediation Directive of 2008. This Directive mainly regulates the interaction between courts and mediation procedures, an aspect which by definition has to be dealt with in the law and cannot be regulated by the parties themselves. The Directive deals *inter alia* with the confidentiality of information disclosed in a mediation procedure in subsequent court proceedings, the effect of mediation procedures on limitation periods and the enforcement of settlement agreements<sup>78</sup>. On these issues it contains binding rules. The Directive is based on the Treaty provisions on judicial co-operation in civil matters and applies only to cross-border mediation. Other EU instruments (not applicable here) contain rules on the mediation itself and the quality of mediators and/or offer support to mediation mechanisms, e.g. by providing a platform for the exchange of information<sup>79</sup>.

The creation of rules is not the only way to stimulate ADRs. In the national systems, the establishment of a mediation market also requires government support in a more practical way: by giving information and offering training facilities, funding and organising research into best practices and effectiveness, subsidies and the setting up of infrastructures<sup>80</sup>. The development in the field of consumer ADRs demonstrates how these lines of support are linked: in the ADR/ODR package<sup>81</sup> the EU pays for the development and maintenance of a platform through which consumers may approach national ADR mechanisms to resolve their transnational disputes. However, in order to join the platform, national ADR mechanisms have to fulfil the quality requirements of the ADR Directive.

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<sup>76</sup> Compare V. Tilman, *Lessons learnt from the implementation of the EU Mediation Directive: the business perspective*, Note for the EP, Policy Department C: Citizens' Rights and Constitutional Affairs, 2011 <http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19584/20110518ATT19584EN.pdf> p. 13.

<sup>77</sup> Compare Green Paper on alternative dispute resolution in civil and commercial law (COM (2002) 196 final), p. 22.

<sup>78</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters OJ 2008, L 136/3.

<sup>79</sup> See for example Regulation 524/2013/EU on consumer ODR, OJ 2013 L 165/1; Directive 2013/11/EU on consumer ADR, OJ 2013 L 165/63. The rules on mediation in these instruments are inspired in part by the older Commission Recommendations 98/257/EC (of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes OJ L 115/31) and 2001/310/EC (of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109/56).

<sup>80</sup> Tilman l.c. note 10.

<sup>81</sup> Regulation 524/2013/EU on consumer ODR, OJ 2013 L 165/1; Directive 2013/11/EU on consumer ADR, OJ 2013 L 165/63.



If the EU opts for supporting, rather than regulating, dispute resolution in respect of TCAs, one way forward might be to formulate minimum requirements for both TCAs and the dispute resolution mechanisms contained therein and offer practical mediation services where both the TCA and the internal procedure meet these minimum requirements. Other support measures could consist of gathering best practices, formulating model clauses and/or rules of procedure which parties may adopt and establishing a list of specialized mediators. None of these measures seem to necessitate the adoption of binding legal acts. A policy and a budget line might suffice. If the EU were to formulate binding rules on mediation in labour cases, however, this would need a legal competence base within the Treaties.

### ***The activities of other international governmental organisations***

In the preceding paragraphs we reached the conclusion that, although parties to TCAs may themselves create mechanisms to deal with disputes arising out of the implementation and interpretation of TCAs and in fact do so, transnational social dialogue may benefit from institutional assistance in the area of dispute resolution. As TCAs are by definition transnational in character, individual States are not in the best position to offer such support. But TCAs are not necessarily confined to intra-EU enterprises either. There is a sliding scale between purely intra-EU agreements (or EFAs) and global agreements (IFAs). Therefore it is also necessary to address the position of other international institutions on this point. The main players to be considered are the Council of Europe, Uncitral, the OECD, the ILO and the UN.

The Council of Europe has adopted several recommendations which aim to promote mediation in different areas of the law. In 2002 the Committee of Ministers drew up Recommendation (2002)10 on mediation in civil matters, which encourages States to support mediation and which contains a set of guiding principles for mediation. The recommendation also applies to labour disputes. The Council of Europe does not support or manage individual mediations. Accordingly, if the EU did offer mediation services, this would not interfere with the work of the Council of Europe. However, the EU should notify the Council of its plans and should make sure that any mediation service offered respects the principles in Recommendation 2002(10)<sup>82</sup>.

Uncitral is a specialized body within the UN structure involved in the modernisation and harmonisation of rules on international business. In the field of consensual dispute resolution, Uncitral adopted a set of model rules in 1980 and a model law in 2002. The Conciliation Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship<sup>83</sup>. The Model Law on international commercial conciliation<sup>84</sup> likewise contains default rules on procedural issues, but also directly targets the interaction between conciliation and adjudication. Both the rules and the model law are applicable to commercial disputes

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<sup>82</sup> <http://www.coe.int/en/> ; Recommendation (2002)10 of the Committee of Ministers to Member States on mediation in civil matters (Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies); on the need for co-operation between the CoE and the EU, see Resolution No. 1 on 'Delivering justice in the 21st century' adopted by the European Ministers of Justice at their 23rd Conference in London on 8-9 June 2000, point 5a.

<sup>83</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1980Conciliation\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html)

<sup>84</sup> [http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf)

only, which seems to exclude labour disputes. They could, nevertheless, offer inspiration for similar guidelines on labour mediation in the EU<sup>85</sup>. Uncitral itself does not offer conciliation services.

The ILO aims to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues<sup>86</sup>. The ILO mainly targets States and monitors compliance with their standards by a reporting system. However, the ILO also pays attention to the position of MNEs: as early as 1967 the ILO adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). The Multinational Enterprises and Enterprise Engagement Unit of the International Labour Office is responsible for promotion and follow-up regarding this declaration. Recently the ILO tentatively engaged in offering mediation services in this area: on the website dedicated to MNEs it states that 'The ILO makes available to companies and trade unions wishing to use the facilities of the ILO a neutral place to discuss issues of mutual concern'. Several recent documents mention this company-union dialogue facilitation service<sup>87</sup>. In the recent agreement on occupational safety in the Bangladesh textile sector, an ILO official is appointed as neutral chair of the steering committee overseeing implementation of the agreement<sup>88</sup>. Though dissenting voices are heard as well<sup>89</sup>, it seems clear that the ILO is looking into the possibility of assisting social dialogue by offering dispute resolution services, including with regard to MNEs. Given the close link between CSR standards and the content of (especially) IFAs, there is a clear overlap in subject matter between the current initiative and the work of the ILO. It seems wise to co-ordinate any EU initiative in this area with the ILO, especially as the Commission and the ILO already collaborate in the maintenance of the TCA database.

Another relevant instrument is to be found in the OECD Guidelines for multinational enterprises<sup>90</sup>. These non-binding Guidelines contain recommendations from governments of OECD Member States to the multinational enterprises operating in or from their territory with regard to Corporate Social

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<sup>85</sup> UNCITRAL Model Law on International Commercial Conciliations with Guide to Enactment, p. 20; interestingly enough, the Rana Plaza Agreement of 2013 contains an arbitration clause which explicitly refers to the Model Law on commercial arbitration (rather than the Model Rules).

<sup>86</sup> See <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

<sup>87</sup> Implementation strategy for the follow-up mechanism of and promotional activities on the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), Governing Body 320th Session, Geneva, 13–27 March 2014 GB320-POL\_10\_[ENTER-140214-1]-En.docx p. 3 Point A.f. Dialogue 14. The company-union dialogue facilitation service, proposed by the Working Group and accepted by the Governing Body, is being promoted through the ILO Helpdesk for Business website and new promotional leaflet.

<sup>88</sup> International Labour Conference Provisional Record 102nd Session, Geneva, June 2013, Sixth item on the agenda: Recurrent discussion on the strategic objective of social dialogue under the ILO Declaration on Social Justice for a Fair Globalization - Report of the Committee for the Recurrent Discussion on Social Dialogue ILC102-PR11-[RELCO-130617-3]-En.docx 11/28 point 95. International Labour Conference Provisional Record 102nd Session, Geneva, June 2013, Sixth item on the agenda: Recurrent discussion on the strategic objective of social dialogue under the ILO Declaration on Social Justice for a Fair Globalization - Report of the Committee for the Recurrent Discussion on Social Dialogue ILC102-PR11-[RELCO-130617-3]-En.docx 11/28 point 96.

<sup>89</sup> See previous note p. 11/27 point 94, where an employers' delegate stressed that 'MNEs were not a fourth constituency of the ILO.'

<sup>90</sup> Together with the United Nations Global Compact and Guiding Principles on Business and Human Rights, the ISO 26000 Standards and the International Labour Organisation's (ILO) Conventions, the Guidelines are referred to as the 'core set of internationally recognised principles and guidelines regarding Corporate Social Responsibility (CSR)'. The current version of the Guidelines was adopted in 2011.

<http://mneguidelines.oecd.org/>

Responsibility. The Guidelines are accompanied by a dispute resolution mechanism<sup>91</sup>. The dispute resolution mechanism is run by the National Contact Points. The NCPs' activities are limited to complaints regarding breaches of the Guidelines committed within the territory of a Member State or by an MNE established there. These complaints are referred to as 'specific instances'. The website clarifies that 'Specific instances are not legal cases and NCPs are not judicial bodies. NCPs focus on problem solving – they offer good offices and facilitate access to consensual and non-adversarial procedures (ex. conciliation or mediation)'<sup>92</sup>. The procedure starts with a specific complaint and ends with a public statement of the NCP unless specific privacy interests prevent this. The authority to issue a statement gives the NCP a special power over the parties to a dispute which is absent in purely consensual mediation.

In 2011 the UN Human Rights Council adopted the so-called 'Ruggie principles' in its resolution 17/4 of 16 June 2011<sup>93</sup>. These principles on MNEs and human rights contain a right to an effective remedy in the event of a breach of human rights or other grievances with regard to the implementation of the principles<sup>94</sup>. Rule 31 contains detailed principles for non-judicial grievance mechanisms<sup>95</sup>. Like the OECD principles, the Guidelines pay specific attention to the issue of involving other stakeholders in the procedure. Though the Guidelines do not establish any mediation mechanism, and aim to be applied in the context of (mainly) human rights protection, the principles for grievance mechanisms contained therein can be used as a source of inspiration, alongside the other sets of rules and principles formulated for this purpose.

Finally, the Permanent Court of Arbitration, established in The Hague, is worth taking a look at. The PCA, established by treaty in 1899, is an intergovernmental organisation providing a variety of dispute resolution services to the international community<sup>96</sup>. In the late 90s and early 00s, it started investigating the need for specialized dispute resolution services in specific areas, including labour law<sup>97</sup>. This led to two specialized services: one for environmental disputes and one for mass claims. For these types of conflicts they drafted optional arbitration and mediation rules as well as a guide for negotiating and drafting dispute resolution clauses. They maintain a list of specialized arbitrators and will administer a procedure upon request of the parties. No separate service was established for labour disputes. Unfortunately, the public records do not state a reason for this.

This overview shows that alternative dispute resolution has drawn the attention of most relevant international actors in one way or another. ADR is being seen more and more as a crucial aspect of the effectiveness of legal protection and access to justice. Mediation, moreover, is deemed important as a way to enhance cooperation between stakeholders and to strengthen the effective implementation of principles of labour law and human rights. Several organisations have formulated rules and principles

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<sup>91</sup> See on these instruments Martje Theuws & Mariette van Huijstee, *Corporate Responsibility Instruments: A Comparison of the OECD Guidelines, ISO 26000 & the UN Global Compact* Amsterdam: Somo, December 2013.

<sup>92</sup> See <http://mneguidelines.oecd.org/specificinstances.htm>. The Manual is prepared by the Consensus Building Institute and sponsored by Denmark, the Netherlands and the UK.

<sup>93</sup> See SOMO report p. 9 and

[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>94</sup> See the Guiding Principles, Chapter III: access to remedy -

[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>95</sup> These should be legitimate, accountable, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.

<sup>96</sup> <http://www.pca-cpa.org/>.

<sup>97</sup> See on the latter initiative: International Bureau of the PCA, *Labor law beyond borders: ADR and the internationalization of labor dispute settlement*, The Hague: Kluwer Law International 2003.

of ADR that could be used as sources of inspiration for an EU mediation mechanism. However, few organisations actually administer ADR mechanisms themselves. The EU, when embarking on that course, should consult both the ILO and the OECD. The PCA might likewise be a relevant source of information on this point.

### ***Mediation models***

Analysis of the TCAs registered in the EU/ILO database shows that a growing percentage of TCAs contain provisions on dispute resolution<sup>98</sup>. However, the clauses vary in content. A distinction should be drawn between grievance procedures open to individual workers and conflict resolution mechanisms which only deal with disputes between the management and workers' representatives. When TCAs contain a more elaborate and well defined mechanism, it is common to have a layered system in which a conflict at national level is first dealt with at that level, and is only taken to the international / European level when the dispute settlement at national level fails. At the latter level the signatory parties will try to solve the conflict between themselves before turning to third-party intervention<sup>99</sup>.

In all these cases, the conflict envisaged seems to be between the different sides (labour vs management) rather than between the different levels on the same side (either labour or management). From the literature on the implementation of TCAs we gather that conflicts regarding the implementation of TCAs may also relate to the interaction between the national level and the transnational level within the same side of industry: national unions may try to make some changes to the rights and obligations in the TCA as agreed upon by the European / international (con)federation; national management might be reluctant to implement an agreement made by central management<sup>100</sup>. Mediation might be useful in these (vertical) conflicts as well. However, the existing clauses do not directly address this type of conflict, which is closely linked to the 'internal affairs' of one of the contracting parties: either the employee representation or the management structure of the MNE.

TCAs do in some instances refer to third-party intervention, but as a last-resort solution only. In that case it seems that only the signatory parties may make use of the external mechanism, though the wording of the clauses is not always clear on this<sup>101</sup>. The advantage of such a restriction is that the autonomous mechanism will not interfere with existing national dispute resolution mechanisms (subsidiarity). Disadvantages are that not all stakeholders may be involved in (defining and) solving the problem, and vertical problems might not get addressed adequately.

If mediation is promoted as a last-resort mechanism to solve problems of interpretation and implementation between the signatory parties, it seems necessary to further inquire into the benefits

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<sup>98</sup> Study by Auriane Lamine, on record with the authors, "TCAs in the EU: Which Dispute Settlement Mechanisms?", Study made in the framework of the ETUC academic experts meetings, 2015, p.24. See also Marassi o.c. note 7, p. 160 ff. Marassi's overview shows that international framework agreements are much more likely to contain dispute resolution mechanisms than European framework agreements (38 out of 62 IFAs versus 15 out of 60 EFAs).

<sup>99</sup> If such third-party intervention is envisaged at all. See overview Auriane Lamine and Sobczak 2012 p. 145-146.

<sup>100</sup> A. Sobczak, *Ensuring the effective implementation of transnational company agreements*, European Journal of

Industrial Relations 18(2) 2012, p. 139-151 at 146-8. See also Leonardi, o.c. note 1, p. 13.

<sup>101</sup> Study by Auriane Lamine. See for example the TCAs of Loomis 2013, Skanska 2001 and G4S 2008 (unclear delimitation), GDF Suez Global Agreement on Fundamental Rights, Social Dialogue and Sustainable Development 2010 (signatory parties only).

to be expected from 'externalizing' the dispute by involving a third party. Should the 'neutral third party' aim to assist the parties in their communication (Harvard-style mediation) without expressing any opinion as to the dispute or the possible resolution thereof? Or should the third party have some authority and be allowed to express an opinion or even suggest or impose a solution?<sup>102</sup> The choice between the two also informs the choice of the third party: especially in the latter case, the EC may play an active role in offering 'good offices'. The example of the ILO and NCP may offer some guidance in this respect. It should be kept in mind, however, that the role of the EC in relation to TCAs is fundamentally different from the role of the NCPs under the OECD guidelines: not only is the role of the NCPs restricted to disputes regarding the correct application of the guidelines, they ultimately have authority to publish their assessment of the conflict. Neither the restriction nor the 'sanction' applies if the EC is to mediate conflicts over the implementation and application of TCAs.

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<sup>102</sup> Compare Drouin in: Papadakis (ed), *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?* Geneva: ILO International Institute for Labour Studies/International Labour Office 2008, p. 255 ff.

## **PUBLICITY OF TRANSNATIONAL COMPANY AGREEMENTS**

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### **Publicity of collective agreements**

For the purposes of this paper, 'publicity' refers to strategies or means which are helpful for the *dissemination* of the substance of collective agreements. Collective agreements have a twofold nature. They seek to regulate relations between the signatory parties (obligatory part) as well as between employer(s) and their employees (normative part). For obvious reasons, collective agreements are known to the signatory parties. The obligatory part does not require publicity. In order for the normative part to be known by the employers and employees concerned, more is needed. In the case of transnational company agreements, even the employers concerned will not necessarily be signatory parties to the agreement. In this respect, TCAs differ from national company agreements. Very often, transnational collective agreements are concluded solely by a parent company or by a company controlling a network of companies. Subsidiary companies and subcontractors might not be included in the negotiations. From the employee side, individual employees are never signatory parties to these agreements. At best, there might be an indirect contractual relationship with a signatory trade union, *id est* with an organisation affiliated to a signatory trade union.

Publicity can be shaped in distinct ways. Firstly, the signatory parties can communicate the (normative) substance of the agreement to the employers and employees involved through direct contacts with the latter. Secondly, they can register the agreement at a public law institution, which might be required to disseminate copies of the agreement for third parties having a genuine interest in asking for such a copy. In a more contemporary world, such a register could be made more public by transferring its content into a database of agreements which could be downloaded. Thirdly, a public authority could decide to publish agreements declared generally binding in an official journal or at least to declare these agreements generally binding. In practice, such a measure will be adopted in the case of collective agreements declared to be generally binding at sectoral or inter-sectoral level, not in the case of company agreements. The first system of publicity can be based entirely upon an autonomous legal framework. Since the other means of publicity require an intervention from a public authority, such a measure falls outside the scope of collective bargaining. It needs to be adopted by authorities able to bind the public institutions required to organise such a register or to publish the collective agreements. These measures are based upon a heteronomous legal framework.

Some of these heteronomous legal practices can be illustrated by specific statutory provisions (Box 1).

The distinction between communication and registration does not always coincide with the bifurcation between autonomous and heteronomous sources. Indeed, some statutory provisions have imposed an obligation on signatory parties of collective agreements to communicate the substance of the collective agreements to their members.

An example of this legislative practice is Article 4 of the Dutch law on collective agreements, which provides as follows:

*'Eene vereniging, welke eene collectieve arbeidsovereenkomst heeft aangegaan, draagt zorg dat ieder harer leden, die bij de overeenkomst betrokken is, zoo spoedig mogelijk den woordelijken inhoud der*

*overeenkomst in zijn bezit heeft. Indien door de partijen eene toelichting op de collectieve arbeidsovereenkomst is opgesteld, geldt deze verplichting ook ten aanzien van de toelichting’.*

In other legal orders, such an obligation does not require a specific statutory provision, insofar as it can be deduced from the general obligation to execute *an agreement in good faith*.<sup>103</sup>

### **Publicity of collective agreements: the potential threats for collective autonomy**

Though heteronomous statutory obligations relating to publicity can be seen as a means to promote collective bargaining, there are some strings attached to the recognition of these agreements in the domestic legal orders. In some countries, the public institutions will use the registration procedure to operate an *ex ante* legality test relating to the substance of these agreements.<sup>104</sup> The existence of a registration procedure is often a necessary prerequisite for the binding nature of the agreement within the legal order concerned (e.g. in France, the Netherlands and Belgium).

### **Autonomous publicity of transnational company agreements**

The issue of publicity is sometimes regulated in an autonomous way in the transnational company agreements. By its very nature, a duty enshrined in an autonomous instrument to register the agreements at a public institution is problematic. It falls beyond the scope of social partners to impose an administrative burden upon these institutions forcing them to register these instruments if signatory parties request to do so, let alone to issue copies of these documents. However, some examples can be mentioned of an autonomous commitment to register the text at a national public institution<sup>105</sup> or even at a European or international public organisation.<sup>106</sup>

More frequently, transnational company agreements provide provisions relating to the duty to communicate the substance of the TCA. As far as the holder of the obligation to communicate is concerned, the majority of these agreements refer to the central management, whereas a minority<sup>107</sup> of the agreements extend this obligation to all the signatory parties. Some of these provisions lack precision on one or a number of the following issues:

- a) the persons to be informed. The persons concerned can vary from employees or new recruits, to employees’ representatives and/ or trade unions, or trade unions or representatives in the case of a lack of representatives;
- b) the question whether copies of the text need to be disseminated;
- c) the translation of the texts<sup>108</sup>;

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<sup>103</sup> See J. Buelens en M. Rigaux, *Inhoud van de collectieve arbeidsovereenkomst*, G. Cox, M. Rigaux en J. Rombouts, *Collectief onderhandelen*, Mechelen, Kluwer, 2006, 122.

<sup>104</sup> See for Belgium: G. Cox, *CAO's: moeilijk evenwicht tussen autonomie en wettigheid*, in P. Humblet en A. Van Regenmortel, *Markante standpunten*, Antwerp, Intersentia, 2015, 14-15.

<sup>105</sup> See Suez (2007) (Direction départementale du travail et de l'emploi/ Conseil des prud'hommes).

<sup>106</sup> See Vivendi (1999): ILO.

<sup>107</sup> See Arcelor (2005/2008), AKER (2008), EDF (2005/2009), Petrobas (2011), Norske Skog (2013), Danske Bank (2008).

<sup>108</sup> See AKER (2008) ('appropriate translations'), Siemens (2012) (responsibility of regional business units for translation into additional languages), SODEXO (2011) (this agreement shall be spread in national languages on both global and local levels), AREVA (2011) (translation into the languages of the countries represented on

- d) the information vis-à-vis subcontractors and suppliers (extremely relevant in case of CSR). Provisions suggesting a binding character of the agreement vis-à-vis subcontractors / suppliers are virtually non-existent. Quite often, very soft formulas are being used<sup>109</sup>;
- e) the question whether dissemination to employees needs to be operated ‘top down’ or rather by local management to the employee side at local level.

Some of the agreements explicitly provide a form of publicity by providing that the text needs to be posted on an intranet or on the internet<sup>110</sup>.

### The issue of publicity in the discourse on (Optional) Legal Frameworks

The issue of publicity of transnational agreements has been highlighted in a number of projected ‘optional frameworks’. In his Ph.D. thesis<sup>111</sup>, Mathieu Hecquet has proposed a statutory obligation (*pour la partie la plus diligente*) to register the collective agreement at the competent authority at European level (European Commission) which could scrutinise the legality of the agreement. In the absence of such registration, the agreement cannot be legally invoked (sanction of *non-opposabilité*). Furthermore, the author provides a statutory obligation to communicate the text to the elected and non-elected workers’ representatives at the level of the Community-scale group of undertakings.

In a subsequent Ph.D. thesis, Even<sup>112</sup> has pleaded in favour of a statutory obligation to register the collective agreement, containing a number of elements (inspired by Article 16 of the Belgian Law on Collective agreements and joint committees). Insofar as these formal requirements are not met, the agreement will not be registered and hence not recognised as an agreement under the proposed Directive.

In the proposal for a Directive (former Article 115 TFEU) put forward by the Proposal of the Working Group Transnational collective bargaining in Europe, Past, Present and future directed by Edoardo Ales, no ‘statutory’ provisions have been enshrined in relation to registration or publicity. However, the proposal of the Working Group provides that the EU TCA needs to be transposed into as many managerial decisions (***binding according to the national laws or practices***) as there are companies in the sector adhering to Employers’ Sectoral or Multi-sectoral Organisations represented within the JNB-SL or companies of the group represented within the JNBCL.

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AREVA EWC), Norske Skog ((2013) (appropriate translations available at all workplaces), Pfeiffer (2010) (Pfeiffer informs the company staff regarding this agreement in the relevant national language) (see also in a similar way Staedler 2008), Generali (2013) (dissemination in all languages of the EU Member States where it operates), Veidekke (2012) (appropriate translations of the agreement available at workplaces), Total (2015) (translation in a number of languages listed), Danone (2011) (in the language of the country concerned).

<sup>109</sup> See Arcelor (2005/2008): ARCELOR supports and encourages its contractors and suppliers to take this agreement into consideration in their own company policies; EDF (2013) (EDF Group shall communicate the existence of this text to its subcontractor, in particular the principles concerning them), ENI (2002/2009) (the Parties agree to raise awareness of the values and understandings accepted in signing this agreement inside and outside ENI), VALEO Group (2012) (will inform its subcontractors of the existence of this text, and particularly the principles applicable for subcontractors), Danone (2011) (circulation to its suppliers and subcontractors).

<sup>110</sup> See AKER (2008), Solvay (2013), Safran (2015), Veidekke (2012), Umicore (2009), Total (2015).

<sup>111</sup> M. Hecquet, *Essai sur le dialogue social*, Paris, LGDJ, 2007.

<sup>112</sup> Z. Even, *Transnational collective bargaining in Europe*, Den Haag, Boom Juridische Uitgevers, 2008.



In the Sciarra Report (*Towards a legal Framework for Transnational Company Agreements*), a Proposal for a Decision (former Article 288 *juncto* 152 TFEU ) is envisaged as being solely binding for the Member States as addressees, containing the optional legal framework, and delegating a power to the European Commission to adopt non-legislative acts of a general nature. This Proposal for a Decision places a responsibility upon Member States to implement the 'TCs according to their national legal traditions and to trace relevant legal changes'. Furthermore, the Sciarra Report contains interesting elements regarding publicity. It indicates that the Decision could empower the Commission to administer a website as the reliable source for all relevant information as a means of publicity and as a sign of effective co-operation among State administrations. In my view the report is unclear whether there will be a managerial obligation or obligations on signatories to register the agreement on such a website, although such an 'obligation' seems to be part of their voluntary decision to 'opt in'.

## Box 1

### Statutory obligation to register a collective agreement at a public institution

a) Article 18 of the Belgian law on Collective Agreements and Joint Committees:

*'Art. 18. La convention est déposée au Ministère de l'Emploi et du Travail. Le dépôt est refusé lorsque la convention ne satisfait pas aux dispositions des articles 13, 14 et 16. Sont également déposées au Ministère de l'Emploi et du Travail:*

- 1. l'adhésion à la convention d'une organisation ou d'un employeur;*
- 2. la dénonciation d'une convention à durée indéterminée ou d'une convention à durée déterminée comportant une clause de reconduction'.*

No formal sanction provided by law, although a collective agreement not registered does not have the binding nature described in the law. An obligation to register is relevant for collective agreements at company level, sectoral level and inter-sectoral level (contrary to the issue of publication solely applicable to sectoral and inter-sectoral collective agreements). The *Greffe* delivers certified copies of collective agreements on request, provided a 'retribution' ('redevance') is paid.

b) § 7 of the German Tarifvertragsgesetz:

*'(1) Die Tarifvertragsparteien sind verpflichtet, dem Bundesministerium für Arbeit und Soziales innerhalb eines Monats nach Abschluß kostenfrei die Urschrift oder eine beglaubigte Abschrift sowie zwei weitere Abschriften eines jeden Tarifvertrags und seiner Änderungen zu übersenden; sie haben ihm das Außerkrafttreten eines jeden Tarifvertrags innerhalb eines Monats mitzuteilen. Sie sind ferner verpflichtet, den obersten Arbeitsbehörden der Länder, auf deren Bereich sich der Tarifvertrag erstreckt, innerhalb eines Monats nach Abschluß kostenfrei je drei Abschriften des Tarifvertrags und seiner Änderungen zu übersenden und auch das Außerkrafttreten des Tarifvertrags innerhalb eines Monats mitzuteilen. Erfüllt eine Tarifvertragspartei die Verpflichtungen, so werden die übrigen Tarifvertragsparteien davon befreit.*

(2) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig entgegen Absatz 1 einer Übersendungs- oder Mitteilungspflicht nicht, unrichtig, nicht **vollständig oder nicht rechtzeitig** genügt. **Die Ordnungswidrigkeit kann mit einer Geldbuße geahndet werden.**

(3) Verwaltungsbehörde im Sinne des § 36 Abs. 1 Nr. 1 des Gesetzes über Ordnungswidrigkeiten ist die Behörde, der gegenüber die Pflicht nach Absatz 1 zu erfüllen ist’.

The German law provides for an administrative fine if signatory parties neglect to register the agreement.

c) Article L2261-1 Code du Travail (France):

*‘Les conventions et accords sont applicables, sauf stipulations contraires, à partir du jour qui suit leur dépôt auprès du service compétent, dans des conditions déterminées par voie réglementaire’.*

Hence, the registration and the binding nature are intertwined.

d) The same holds true in the Netherlands, where Article 4 of the ‘Wet op de Loonvorming’ provides that collective agreements need to be registered at the Ministry of Employment in order to enter into force.

### **Statutory obligation incumbent on public authorities to publish the decision or to declare agreements generally binding, sometimes including the publication of the text of the latter**

a) Articles 25 and 26 of the Belgian Law on Collective Agreements and Joint Committees:

*‘[Art. 25](#). L’objet, la date, la durée, le champ d’application et le lieu de dépôt d’une convention conclue au sein d’un organe paritaire sont publiés par la voie d’un avis au Moniteur belge. Est, de même, publiée par la voie d’un avis au Moniteur belge, la dénonciation d’une convention à durée indéterminée ou d’une convention à durée déterminée comportant une clause de reconduction’.*

*‘[Art. 30](#). Le dispositif de la convention rendue obligatoire est publié au Moniteur belge, en annexe à l’arrêté royal qui la rend obligatoire.*

*Lorsque la convention est rédigée en une seule langue, sa publication se fait toutefois en français et en néerlandais’.*

b) § 5 7) TVG (Germany):

*‘§ 5 7) Die Allgemeinverbindlicherklärung und die Aufhebung der Allgemeinverbindlichkeit bedürfen der öffentlichen Bekanntmachung. Die Bekanntmachung umfasst auch die von der Allgemeinverbindlicherklärung erfassten Rechtsnormen des Tarifvertrages’.*

c) Article 5 Dutch Law of 25 May 1937, ‘tot het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten’:

## 'Artikel 5

- 1. *Het besluit, waarbij de verbindendverklaring wordt uitgesproken, houdt in:*
  - a. *eene opgaaft van de bepalingen, waarop de verbindendverklaring betrekking heeft;*
  - b. *eene opgaaft van het tijdstip, waarop de verbindendverklaring begint te werken en dat, waarop hare werking eindigt;*
  - c. *voor zoover noodig eene omschrijving van het gebied, waar en van de werkzaamheden, waarop de verbindend verklaarde bepalingen van toepassing zijn.*
- 2. *Van een besluit omtrent verbindendverklaring wordt mededeling gedaan door plaatsing in de Staatscourant.*
- 3. *Van de verbindendverklaring wordt aanteekening gehouden in een register, dat ingericht is volgens voorschriften door Onzen Minister gegeven. De collectieve arbeidsovereenkomsten, waarvan bepalingen verbindend zijn verklaard, worden als bijlagen bij het register bewaard.*
- 4. *Het in het vorige lid bedoelde register met bijlagen ligt voor een ieder kosteloos ter inzage. Schriftelijke inlichtingen, het register betreffende, worden tegen betaling der kosten vanwege Onzen Minister aan een ieder verstrekt'.*

Publication of the decision to extend *erga omnes* a sectoral agreement in the *Staatscourant*, not the sectoral agreement as such. The latter can be consulted without cost, insofar as the Government keeps a register of the agreements declared to be generally binding.

### **3. THE ETUC'S ANALYSIS AND POSITION ON THE MOST CRITICAL POINTS OF AN OPTIONAL LEGAL FRAMEWORK**

The Optional Legal Framework (OLF) aims at supporting and promoting the further development of Transnational Company Agreements. Such an OLF should promote this new tool of the European social dialogue in line with the provisions of the Treaties, the European Social Charter and the EU Charter of Fundamental Rights. It should fully respect the autonomy of the social partners and should not undermine or impose changes to the collective bargaining rules and practices established at national level.

The OLF can be implemented through:

- A Decision of the Council on a proposal of the European Commission;
- A decision designed, signed and autonomously implemented by the European social partners under Art. 155 of the TFEU.

#### **NEGOTIATIONS**

The proposal submitted here is in line with, and fully respects, the autonomy of social partners as enshrined in the Treaty of the European Union and their right to bargain collectively as enshrined in Article 6 of the European Social Charter, as well as Article 28 of the EU Charter of Fundamental Rights.

In order to guarantee the respect of such prerogatives it is necessary that:

- 1) The OLF recognises that the European Trade Union Federations are the only bargaining agents on the trade union side which can access the OLF itself.
- 2) The OLF must not interfere with the internal procedures set by the ETUFs to collect the mandate, sign and manage the TCAs.

##### **1. ETUFs' procedures and access to the OLF**

The mandate is of fundamental importance in order to make a TCA more binding and, as a consequence, enforceable. Some ETUFs have set up procedures to secure a mandate to negotiate and sign a TCA. Such rules are a necessary but independent component to the Optional Legal Framework.

Hence, the OLF should not interfere with the autonomy of ETUFs. It should not introduce constraints in the ETUFs' capacity to determine their own procedures.

As already affirmed, the ETUFs are and must remain completely free to set their own procedures. The ETUC itself may play only a role aiming at promoting the existing best practices.

A convergence of the ETUFs' procedures is desirable but not absolutely necessary for the proper functioning of the OLF. It is important to reaffirm that any such convergence should be autonomously agreed upon by the ETUFs themselves. The OLF itself is an incentive for ETUFs to establish procedures for negotiating at cross-border level with multinational companies.

In the existing practice, however, some key common elements of these procedures can be identified:

- a) The leading role of the ETUFs in the negotiations of TCAs;
- b) The involvement of EWCs in negotiations with MNCs where they are established;
- c) The signature of the ETUF – fully legitimised by the mandate conferred previously in accordance with the internal rules – binds all its affiliates.

In this context, with a view to strengthening the mandate, the ETUC would suggest that the ETUFs' procedures may explicitly affirm that the mandate is conferred to negotiate and sign agreements '*on behalf of their member organisations*'. This clause may be stated either in the act of constitution of the ETUF or in a formal resolution endorsed by the decision-making bodies of the ETUF. It is up to the ETUFs themselves to design their procedures according to the specificity of their constitution rules and of the industry sector in which they operate.

The analysis should be instead focused on the relationship between the abovementioned procedures and the OLF itself.

In particular, the OLF should deal with representativeness on two different levels.

1. The first pertains to access to the OLF itself. Here, representativeness refers to sectoral representativeness as in sectoral social dialogue committees. The OLF's only task should be to select the organisations that have access to the OLF itself. For that purpose, it would be wise to build on what already exists in the current EU *acquis*. Decision 500/1998 might be a good reference.
2. The second level should ensure that the ETUFs effectively represent the employees of the company involved in the negotiations. In this case, representativeness has to be confirmed at the beginning of the negotiations by requiring the bargaining agents to disclose their mandate and how it was given to them. The OLF introduces the following rules (applicable to both parties):
  - a) disclosure of the mandate; and
  - b) mutual recognition of the parties.

A *consideranda* may, however, mention that ETUFs' procedures integrate the OLF without any other reference to the features of ETUFs' procedures themselves. On the other hand, some definitions to exactly clarify access to the OLF may be introduced as follows:

#### *Article X: Objective*

*This decision establishes an optional legal framework for European Transnational Company Agreements (referred to below as 'TCAs') signed by a European Trade Union Federation, on the one side, and a cross-border undertaking, a cross-border group of undertakings, two or more undertakings settled in at least two different Member States, on the other side (referred to below as 'the bargaining agents').*

#### *Article X: Definitions*

- a) *European Trade Union Federation: organisation representing employees at European level as per Article 1 of Decision 500/1998/EC which has adopted a procedure to acquire a mandate to negotiate and sign a Transnational Company Agreement.*
- b) *Procedure to negotiate and sign a TCA: procedure officially adopted by the decision-making bodies of a European Trade Union Federation with the specific intent of establishing framework rules for negotiating, signing and implementing TCAs.*

## **2. Role of the EWCs**

A crucial point – strictly related to the negotiating procedure – concerns the involvement of the European Works Councils. The Parliamentary Report says that ‘European works councils should be fully involved in the negotiations with European trade union federations where applicable, notably since they are able to detect the need/opportunity for a TCA, initiate the process and pave the way for negotiations, and help in ensuring the transparency and dissemination of information concerning the agreements to the workers involved.’

It is a fact that EWCs have a role in this field, and an OLF should reinforce the partnership between EWCs and ETUFs when negotiating and implementing TCAs. However, asserting that ETUFs have to consider EWCs as bargaining agents goes beyond what the EP states, and this may be at odds with respect for the autonomy of social partners and the trade unions’ prerogative to bargain collectively. This is consistent with the idea proposed by Parliament itself that TCAs should be signed by ETUFs.

Parliament itself then recognises that some European trade union federations have developed procedural rules for involving European works councils. Parliament's approach reflects the reality and deserves to be properly taken into consideration.

Building on this experience, the OLF should be neutral and refrain from making any reference to the EWC Directive. The decision on how to build a partnership should be left to the bargaining agents and the EWC itself. It must also be said that a Decision establishing an OLF may not be the right instrument to extend the competence of the EWCs. Directive 2009/38 grants the EWCs the right to be informed and consulted on negotiations and implementation of a TCA. This is a sufficient background for an EWC to open talks with the ETUFs in order to autonomously decide what role the EWC should have in the implementation of the agreement.

However, a *consideranda* could invite the ETUFs to consider mentioning the EWCs' role in their procedures, for example:

*(xx) Whereas the EWCs, where they are established, must be properly informed about the process and involved in the negotiation, management and implementation of a TCA according to the rules established by the ETUFs and by the TCA itself;*

### **3. Enforceability in controlled undertakings and subsidiaries. Definition of a multinational company**

The employers’ side has an interest in identifying the most effective way to negotiate, sign and implement a TCA. Practice has shown that the central management of an MNC has not always retained the capacity to legally bind its local managers and subsidiaries. Sometimes this is because they are legally independent entities within a corporate structure, and sometimes because they are ‘second-tier’ subsidiaries (i.e. indirectly dependent).

These circumstances do not make a TCA into a multi-employer agreement. The OLF considers the multinational company as a single economic entity and builds on the interest of the employer signatory side to engage all the operations covered by the TCA.

Bearing in mind the corporate structure of multinational companies, the definition of control does not seem to be of fundamental importance for the smooth enforcement of signed agreements. Defining criteria of dominant influence, the OLF would indeed interfere with the voluntary character of negotiations and/or the promotional role the OLF itself is supposed to play.

An easier solution can be found by committing local managers and subsidiaries to respect the provisions of the agreement. To such an end, the controlling undertaking (parent company) should involve and

inform the subsidiaries concerned from the outset. Several solutions can be identified<sup>113</sup>. One is to envisage a mechanism through which the subsidiaries guarantee a sort of ‘power of attorney’ to the bargaining unit<sup>114</sup>, declaring that they will be bound by the agreement. In this way, controlled undertakings and subsidiaries (even at lower levels) could be bound by an obligation to enforce the provisions and be contractually liable for any non-implementation. This solution could be used even for second-tier subsidiaries, although there may be some difficulty in securing the mandate. In any case, as has been stated above with regard to the ETUFs, this represents a suggestion on which the decision should be left to the MNCs themselves.

As foreseen for the trade union side, the mandate of the MNC bargaining unit should also be disclosed at the beginning of negotiations, to clarify the scope of the agreement to be negotiated. To this end, a specific provision requiring a list of controlled undertakings and subsidiaries covered by the TCA to be attached would be welcome.

On the contrary, the OLF should not set any rule that obliges the parties to insert clauses establishing obligations whose respect depends on third parties. In particular, this refers to clauses imposing the application of provisions of the agreement by subcontractors and suppliers. The inclusion of this obligation should be left to the will of the signatory parties, so as not to affect the promotional role of the OLF.

In the light of these observations, an OLF should not go beyond its promotional role and should refrain from introducing boundaries that would hamper the smooth running of negotiations. There is no objective reason for an OLF to predetermine what companies can and cannot access exclusively on the basis of their corporate structure.

It would be sufficient that:

- a) the company effectively has a transnational character;
- b) the central management discloses its mandate. The disclosure should allow the other party to know what subsidiaries are covered by the negotiations and under what terms those subsidiaries are bound by the agreement.

An OLF could address this issue in its *consideranda* and body text.

*(Xi) Whereas defining a cross-border undertaking or group of companies would go beyond the objectives and scope of the promotional aim of the optional legal framework, whereas the central management of a cross-border undertaking or the central management of the controlling undertaking of a cross-border group of companies shall disclose to what extent its signature is binding on its subsidiaries and controlled undertakings, and what subsidiaries or controlled undertakings shall be covered by the TCA.*

*(Xii) Whereas a pre-condition for a cross-border undertaking or a cross-border group of undertakings to enter a TCA is the disclosure of the agreed mechanisms of control exercised by the central management over the other entities located within the EU and outside of it.*

#### Article XX Definitions

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<sup>113</sup> See L. Pisarczyk

<sup>114</sup> As on the trade union side, the composition of the bargaining unit should be left entirely to the autonomous decision of the parties concerned. In any case, Prof. Pisarczyk suggests that the central management should include representatives from the lower level management in the team.

...

x) *Cross-border undertaking: all undertakings employing staff in at least two Member States;*

y) *Cross-border group of undertakings: all groups of undertakings employing staff in at least two Member States, directly or through a controlled undertaking;*

z) *Undertaking: all employers registered as such within a Member State;*

#### *Article XX: Disclosure of mandate*

*At the beginning of the negotiation process, both parties have the duty to disclose the mandate they have been given. The mandate disclosure shall provide evidence of the capacity of the bargaining agents to act on behalf of and to bind the parties they represent.*

#### *Article X: Scope of the TCA*

*Bargaining agents shall define the operations or undertakings to be bound by measures agreed in the TCA by means of one of the following options:*

- a) identifying a list of operations and undertakings to be covered by the TCA;*
- b) setting criteria by which it is possible to determine the control of the parent company over its subsidiaries.*

*Under option a), parties will also determine procedures to update the list and publicise any change made in the list.*

*Under option b), the organisation which acts on behalf of the employees, in a spirit of good faith and fair cooperation with the central management, must be in a position to regularly assess changes in the composition of the cross-border undertaking or the cross-border group of undertakings.*



## **ENFORCEMENT AND ARTICULATION OF THE AGREEMENT**

### **1. Direct effect**

The OLF shows a preference for a solution which makes the agreement directly applicable in all Member States. This means that the ‘European’ signature would bind not only the signatory parties but also those whom they represent, thereby granting rights to individual employees.

Under this scenario, the advantage would be that the agreement is implemented in each Member State according to national laws, collectively agreed rules and practices governing the collective bargaining system in the country concerned. This means that a TCA would operate in the national legal order in the same way a national collective agreement does. This legislative technique is not unknown in EU law, but the implication is that a TCA operates differently in each Member State. This would not affect the promotional aim of the OLF, but rather could strengthen it. Indeed, the purpose of the OLF is not to harmonise or to interfere with national systems. Since no new enforcement mechanisms are introduced, the OLF would clarify how the TCA operates at national level. The European signature – fully legitimised by the mandate conferred previously in accordance with the internal procedures – would in fact help the bargaining agents to obtain the desired effects without going through costly and unpredictable bargaining rounds in each country.

This type of approach can be found in academic literature and reflects the reality of many TCAs.

*“Acceptance of national diversity means that a [TCA] has direct effect in every Member State in the same way as national collective agreements in the specific national legal order. ... Acceptance of diversity is not only a political idea. It is also a legal principle and an issue of effectiveness”.*

Rather than regulating details, the OLF pursues its *effet utile*.

*“We can retain the concept that social partners at community level do not depend on transposition agreements. The [TCA] is effective as if it had been transposed because ... in every Member State the [TCA] is to be treated as a national agreement”<sup>115</sup>.*

This argument, which was developed to support the validity of negotiations under Articles 154 and 155 of the TFEU, can reasonably be extended to the discussion on the legal nature of TCAs. What is the principle of mutual recognition? Once again, the acceptance of national diversities.

TCAs have to be seen as a level of their own. But once an agreement is reached and signed, then it has to be applied at national level. When it comes to the moment of the implementation, the national/local social partners – bound by the mandate previously conferred – are jointly responsible for it and they are bound to implement it as if it were a company-level agreement operating under the national rules. That being so, it can be affirmed that TCAs are comparable to and have to be applied as company agreements.

To strengthen the mandate further, it would be important to add to the opt-in clause a provision which may clarify the link between the signatory parties and those who are responsible for the enforcement at national/local level. This may read as follows:

*‘Opting into the OLF, the signatory parties and those whom they represent shall recognise that the TCA will have the same legal value as a company agreement at national level, it will cover the same workforce that a company agreement in the legal system at issue would cover, and it will be enforced in the same way as a national company agreement. Indeed, the mandate procedure implies that, in the*

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<sup>115</sup> Both paragraphs in quotation marks refers to O. Deinert, *Modes of Implementing European Collective Agreements and Their Impact on Collective Autonomy*, *Industrial Law Journal*, volume 32, pp. 317-325, Oxford University Press, 2003

*national legal system, national trade unions and subsidiary firms, who gave a mandate to the bargaining agents for negotiating and signing the agreement, do consider the TCA as having the same effects as a company agreement signed by themselves according to national law, collectively agreed rules and practices’.*

## **2. Non-Regression Clause and Most Favourable Clause**

One of the consequences of a TCA is its potential interference with existing collective agreements applicable to the same undertaking or operations. To the extent that bargaining agents deal with topics which are different to those addressed by the national collective agreements, which is often the case in transnational negotiations, the issue does not arise. Analysing TCAs, it emerges that trade unions and multinational companies apply self-restraint to themselves as if they were spontaneously led by a principle of subsidiarity applied to collective bargaining practices.

Insofar as the potential and unclarified interference between the transnational and national level of collective bargaining is perceived as a reason for not engaging in transnational negotiations, the OLF cannot overlook the issue.

The issue has to be addressed of introducing safeguards operating on two different levels.

1. An OLF, while encouraging a more structured approach to transnational negotiations, should not constitute valid grounds for reducing the general level of workers’ protection granted by the law, collective agreements and practices of the countries where the TCA is implemented. It identifies the necessity to equip the OLF with a non-regression clause. It recalls the concept already existing in EU legislation on labour issues and it puts at the centre of the functioning of a TCA the objective that the parties have agreed to achieve (*‘effet utile’*).
2. The second safeguard concerns the single TCA and the conformity of its clauses with clauses of collective agreements applicable under the national rules to the operations covered by the TCA. Given the limited scope of the EU competences in the field of industrial relations, the design of an OLF cannot neglect the point that national frameworks have to be seen as more likely to produce a balanced and stable relationship between the two sides of industry. As an issue of efficiency, this balance of interests – as set out in national collective agreements – should be safeguarded without voiding the added value of transnational negotiations. This issue has to be addressed on a case-by-case basis. Each single TCA has to include a transparency clause that sets out the relationship between the TCA itself and other collective agreements in force in the different operations of the multinational company. The OLF may establish a fall-back provision in case the parties do not include such a transparency clause in their TCA. The fall-back provision should be based on the principle that a TCA cannot impose *in pejus* changes to conditions agreed upon at national level and automatically suspends TCA clauses which provide less favourable conditions to employees. *A contrario*, the most favourable provision for the employee applies.

### *Article x: Non-regression clause*

*Implementation of the provisions of this decision shall not constitute valid grounds for reducing the general level of protection afforded to workers. This decision shall not prejudice the right of social partners to conclude, at the appropriate level – including the European level – agreements adapting and/or complementing the provisions of this decision in order to take into account particular circumstances.*

*Article x: Transparency clause*

*Bargaining agents shall agree on a transparency clause determining which clauses prevail in the event of conflicts between the provisions of a TCA and any other applicable national agreement.*

*In the absence of such a transparency clause, in the event of a conflict between norms in a TCA and any other applicable national agreement, the rule of major favour for the employee applies.*

### **3. Monitoring of the effects of TCAs**

This is one of the most frequent clauses appearing in TCAs. Such clauses include procedures for joint assessment, reporting, the setting up of special committees, etc.

Such clauses are usually supposed to extend the effects to third parties such as sub-contractors and suppliers. As we have already said, the OLF cannot serve as a basis for extending the effects of TCAs to the abovementioned subjects. On the contrary, the OLF can improve the enforcement of the TCA by providing direct and binding effects for monitoring procedures, including those which force all subsidiaries of the group of undertakings to implement the social clauses in a TCA when setting out commercial arrangements with sub-contractors and suppliers.

A *consideranda* may thus invite the signatory parties to jointly commit to monitor and assess the enforcement of the agreement. Likewise, they should also be urged to set within the TCA a specific procedure to such an end. It may read as follows:

*(xx) Whereas the signatory parties should jointly commit to monitor, periodically report and assess the effective enforcement and set up a procedure to this end’.*

## **DISPUTE MANAGEMENT**

Signatory parties have proven to be able to create different sorts of mechanisms for jointly solving disputes on the interpretation or application of a TCA<sup>116</sup>. This must be safeguarded, and the OLF should encourage parties to establish their own solutions.

However, considering that each TCA applies in different, non-harmonised legal orders, that its legal validity stems from a European act and that it is subject to a multilingual interpretation, not all disputes which may arise concerning its implementation could be solved by the TCA's internal provisions themselves. Moreover, there may also be the risk that, in the absence of external dispute resolution mechanisms, parties may find interest in reopening the negotiations, resulting in an endless rebalancing of the interests of the conflicting parties. On the contrary, for a TCA unfolding its socio-economic value in full, stability and conservation of results reached in the agreement has to be preserved. In such a view, it could be useful if the internal mechanism provides for reference to an ADR body.

The extrajudicial dispute resolution mechanism would help the parties settle the dispute and preserve the arrangement. This solution would also have an important added value: cumulative private jurisprudence could add to a sort of compendium that in turn could become a source of practices which could help settle comparable future disputes.

However, the drafting of the OLF should take into account all possible solutions which are alternatives to public courts. Arbitration does not meet the spirit of the OLF, as it tends to trade on each event in a way that weakens the underlying contractual relationship. It keeps parties more focused on determining the costs and advantages of breaching the contract, rather than encouraging them to abide by the provisions of the agreement.

A legal framework that supports negotiations but does not interfere with them should look instead at solutions that comply with the principle of '*pacta servanda sunt*'. From this perspective, mediation fits better with the objectives of the OLF. It mitigates the risk of renegotiation, improves the stability of the agreement, and avoids possible third-party interference in the relationship. For that reason, solutions that allow access to the ADR mechanism to parties which are not signatories exceed the intention of the OLF itself. This means that third parties claiming non-compliance with TCA provisions should first refer to the signatory parties. Only the latter may then apply to the ADR body if they are unable to autonomously settle the conflict using the internal procedure established in the TCA itself. This could further strengthen the autonomous character of this sort of agreement.

This is the case as long as the breach of the agreement or the agreement itself does not have a negative impact on a legitimate interest of a party to the dispute or a concerned third party. If this happens, nothing can prevent those entities (be they signatories or not) from reporting the violation to a public judicial body for redress.

The Decision on an OLF should stick to the following principles:

- The OLF should encourage the bargaining agents to include solutions for dispute management in their agreements and to refer to an ADR body as a final step;
- Only signatory parties should be entitled to call on the ADR and have access to it;
- Setting up the ADR mechanism should be delegated to the European Commission under Art. 290 TFEU, since promotion and facilitation of a dialogue between labour and management is one of its tasks, as stated in Art. 154 TFEU;
- The delegated act should respect certain constraints included in the Decision for an OLF.

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<sup>116</sup> A. Lamine, "TCAs in the EU: Which Dispute Settlement Mechanisms?", Study made in the framework of the ETUC academic experts meetings, 2015, p.24.

The spirit of the provision could be specified in a *consideranda* as follows:

*(xx) Whereas the TCA should specify the signatory parties' common responsibility in its implementation and it should also indicate the internal complaint mechanism for workers' and management representatives covered by the text, each of the signatory parties should still have the possibility to report the dispute before a mediation structure at European level.*

*(xxi) Whereas such a mediation structure should be determined by a delegated act of the European Commission in order to establish an extrajudicial dispute resolution mechanism which should be accessible, without cost, exclusively by the signatory parties to the TCA. The mediators' panel should be composed of a mediator appointed by each of the signatory parties and a third and neutral expert appointed by the European Commission.*

In addition, an article of the Decision should read as follows:

*Article X: Dispute resolution*

*Within 9 months from the entry into force of this Decision, the European Commission will set up, in agreement with the European social partners, a mediation structure that shall have the following features:*

- Three lists of specialists will be set up in order to ensure balanced representation of employees, employers and neutral mediators;*
- Each list will include at least one mediator from each Member State;*
- A list of solutions found in existing TCAs;*
- Provisions defining the operation of the mediation structure, including the measure that only the signatory parties to the TCA can appeal to the ADR.*

## **PUBLICITY**

Publicity is a legal tool that normally belongs to systems which confer *erga-omnes* effects to collective agreements with a view to ensuring legal certainty. Registration of agreements may provide a solution for the objective of communication/information about the existence of the agreement. However, the need to publicise a TCA should be defined.

It is not disputed that no *erga-omnes* effect can be attached to a TCA. Nor it is disputed that submitting the validity of a TCA to a registration process would go beyond the promotional intention of the OLF itself. In any case, given the cross-border dimension of the relations established by TCAs, certain additional elements should be considered:

- Greater attention should be paid to the dissemination of the existence of a TCA. Today, a website can be an effective way to store texts and make them accessible to all;
- The final text of an agreement is often produced by multiple persons working separately at a distance. Clearly identifying the official final version of the text is crucial;
- The text may be read in different languages that probably are not the language in which the text was negotiated or the language(s) of the official version(s) the parties have decided to adopt. Identifying the official version(s) to be used for the interpretation of the actual intent of signatory parties is important – this problem is not unknown to practitioners dealing with EU laws.

So the OLF should provide for a registration mechanism – an intermediate solution between a publicity regime and a mere dissemination/communication tool.

One solution for the OLF is to refer to Article 152 TFEU and entrust to the European Commission the task of setting up an appropriate registration mechanism. In any case, the OLF should specify that the Commission's role would not relate to any legality check. The Commission should check only that the elements requested by the Decision in order to qualify the agreement as a TCA are present. Thus, a mere external or formal *ex ante* control.

A possible solution could be the following:

### *Article x: Publicity*

*Within 6 months from the entry into force of this Decision, the European Commission shall establish a mechanism for publicising the Transnational Company Agreements. This mechanism shall have the following features:*

- *A free-access website which shall be developed in the form of a database;*
- *Clear identification of the procedures for submitting a new text or relevant changes to existing texts;*
- *Official texts of the TCAs made available and easily accessible;*
- *If the TCA exists in other languages, a clear indication of the official version(s) to be used for the interpretation of the text.*

*The publicity mechanisms meet the needs for transparency and dissemination of the existing agreements for the benefit of recipients and third parties. Bargaining agents will submit the official text to the European Commission for publication. For the sole purpose of achieving an even wider dissemination of the agreement, the signatory parties may provide the Commission also with the versions in other languages.*

*However, the publicity mechanism does not affect the legal validity of the agreement.*

#### **4. CONCEPT EXAMPLE OF A POSSIBLE EUROPEAN OPTIONAL LEGAL FRAMEWORK FOR TRANSNATIONAL COMPANY AGREEMENTS**

DECISION No [NUMBER] OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF [DATE] [or alternatively DECISION OF THE EUROPEAN SOCIAL PARTNERS]

on the Optional Legal Framework for Negotiations of Transnational Framework Agreements between European Trade Union Federations and Cross-Border Undertakings or Cross-Border Groups of Undertakings.

[The European social partners]

Or

[The European Parliament and the Council]:

Having regard to the Treaty on the European Union and the Treaty on the Functioning of the European Union,

Having regard to article 6 of the TEU,

Having regard to article 152, article 154 and article 156 of the TFEU,

Having regard to article 290 of the TFEU,

Having regard to the Community Charter of Social Fundamental Rights of Workers and in particular to articles 12 and 13,

Having regard to the European Social Charter and in particular to article 6,

Having regard to article 28 of the Charter of Fundamental Rights of the European Union,

Having regard to the European Parliament resolution of 12 September 2013 on cross-border collective bargaining and transnational social dialogue (2012/2292(INI))

Having regard to Commission Decision 98/500/EC of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level,

(1) Whereas the Union and the Member States ensure that the conditions necessary for the competitiveness of the Union's industry exist and for that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at encouraging an environment favourable to cooperation between undertakings.

(2) Whereas the Union and the Member States have as their objectives the promotion of employment, improved living and working conditions – so as to enable harmonisation while maintaining

improvement – proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

(3) Whereas such a development will be ensured not only from the functioning of the internal market, which will promote the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

(4) Whereas the Commission's green paper on restructuring (Com (2012) 7 final) affirms that Transnational Company Agreements (TCAs) are one of the tools available to address the social and economic effects of restructuring in a socially responsible way at company level. Building on the experience of social dialogue at enterprise level, they may contribute to a fair distribution of the costs of adjustment within multinational enterprises and groups in advance or in critical situations and thus help prevent, mitigate or shorten industrial conflict.

(5) Whereas Transnational Company Agreements realise the potential of social dialogue to deal with restructuring, reorganisation and anticipated measures. In addition to the organisation of social dialogue itself, the agreements address specific subjects such as health and safety at work, equality in employment, training and mobility, planning of employment and skills needs, measures to avoid dismissals and accompanying measures in case of restructuring.

(6) Whereas there are problems hampering the smoother development of negotiations at transnational level and such problems mainly concern the identification of the actors involved and transparency of Transnational Company Agreements.

(7) Whereas to realise the benefits of TCAs to build a single market, uncertainties concerning the legal nature of TCAs have to be removed within a set of rules which promote voluntary and autonomous negotiations between management of transnational undertakings or transnational groups of undertakings and their employees.

(8) Whereas more than 280 Transnational Company Agreements have been signed by multinational companies and employees' representatives and all of them are applicable in more than one member state, or cover undertakings registered in at least one member state.

(9) Whereas an optional European legal framework (OLF) for voluntary and autonomous TCAs would be necessary and useful in order to provide greater legal certainty, greater transparency, foreseeable and enforceable effects for agreements following the framework provisions.

(10) Whereas practices relating to TCAs should be encouraged while respecting the contractual autonomy of the contracting parties.

(11) Whereas the bargaining agents should decide autonomously if they wish to negotiate making use of the optional legal framework.

(12) Whereas TCAs should reflect autonomous choices of the bargaining agents, as regards the mutual recognition of their mandate and representativeness.

(13) Whereas the definition of a cross-border undertaking or group of undertakings, other than the fact that it operates in more than one member state, would go beyond the objectives and scope of the promotional aim of the optional legal framework and it is the responsibility of the central management of a cross-border undertaking or the central management of the controlling undertaking of a cross-border group of undertakings to disclose the extent to which its signature incorporates its subsidiaries and controlled undertakings and which subsidiaries or controlled undertakings will be covered by the TCA.



(14) Whereas a precondition for a cross-border undertaking or a cross-border group of undertakings to enter into a TCA is the disclosure of the control mechanisms exercised by central management on the other entities located within and outside the EU.

(15) Whereas the procedures autonomously adopted by the European Trade Union Federations proved to be an efficient procedure to obtain a mandate from employees of cross-border undertaking or a cross-border group of undertakings.

(16) Whereas the signature of the European Trade Union Federation and of the central management should be sufficient to ensure the legal status of the TCA.

(17) Whereas a precondition for a European Trade Union Federation to enter into a TCA is to disclose the agreed mechanism for obtaining a mandate from employees of the cross-border undertaking or cross-border group of undertakings.

(18) Whereas the EWCs - where established and appropriate - should be properly informed about the process and involved in the negotiation, management and implementation of a TCA according to the rules established by the ETUFs and by the TCA itself.

(19) Whereas a cross-border undertaking or a cross-border group of undertakings may operate in more than one sector and more than one ETUF may be concerned. ETUFs should disclose which internal procedure applies to the negotiations at stake.

(20) Whereas a nominative list of all the subsidiaries covered by the TCA should be annexed to the TCA, unless the TCA defines criteria to determine which undertakings, subsidiaries or operations of the cross-border undertaking or of the group of undertakings fall under the TCA scope. The TCA should also specify the applicable procedure for updating the list of undertakings, subsidiaries or operations falling under the TCA scope.

(21) Whereas this decision cannot constitute a reason for reducing labour standards and working conditions established by law or agreed upon at national level.

(22) Whereas a transparency clause should be included in each TCA, determining which clauses prevail in case of conflict between the provisions of a TCA and any other applicable national agreement. In the absence of such a transparency clause, in case of conflicts between provisions of a TCA and a national agreement, the provisions more favourable for the employee shall apply.

(23) Whereas adequate dissemination of the existence of a TCA should be ensured and the mechanisms for registration of a TCA should be delegated to the European Commission which, in agreement with the European social partners, will decide on a registration mechanism for TCAs.

(24) Whereas the signatory parties should jointly commit to monitor, periodically report and assess the effectiveness of enforcement and establish a procedure to this end.

(25) Whereas the TCA should specify the signatory parties' joint responsibility for its implementation and it should also indicate the internal complaint mechanism for an autonomous resolution of disputes, but each of the signatory parties should still have the possibility of reporting the dispute before a mediation structure at European level.

(26) Whereas such a mediation structure should be set up by a delegated act of the European Commission with a view to establishing an extra-judicial dispute resolution mechanism accessible, without any cost, exclusively by the signature parties to the TCAs; the mediators' panel should be composed of a mediator appointed by each of the parties and a third and neutral expert.

(27) Whereas each TCA should include its starting date, expiration date or procedure for renegotiation, termination or renewal of the TCA.

(28) Whereas each TCA should be signed, dated and declare the official language(s) for its interpretation.

(29) Whereas, in opting in to the OLF the signatory parties and the parties they represent should recognise that the TCA will have the same legal status as a company agreement at national level, it will cover the same workforce a company agreement, in the applicable legal system, and it will be enforced in the same manner as a national company agreement.

(30) Whereas national laws and collective agreements apply mutatis mutandis to the implementation of TCAs at national level. The optional legal framework for TCAs is not a reason to modify or reform collective bargaining systems at national level.

HAVE ADOPTED THIS DECISION:

#### Article 1: Objective

This decision establishes an optional legal framework for European Transnational Company Agreements (hereinafter “TCAs”) signed by one or more European Trade Union Federations, on the one side, and a cross-border undertaking, a cross-border group of undertakings, or two or more undertakings based in at least two different member states, on the other side (hereinafter “the bargaining agents”).

#### Article 2: Definitions

- a) European Trade Union Federation: organisation representing employees at European level according to article 1 of Decision 500/1998/EC which has also adopted a procedure to obtain the mandate to negotiate and sign a European TCA;
- b) Cross-border undertaking: any undertaking employing staff in at least two member states;
- c) Cross-border group of undertakings: any group of undertakings employing, directly or through a controlled undertaking, staff in at least two member states;
- d) Undertaking: any employer registered as such within a member state;
- e) Transnational Company Agreement: any agreement negotiated and signed according to this optional legal framework which applies in at least two member states of the EU or, if applicable, of the European Economic Area;
- f) Procedure to negotiate and sign a TCA: procedure adopted by the decision-making bodies of a European Trade Union Federation with the specific intent of establishing framework rules for negotiating TCAs.

#### Article 3: Opt-in clause

This Decision applies to all TCAs in which the bargaining agents declare in writing that the agreement is subject to this Decision.

#### Article 4: Disclosure of mandate

At the beginning of the negotiation process, both parties shall disclose the mandate they have obtained.

#### Article 5: Scope of the TCAs

The bargaining agents shall define the scope of the TCA by:

- a) Listing the operations, subsidiaries and undertakings that will be covered by the TCAs; or
- b) Setting out control criteria which identify the parent company and controlled subsidiaries or undertakings;

In the case of option a), the parties will also determine procedures to update the list and publicise the changes within the list.

In the case of option b), the organisation acting on behalf of the employees, in a spirit of good faith and fair cooperation with the central management, must be given a position which enables it to regularly assess changes in the composition of the cross-border undertaking or of the cross-border group of undertakings.

#### Article 6: Content of the agreement

All TCAs should include:

- official name (designation) and signature of the signatory parties;
- location where the agreement was signed;
- date on which the agreement was signed;
- date on which the agreement enters into force;
- expiration date or contract duration or, alternatively, a procedure by which one of the parties can terminate the agreement if its duration is indefinite;
- procedure for termination, renegotiation, renewal of the agreement.

#### Article 7: Non-regression clause

This decision shall not constitute valid grounds for reducing the general level of protection afforded to workers. This decision shall not prejudice the right of social partners to conclude, at the appropriate level – including the European level – agreements adapting and/or complementing the provisions of this decision in order to take account of particular circumstances.

#### Article 8: Non-interference clause

In case of conflict between the provisions of a TCA and any other applicable national agreement, the provision more favourable for the employee shall apply.

#### Article 9: Registration of the agreement

Within 6 months from the entry into force of this Decision, the European Commission will set up a register for disseminating the TCAs. The register shall have the following features:

- A free-access website shall be provided in the form of a database;
- Procedures to submit a new text or relevant changes to the existing texts have to be clearly identified;

- Official texts of the TCAs will be made available and easily accessible;
- A clear indication of the official version(s) to be used for the interpretation of the text, in cases where the TCA exists in several languages.

The registration mechanism meets the need for public accessibility and dissemination of the existing agreements for the benefit of recipients and third parties. Bargaining agents will submit the official text to the European Commission for publication. They may also provide the Commission with the versions in other languages in order to achieve an even wider dissemination of the agreement.

In any case, the registration mechanism does not affect the legal validity of the agreements.

#### Article 10: Disputes Resolution

Within 9 months from the entry into force of this Decision, the European Commission will, in agreement with the European social partners, set up a mediation structure that shall have the following features:

- Three lists of specialists will be established in order to ensure a balanced representation of employees, employers and neutral mediators;
- Each list will include at least one mediator from each member state;
- A list of settlement agreements reached in the context of TCAs. Once a settlement agreement will be reached, it has to be attached to the TCA itself and included in the database;
- Provisions defining the operation of the mediation structure, including the measure that only the signatory parties of the TCA can appeal to ADR.

#### Article 11: Protection of the bargaining agents

In the exercise of their functions, members of negotiating delegations – including any members of the European Works Council and employees’ representatives of the multinational company involved in the transnational negotiation – shall enjoy protection and guarantees similar to those provided to employees’ representatives by national legislation and/or practices in force in their country of employment. In the event that national legislation and/or practices in force in the country where the company is headquartered or the country in which the negotiations are taking place are more favourable for the employees, the latter shall apply.

This protection shall apply in particular to attendance at meetings of negotiating bodies or any other meetings within the framework of the agreement resulting from the negotiations themselves, as well as to the payment of wages for members who are in the staff of the transnational undertaking or the transnational group of undertakings for the period of absence necessary for the performance of their duties.

#### Article 12: Assessment of the optional legal framework

Every two years the European social partners will perform a joint assessment of the functioning of the optional legal framework. Their joint assessment will be transmitted to the European Commission. On the basis of the inputs received from the social partners, the European Commission may take action to enhance the optional legal framework and create an enabling environment for TCAs.



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With the support of the European Commission

