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Employment, Social Affairs and Equal Opportunities DG

Social Dialogue, Social Rights, Working Conditions, Adaptation to Change

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Second meeting of the Expert Group on TCAs of 27 November 2009

Minutes

1. PRESENCE

In addition to Commission's representatives, the second meeting of the Expert Group on TCAs had 45 Participants: 32 permanent members, 5 permanent observers and 8 speakers and ad-hoc experts in a personal capacity:

- **19 EU and 2 EEA Governmental experts** from AT, BE, BG, DE, EE, EL, ES, FI, FR, IE, IT, MT, NO, PL, PT, RO, SE, UK
- **13 Social Partners' experts:** 6 experts from the employers' organisations nominated by BusinessEurope (BusinessEurope, CEEMET, CEEP, MEDEF, NordicIndEmp, UEAPME), 7 experts of the trade-union organisations nominated by ETUC (CCOO, CSC-ACV, (ETUC, EMF, UNI Europa, DGB, Nordic In, NSZZ Solidarnosc, UGT)
- **3 Institutional experts** from the European Parliament, European Foundation for the improvement of Living and Working Conditions (Dublin) and ILO
- **3 Academics:** Frank Hendrickx (University of Tilburg), Fernando Valdes (Universidad Complutense de Madrid), Aukje Van Hoek (University of Tilburg)
- **5 Company actors:** Jean-Claude Gaudriot and Noël Tritz (Solvay: Head of European industrial relations and Secretary to the European Works Council), Günther Koch and Michael Riffel (Volkswagen: Director Volkswagen Group Human Resource international and General Secretary of the Group Works Council), Jean-Yves Tollet (ArcelorMittal: Head of international coordination for Labour law, Legal affairs).

The **European Commission** was represented by

- Armindo Silva, Acting Director "Social Dialogue, Social Rights, Working Conditions, Adaptation to Change", DG EMPL and Chairman of the expert group

- Fernando Vasquez, Deputy Head of unit "Working conditions, Adaptation to change", Chairman of the morning session
- Sabine Boehmert (International affairs), Torsten Christen (European employment strategy, CSR), Carina Bjurklint, Nicolas Breczewski, Dimitrios Dimitriou, Julia Enzelsberger, Francisco Perez Flores and Evelyne Pichot (labour law), all DG EMPL.

2. OPENING

Mr Vasquez opened the second meeting of the Expert Group. He welcomed the participants and recalled the main objectives of the expert group and its background by reference to the meeting of 14 May 2009; particularly he stressed the increasing role of Transnational Company Agreements (TCAs) in the present economic and social context. Mr Vasquez presented the draft agenda as well as the amended rules of procedure and amended draft minutes of the first meeting which were approved without comments.

3. LATEST DEVELOPMENTS IN THE FIELD OF TRANSNATIONAL COMPANY AGREEMENTS

Mrs Pichot presented the latest developments in the field of TCAs (*See presentation and latest examples of transnational texts*). Within the last 2 years, as known through public sources, 49 new texts have been concluded. 40 of them have been completely new texts and 9 have been updates to previous ones. As regards the scope, the texts can be divided into 21 European, 15 mixed and 13 global ones. 24 texts cover CSR/fundamental rights, 13 deal with restructuring (including example of ArcelorMittal), 12 with others issues (including examples of Solvay and Volkswagen).

Since the mapping done in 2008, more companies and more workers have been involved in TCAs. 23 new companies (out of 43) were involved in concluding the new texts whereof both, big companies but also smaller ones, took part. Looking at the current figures also a diversification in sectors¹ and origin² is noticeable. About 9.8 million employees worldwide are currently working in companies involved in TCAs, whereof 6.5 million in companies having texts with a European or mixed scope.

Mrs Pichot also underlined the increasing number of initiatives in view of TCAs by social partners. Within budget line 04.03.03.03 "Information, consultation and participation of representatives of undertakings"³, 12 projects dealing with TCAs have been granted € 1.6 million in 2009. The majority of these projects primarily focus on TCAs; others partly cover or at least include some elements on TCAs. Secondly, Mrs Pichot mentioned that European trade union federations have established new negotiating procedures and that new initiatives to conclude International Framework Agreements were also taken from Global Union Federations. Furthermore Mrs Pichot referred to the recent trend of developing initiatives for specific sectors or categories.⁴

¹ Sectors: finance, telecom, security.

² Countries: UK, Nordic countries, IT, ES, BR.

³ which is intended to strengthen transnational cooperation between workers' and employers' representatives in information, consultation and participation matters.

⁴ Such as the Nordic financial sector or pilots.

In her final remarks, Mrs Pichot drew the audience's attention to various ongoing research projects in the field of TCAs, namely she referred to the research of the European Foundation for the Improvement of living and Working conditions and of the ILO as well as to the studies on international private law 2009 and on company agreements 2010 (commissioned by the European Commission) and other research projects and academic articles. Last but not least she mentioned that the database on TCA-texts will be opened in 2010.

4. LATEST EXAMPLES OF TCAS

Mr Vasquez thanked Mrs Pichot for her introductory remarks and gave the floor to the representatives of Solvay to talk about their experience of charters on corporate social responsibility, health & safety and social policy in joint ventures as well as practices for subcontracting.

Example of Solvay: Mr Gaudriot and Mr Triz together presented the TCAs concluded in the Solvay Group (*See presentation*). Mr Gaudriot firstly stressed the importance of having a shared vision and a common desire to deepen and enrich the social dialogue at European level. He considered the EWC as an extremely important vector for developing TCAs, as it provides for a permanent structure. Mr Tritz also praised the existence of a common shared vision regarding employee involvement within the Solvay group and stressed that a well functioning EWC should put forward European proposals, particularly through TCAs. Subsequently Mr Gaudriot explained the functioning of the existing framework and its structures, mainly emphasizing the role of the permanent secretary⁵. Besides the permanent secretary which prepares new proposals in cooperation with the Solvay Directors, Mr Tritz mentioned the functioning of the established working group⁶ and underlined the importance of a regular reflection forum to guarantee the balance between the partners.

Mr Gaudriot described the negotiation process which is divided into five stages: Firstly, a theme of negotiation must be chosen; secondly, the preparation of the canvas of issues in the draft agreement takes place; thirdly, the draft agreement is submitted to the members of the EWC; fourthly, the draft agreement is finalized by the permanent secretary in cooperation with the Director of Social Affairs and fifthly, the final draft agreement is proposed to the members of the EWC. Concerning the choice of subjects for negotiations Mr Tritz added that issues were jointly identified and selected by both parties, particularly in the regularly organized seminars.

Mr Gaudriot expressed satisfaction with the four existing Solvay charters and pointed to further potential developments in the future. Next Mr Gaudriot summarized the common content of the existing agreements and explained that all of them contain general principles consistent with national laws and legal systems of European countries as well as provisions reflecting reciprocal commitments to be taken over in the framework of social dialogue in each country.

Mr Tritz then stressed the role of the seminars organised to implement the texts and noted that for example in France already 4000 out of 5000 employees participated in the discussions.

⁵ Which consists of three elected members and is allowed to take external experts on board.

⁶ Consisting of 6 members of the EWC and 6 members from the management.

Mr Gaudriot concluded the presentation by underlining the importance of the seven developed general principles which have to be specified later at national level and described TCAs as a powerful tool and a good answer to meet the challenges of globalization, particularly in view of social matters and sustainable development!

Mr Vasquez opened the discussion. Prof. Valdes firstly asked about the degree of effectiveness such charters have within the Solvay group and he subsequently was interested in the general implementation of these charters, the treatment of claims in conjunction with these principles and if the staff feel involved in this complex implementation process. Secondly, he wanted to know whether Solvay has established a system for resolving emerging disputes and if so, how it looks like. The trade union expert from DGB was interested whether more initiatives for concluding TCAs are coming from the employees' or the employer's side and if proposals, put forward by the staff, are really considered. As to implementation, the trade union expert from Nordic Ind. Emp. asked about the application of the principles regarding remuneration in practice. Mr Vasquez wondered how representatives from outside Europe are involved in those agreements that are signed by the EWC.

As to the effectiveness of the Solvay Charters, Mr Gaudriot explained that social dialogue is not only focused on the central level but also takes place at national level. Action plans can be set by central and national level. He further reported that a steering committee and the EWC have an important role in monitoring and implementing the agreements. Solvay doesn't expect a lot of conflicts, but in case one occurs, any dispute over compliance with the agreed commitments is handled by dialogue between management and staff representatives in representative bodies at the level in which this dispute may arise. Potential problems of interpretation, which Solvay has not known yet, would be treated at the level of the Secretariat and the Directorate of European Social Relations. As to the implementation, Mr Tritz illustrated that for example once in Bulgaria health standards had not been correctly implemented but a plan was immediately adopted by the management after the employees had raised this issue. Furthermore he added that several new awareness raising seminars will take place, presumably in Italy, Spain and the Netherlands. Regarding the principles regarding remuneration Mr Gaudriot answered that remuneration should be fair and objective according to the principle of equal work-equal pay

Example of Volkswagen: Mr Koch and Mr Riffel presented their experiences of the 2009 Volkswagen Charter on labour relations. (*See Presentation*) The Charter on Labour Relations within the Volkswagen Group was concluded between the Group executive management, the German VW Group Works Council and the VW Group Global Works Council. Mr Riffel recalled the historically grown work culture at VW (for example the pioneering role of Volkswagen in collective agreements) and referred to the 2006/2007 discussions between employee representatives about a future strategy for 2020, including standards to apply to employees, co-determination and innovative working relationships. Mr. Riffel pointed out that so far no external third party has ever been called to settle a dispute.⁷ The Charter on labour relations itself is based on the motto "Motivation of staff through participation", which is to be supported by transparency and participation. Mr Riffel considered that operational democracy needs participation; however this also means more responsibility for employees. He stressed that with this charter the parties have established in-house participation rights of

⁷ The course of conflicts mainly depends on how parties deal with each other and how effectively they can reach agreements and implement them. According to Mr Riffel crucial elements for a solution are information and participation of all stakeholders, and to ensure mutual recognition and respect.

democratically elected employee representatives and recognised country-specific trade-union traditions within the VW Group. The Charter provides a binding framework within which existing labour relations are further developed. At the local level, the respectively involved parties shall define implementation of this Charter into a "site-specific participation agreement". Mr. Riffel draw attention to the terminology of "participation rights" (information, consultation and co-determination) used in the Charter. Finally he gave an overview about the general rules of procedure subsequent to the conclusion of the agreement.⁸ As to the clarification and agreement procedures Mr Riffel explained the established 2-level resolution system.⁹ In his final remark he praised that all costs incurred in connection with the aforesaid process are borne by the company.

Mr Koch also referred in his presentation to the long historical tradition of VW in the field of employee participation and cited many previously concluded international agreements since 1990.¹⁰ On the question why the company is so interested in proposals made by employees' representatives, he answered that participation creates competitive advantages.¹¹ The charter aims to create a "new performance contract" promoting competitive advantages through fair balance of interests. In practice this means for instance that employee representatives are informed about economic trends and product news before the final planning. Then Mr Koch explained the designed matrix of participation rights in the Charter. Most issues dealt with consultation under EU law are dealt with co-determination in the Charter. The selection of participation rights are at the discretion of the responsible employee representatives. Finally he talked about the procedure for the conclusion of a "Site-specific participation agreement" as mentioned before by Mr Riffel.

Prof Valdes asked how the participation rights are implemented within the VW group and if participation takes place according to national rules. Secondly he wanted to know who the negotiators of the Charter have been and what VW actually understands under the term "democratically elected members"? As to the participation regime, Mr Koch answered that even in countries where only information rights are given to the employees by the legal order, VW group provides co-determination rights to all employees in every VW site. Concerning the second question Mr Koch said that negotiators of the Charter have been the Global Works Council (together with the German Group works council) and the Group executive management and that the Charter is applicable to all VW Works Councils worldwide, but not to external trade unions. Members are directly elected in VW site and work together with external trade unions. Mr Riffel agreed with Mr Koch and added that with exception of South Africa where recently Works Council elections took place all members of the Global Works Council signed the Charter.

The trade union expert from EMF pointed to the difference between global and European agreements. Mr Welz from Eurofound was interested in VW's point of view regarding the

⁸ As general rules of procedures are particularly noted: 1- Declaration on maintaining secrecy, 2- Right to external consultants, 3- Clarification and agreement procedures, 4- Communication with the workforce, 5- Establishment of a Control group and 6- Takeover of costs.

⁹ In general the parties concerned shall install a local agreement committee. In case that no agreement can be reached at this level, the president and secretary-general of the VW European Group Works Council or the VW Group Global Works Council on the one side and the director of labour and head of Group HR International on the other shall be called upon to help resolve the situation.

¹⁰ There are also countries outside Europe like China in the scope of the agreement.

¹¹ According to the management the involvement of employees will lead to increased productivity and ultimately will help to make VW Automobile Manufacturer number 1 worldwide.

influence of European Union law and the necessity of having an optional framework for transnational collective bargaining. Mr Koch responded that VW group practice already goes beyond EU scope in everyday's business as VW is not only operating in Europe but worldwide. As regards the question "when employees should be involved" he illustrated that VW group applies a more progressive approach than present EU law stipulates. But VW group does not intend to harmonize local collective bargaining to European ones. From the VW's philosophy every worker should be able to live decently, this means to receive best wages within his region but it does not mean to have equal wages in all countries. Therefore VW doesn't support the idea of common transnational collective bargaining. The trade union expert from EMF noted that there seems to be a language misunderstanding when talking about collective bargaining. He wanted to raise awareness to the fact that company agreements are nearer from "Betriebsvereinbarungen" than from "Tarifverträge" following German terminology and added that European agreements, however, cannot be extended to a global scope, as any legal basis for such an extension is missing. Mrs Pichot also confirmed that under the term "transnational company agreement" the German "transnationale Betriebsvereinbarungen" are meant. Finally Mr Papadakis from the ILO raised the question which impact or contribution the Charter that is intended to provide crisis management has made to the current crisis. Mr Koch illustrated that due to the crisis the production had to be reduced dramatically (-45 %) and many flexible instruments were necessary to handle the difficulties. However, because of the good cooperation and the standardization of the proceedings VW group was able to keep all directly employed workers and to provide employment security. Mr Riffel also emphasized the use of flexible measures to overcome the crisis and talked about the importance of a fair distribution of risks and chances among all parties, and of consultation.

5. RESEARCH ACTIVITIES OF THE ILO

Mr Papadakis presented the ILO research projects on cross-border dialogue and agreements (*See presentation*). He stressed the gap between the increasing transnational dimension in which the economic actors intervene with the development of Multinational Enterprises (MNEs) and the still largely national dimension of the social actors.¹² From an ILO perspective IFAs are particularly interesting because they are firstly establishing cross-border social dialogue structures and secondly promoting specific ILO instruments. As regards the period from 2006 to 2009, research was primarily focused on collaborations and information exchange with external experts and academics in the field of IFAs. During the above mentioned period 3 research workshops took place about mapping, research methodologies and impact of IFAs. Furthermore an Edited Book and a Working paper were published and an "E-survey on management perceptions" was carried out. Whether IFAs are "collective agreements" in the sense of the Recommendation 91 on Collective Agreements is not absolutely clear. IFAs possess some, but not all, of the essential constitutive elements of industrial relations instruments akin to collective agreements.¹³ As to motivations for companies to signing agreements in extra-EU countries, field research was carried out on agreements concluded in companies headquartered in South Africa, Russian Federation and Japan. The guided interviews revealed that civil pressure combined with anticipatory factors were a catalyst in explaining the decision of the companies. Then Mr Papadakis presented the

¹² As a response to this mismatch the number of voluntary initiatives emerged significantly in recent times.

¹³ There are still a number of other outstanding issues such as content, effectiveness of machinery for monitoring and follow up or dissemination.

main findings of the conducted E-Survey of MNEs. In this survey, in which 17 companies¹⁴ employing about 2.2 million workers¹⁵ participated, management perceptions on the impact of IFAs¹⁶ have been analysed. Regarding dissemination the E-Survey found that IFAs largely remain an internal document.¹⁷ As to monitoring the E-survey stated that periodic labour management meetings take place and also some degree of institutionalisation is notably at EU level whereas World Employee Committees remain an exception. As main impacts the E-survey identified the increased trust and credibility of the company towards shareholders and investors but not, although often claimed, significant impacts on the increase of market share or any productivity or innovation improvement. As biggest challenges in the field of IFAs conviction of managers in foreign operations and existing prohibitive local laws and practices are detected. However IFAs generate relatively high potential for collective bargaining and negotiations at foreign operational levels. Relatively low potential was found instead for increases in wages to "higher common denominator of foreign operations" or for information leaks to competitors. Subsequent to the already completed research in this field there will be a publication on the impact of IFAs in March 2010 and another project in this area. Based on the presented facts Mr Papadakis described the present objectives of the ILO to act as a repository of knowledge. ILO instruments and functioning are still mostly driven by national level priorities and less by "cross-border" initiatives. Therefore he very much welcomed the Maritime Convention as a very innovative instrument.¹⁸ Concerning new developments in the field of IFAs he mentioned the MULTI Help Desk (2008), the ILO Declaration on Social Justice for a Fair Globalisation (2008), the ILO Strategic Policy Framework 2010-15 and Debates at the June 2009 International Labour Conference which led to the Global Jobs Pact.

Mr Vasquez thanked for the interesting presentation and opened the discussion. Firstly Mr Tollet (ArcelorMittal) commented on Mr Papadakis presentation. He explained the choice made by ArcelorMittal to conclude an agreement on the establishment of health and safety committees providing for locally adapted structures that are suitable for each country through national/local negotiation. He stressed how far reaching commitment and concrete tool such agreements represent to develop social dialogue and improve working conditions in the context of a steel company with important safety challenges. It noted that the company preferred that kind of concrete agreement to the renewal of the 2005 Arcelor global agreement on CSR and referred to possible (legal) risks regarding the extent of CSR commitments, in particular the incorporation of ILO conventions. Mr Gaudriot (Solvay) pointed out the importance of appropriate interlocutors and partnership of actors. He also stressed the importance to go beyond declarations towards follow-up and concrete application of commitments included in TCAs. Following the previous speakers, the trade union expert of UGT pointed out the difference of approach between IFAs involving rights and competence of actors (EWC/TU) and CSR perspectives. She was interested to learn more about the practical implications of this differentiation. Mr Papadakis answered that IFAs are industrial relations' issues but with important CSR components. He referred mainly to the distinction between CSR (unilateral, geared towards consumers) and IFAs (joint, addressing common

¹⁴ 17 companies out of 63; that means ¼ of signatory companies.

¹⁵ 2.2 million workers out of 5.9 million covered by IFAs, 40% of the workforce.

¹⁶ Especially in regard to successes, challenges in implementation, costs and benefits but also potential developments.

¹⁷ While line managers and managers in foreign operations are mainly informed; consumers, labour force and suppliers are rarely informed.

¹⁸ In comparison to many other globalised industries he underlined that in the Maritime sector not only workers but also employers are organized at the global sectoral level.

concerns workers/employers) as set out in extenso in the relevant studies produced by ILO and Eurofound.

6. RESEARCH ACTIVITIES OF THE EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS

Next Christian Welz gave a presentation about "IFAs and European Framework Agreements (EFAs): 'essai' of a qualitative analysis". (*See presentation*) At the beginning Mr Welz gave a general overview about the system of European social dialogue by illustrating the contexts between the different factors with a graphic¹⁹. Whereas an IFA is a company agreement signed by a Multinational Company (MNC) and a Global Union Federation, an EFA is a company agreement signed by a MNC and a European Industry Federation (EIF) and/or a EWC. Already from the definitions it is clear that these two types of agreements affect different actors. Common to both, however, is that a legal framework for such agreements doesn't exist, neither at the European nor at the international level.

In October 2008 most IFAs have been concluded in DE, NL, FR and SE. Regarding the content of IFAs it is interesting to see that there is very often a general reference to the ILO (69% of all agreements), to ILO core conventions (55%), to the UN Declaration on HR (26%), to Global Compact (23%), to the OECD Guidelines (19%) and to the ILO Tripartite Declaration (13%). In contrast to that, EFAs mainly deal with restructuring, social dialogue, Health & Safety and only very few with CSR. Regarding the level linkages at EU level there is apparently a clear trend towards an increasing interaction between the different players.²⁰ To sum it up, Mr Welz noted that EFAs (compared to IFAs) cover other topics, are signed by different negotiators and have different scopes! However it is striking that IFAs and EFAs mainly reflect traditions of European IR and are concentrated in social market economies with collective interest representation.

Moreover Mr Welz discussed the issue of inclusion of suppliers and subcontractors in the application of IFAs! In 31% of all analysed IFAs suppliers/subcontractors were not mentioned. In his final remarks Mr Welz noted that transnational dialogue at company level mainly takes place between stable actors on the EMP side, but variable ones on the TU side.

7. ISSUES ON IMPLEMENTATION AND DISPUTE SETTLEMENT IN TCAS

Mr Silva opened the afternoon session of the meeting. Mrs Pichot presented issues on the implementation and on dispute settlement in TCAs. As to status and implementation questions in TCAs she noted that many texts declare their provisions being "legally binding in all subsidiaries". Some texts are intended to become legally binding through national implementation; others are an annex to EWC agreements or are even company agreements under national law. Looking at the latest examples there are more recently also specific projects to carry out implementation as part of an agreement. Regarding follow-up and

¹⁹ Relations between the Intersectoral social dialogue, Sectoral social dialogue, EWCs, IFAs, EFAs, SEs and national social dialogue.

²⁰ This is the case between Intersectoral and sectoral dialogue in both directions, between the sectors and but also between sectoral and company level as well as between companies.

monitoring Mrs Pichot informed that most of the texts include follow-up provisions.²¹ In comparison to that, only few texts include provisions on disputes.²² Once in a while there are some specifications as to applicable law, competent jurisdiction or the decisive linguistic version in TCAs.

From the actors' point of view the main challenge on implementation and disputes seems to be the issue of collective "ownership" of the text and the case of changes in ownership or management of the company but also a need for respect by all management levels, monitoring, adapting texts and solving interpretation issues were listed by the actors. Mrs Pichot drew the conclusion that it is important to clearly determine firstly how social actors should be allowed to implement, protect and adapt concluded TCAs and secondly how to provide feasible solutions for interpretation and application disputes. Referring to the current status of law there are three main difficulties for her that should be addressed: a) Difficulties in the application of rules to determine applicable law and jurisdiction; b) National mechanisms to extrajudicial settlement for TCAs and c) Legal basis for transfers of personal data to non EU-countries.

8. RESULTS OF THE STUDY ON INTERNATIONAL PRIVATE LAW ASPECTS OF TCAS

In her presentation Prof Van Hoek talked about specific issues of TCAs in an international private law context and presented the outcomes of the study "International private law aspects of dispute settlement related to TCAs" which was undertaken for the European Commission. The objective of the study was firstly to provide a comprehensive overview of the rules to be applied as to the applicable law and the competent jurisdiction when a dispute arises on the interpretation or application of a TCA; secondly to identify the practical and legal obstacles to the way disputes relating to TCAs can be settled in court; and thirdly to identify and suggest any actions that might be taken to overcome these obstacles. Prof Van Hoek underlined that some issues of private international law would not arise if TCAs were covered by a uniform European regulation. The currently relevant legal instruments are: Rome I Regulation on law applicable to contractual obligations (Rome I), Rome II Regulation on law applicable to non-contractual obligations (Rome II) and Brussels I Regulation on jurisdiction in civil and commercial matters (Brussels I).

Legal classification of TCAs is needed to identify relevant instruments to be used. As to characterisation of obligations under a TCA it is important to taking into consideration that there is no "single notion" of a TCA but a wide variety of documents and texts. The diversity of the signatory parties to a TCA is also problematic. Additionally the characterisation in international private law does not necessarily coincide with the characterisation in national law! Therefore the answer to the first question depends on whether claims based on a TCA are "civil and commercial" in nature. Prof Van Hoek argued, based on the case law of the ECJ on the Brussels Convention and Brussels I Regulation, that there is no reason to exclude TCAs from the scope of application of these Regulations. Secondly, the question arises to what extent claims based on a TCA can be deemed to be "contractual" in nature. Prof Van Hoek argued that an analysis of the rules on applicable law and jurisdiction should be based

²¹ Usually an annual review by signatories/the EWC takes place, or special bodies are established to carry out the follow up but sometimes also specific tools such as reports, indicators or dashboard are used.

²² Usually an examination by signatories shall take place when anomalies arise, but more precise procedures are often missing.

on the assumption that commitments which management has undertaken in a TCA towards the workers and their representatives can in most cases be classified as contractual under the relevant instruments. According to her the relevant criterion is whether the TCA contains obligations voluntarily taken on by (at least one of) the parties. Hence, the concept of "contract" is wide enough to cover commitments which are largely unilateral in character. Besides, Prof Van Hoek mentioned that both the Brussels I Regulation and the Rome I Regulation contain special provisions for individual labour contracts. For Prof Van Hoek those provisions don't apply because even though a TCA can contain individualised rights, this doesn't change the classification of the TCA as such. Claims of outsiders (e.g. competitors or consumers) instead have to be classified separately as there is no contractual relationship between the signatory company and the claimant. In this regard any liability claim, even when based on statements contained in a TCA, will sound in tort.

As to the applicable law the Rome I Regulation has to be considered. Generally the parties to a TCA (such as the central European management, local subsidiaries, International/European/National trade unions or EWCs) can designate the law to be applied to their agreements themselves. Such a choice of law will (have to) be respected on the basis of Article 3 of the Regulation. Prof Van Hoek restricted, however, that agency/mandate third party relations are not covered by Rome I. She also mentioned that by their choice of law the parties can select the law applicable to the whole or to part only of the contract (keyword: depeçage) and addressed the issue of choice of non-national systems of law. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the applicable law has to be determined first by enquiring whether there is a party which performs the obligation "characteristic" of the contract type. If such a party may be impossible to discern the Rome I Regulation refers to the law having the closest connection to the contract at hand. Regarding the applicable law Prof Van Hoek concluded that party autonomy has to be considered as the preferred solution.²³ Regarding the normative effect Prof Van Hoek highlighted the different possibilities of effect on individual labour contracts (such as statutory, mandate/membership or others) and explained that the normative effects of collective agreements are determined by national law ("reception") as well as that the mandate of national representatives is determined by national law of country of origin. This led Prof Van Hoek to the result that a TCA under law A can have only normative effect on labour relations governed by law B to a limited extent and/or to subject of conditions.²⁴ In total, Prof van Hoek recommended to express a provision on binding character of the agreement, to express choice of law in TCA with specifications, to explicit mandate to negotiators at European level and to do the implementation at national level according to national rules.

Regarding jurisdiction Prof Van Hoek referred to the Brussels I Regulation.²⁵ She raised the issues of Non-EU employers versus EU employers and commented on exclusive jurisdiction, jurisdiction over individual contracts of employment and other possibilities. To solve this issue she recommended to insert a place of performance for specific obligations in the TCA and to insert a non-exclusive choice of forum in the TCA.

²³ The principle of "closest connection" causes uncertainty. Take into consideration that the choice of law is an obligatory aspect of the TCA.

²⁴ Because for this question restrictions under law A, overriding mandatory provisions under Rome I and public policy objections under law B must be contemplated.

²⁵ The Brussels I Regulation covers jurisdiction in international matters and in principle gives jurisdiction to the country of domicile of the defendant

Last but not least Prof Van Hoek addressed the issue of *ius standi*. With regard to the legal capacity of unions and works councils there exists a large variety in national solutions. As national law cannot be overcome by a party autonomy in this point Prof Van Hoek suggested four ways to address the *ius standi* issue: firstly the creation of a European rule on the standing of workers' representative bodies, secondly the establishment of a system of mutual recognition, thirdly avoidance through jurisdiction rules or fourthly unilateral acceptance of *ius standi* by the Member states.

Mr Silva asked Prof Valdes to present findings of his research on extra-judicial dispute settlement. Prof Valdes focused on autonomous mechanism to address the central question of effectiveness of TCAs. In his remarks he cited two main concerns. Firstly he referred to the issue of competence. He reminded the audience to distinguish between individual and collective conflicts and to not deprive TCAs from their complementary role so that any rivalry with national systems is avoided. Secondly he raised the issue of which body is competent to resolve TCA disputes. According to him there should be distinguished between internal and external bodies. With regard to external bodies he called autonomous procedures such as arbitration, mediation and arbitration. In his view, conflict resolution should not be seen as a disconnected part of the contract and he recalled the risks of judicial solutions.²⁶

In the subsequent discussion, the trade union expert of ETUC concentrated on considerations about dispute resolution, and wondered if there is a possibility that partners can impose sanctions themselves, and if so, how they could be enforced. The trade union expert of EMF stressed the fact that a European legal framework could make things easier but the discussion has to go deeper. According to him, trade unions don't want to go to court, that collective disputes should be settled internally between the social partners and just in case that this is not possible the issue shall be transferred to external institutions.²⁷ He called for a much stronger takeover of responsibility by the social partners in TCAs. As a second point he mentioned that a hierarchy of collective agreements should not also exist at national level but also on European level and thirdly, he spoke about the role and legal status of European actors. The DE governmental expert²⁸ asked the speaker to repeat the arguments for applying the Rome I Regulation in this context, mainly focusing on the reasons why ECJ rulings, which were issued in relation to consumer rights, should also be applicable to TCAs. Finally she asked about the normative effect of domestic law, when the Rome I Regulation is applicable. In Germany there are already binding rules for negotiations of collective agreements. Can mandates also be used in this context? Referring to the first question of DE expert, Prof Van Hoek answered that the fact that the rules for individual labour contracts don't mention collective agreements doesn't mean a total exclusion for them. ECJ rulings that were issued to consumer contracts gave a general view on the classification of contracts in an international private law context and therefore can be used for TCAs. As to the second question, Prof Van Hoek informed that the recognition of a collective agreement is a unilateral decision by the national law and there is no mandate space left. Going back to EMF's comment she totally agreed that it is up to the social partners to find an autonomous dispute resolution but restrained that the current study dealt with resolution by court. Prof Hendrickx (co-author of

²⁶ Judicial solutions always contain the risk that different national courts come to different conclusions. For him there also remain lots of questions in this context, such as more permanent or acute use of an institution, procedural aspects and the question of liability of an extrajudicial decision.

²⁷ In line with Prof Valdes the EMF expert wanted disputes to be solved outside the court because if the social partners can't find a solution also the denouncement of the agreement is a considerable possibility.

²⁸ The German representative thanked for the study but proposed another detailed discussion about it after all experts have studied the whole report.

the presented study) added that alternative dispute resolution is an important tool, but it wasn't subject of the current study. Regarding the *ius standi* issue of European actors Prof Hendricks admitted that there are still open questions which always refer to the general international private law rules, particularly the issue of legal capacity. The BE governmental expert asked what happened if TCAs contain provisions that are against national law. Does it mean that only these particular provisions are void or the TCA in total? The employer expert of MEDEF wondered if the discussed court problems are really important to the actors or if they are more academic and theoretical in nature, stressing the mainly declarative nature of the texts concluded. Prof Valdes added from an academic point of view that the schemes presented can only be applied if the assumption is true that a collective agreement is a contract. But this is not the case all over Europe. In Spain, for example, a collective agreement is considered a legal "source of law". Thus, characterising TCAs as contract would be problematic in Spain. He wondered how a European unified process could look like and stressed that the existing tools are still inadequate. Secondly Prof Valdes argued that the risen problems with court proceedings have not found (any) practical significance, because TCAs mainly contain only general guidelines and not concrete workers' rights. Referring to the question of BE Prof Van Hoek noted that the question of invalidity of provisions depends whether appropriate arrangements were made in the TCA by the parties and if not, should be solved with the law that is dealing with the TCA. She agreed with the other participants that there are not many court cases in TCAs issues but reminded the actors once again to further discuss issues of "legal bindingness" to avoid conflicts.

9. INSIDER VIEWS – THE APPROACH TO IMPLEMENTATION AND DISPUTES IN ARCELOR MITTAL TCAS

Mr Silva asked Mr Tollet (ArcelorMittal) to speak about his experiences with TCAs, and placed particular emphasis on the recent agreement on anticipating change of ArcelorMittal. Mr Tollet stressed that social dialogue is the best way to be effective in restructuring situations and that TCAS have been concluded in ArcelorMittal to overcome difficulties. Indeed, the latest agreement provides very concrete commitments to reopen blast furnace when market conditions allow it and to provide for support to workers in transitory periods. Regarding the geographical scope of the agreement all countries covered by EMF members are included, so not only EU-Member States such as Romania, but also for example Bosnia and Turkey. Mr Tollet reported that this agreement guarantees minimum standards in countries that do not have high legal standards. An agreement on CSR, concluded in 2005, has not been renewed in 2008, because ArcelorMittal decided that in difficult situations common agreements should be concluded on specific issues: e.g. on safety & security and crisis management, which bring an important input to corporate identity. Representation from both sides and networking on social dialogue are important keywords in this context. On health and safety the deployment of H&S joint committees in all facilities is agreed upon and minimum standards will be reviewed on a yearly basis by the follow up committees. Firstly a national follow up committee is set up in each participating country and secondly there is a Social Dialogue Group acting as a follow up committee at European level. Their mission is to identify existing problems and to propose possible solutions. Furthermore a conciliation body was established in order to conciliate in any disputes resulting from the interpretation or implementation of this agreement. Only this conciliation body can settle such a dispute and its decision is final, so that no courts are involved. Mr Tollet continued that this agreement entered into force for an indeterminate duration. However, in the event that any change occurs which would disrupt the balance of commitments prevailing between the signatory partners,

either ArcelorMittal or the EMF could ask to modify it. If one of the negotiating parties is not complying with the agreed obligations, the agreement may be terminated.

The employer expert of MEDEF welcomed the approach that social partners should always settle their own affairs themselves. In different industries certain issues have different importance (e.g. safety - Steel, banks), and therefore social partners must find their own way to conclude and implement such agreements on a case by case basis.

Mr Silva closed the meeting by thanking all participants for a very fruitful discussion. He praised that today's meeting made substantive progress to address issues at stake, He stressed that we are still in a period of open debate and that conclusions will be drawn by the commission only at the end of the work of the Expert Group.

Mr. Silva also drew the attention to the tentative dates of meetings of the Expert Group in 2010: Monday, April 19 and Tuesday, October 12. Referring to the documents of the meetings he indicated that they will be put, once adopted, at the following website address <http://ec.europa.eu/social/main.jsp?catId=707&langId=fr&intPageId=214> .