

Expert Group

Transnational Company Agreements

**Draft elements for conclusions of DG
Employment, Social Affairs and Inclusion**

Revised Working document

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Introduction

In July 2008, the Commission published a Staff Working Document on "The role of transnational company agreements in the context of increasing international integration"¹, where it drew the attention to the key role and potential of such agreements in an increasingly globalised business environment. The document started a discussion at EU level about the main issues raised by their implementation such as the determination of the parties to an agreement, its effects and the settlement of any disputes that may arise in its interpretation and implementation.

In this Staff Working Document, which was framed by the 2005-10 Social Agenda's plan of an optional European framework for social partners wishing to formalise the conduct and the outcome of transnational collective bargaining, the Commission announced its intention to set up an expert group on transnational company agreements (TCAs) whose mission would be to monitor developments and exchange information on how to support the process under way. The Commission further committed itself to providing the expert group with its initiatives and work on the subject, which would focus on:

- developing a database of transnational texts;
- organising exchanges of experience and analyses;
- reviewing the effects produced by company agreements and the way norms relate to each other in the Member States;
- clarifying the rules of international private law in connection with transnational texts.

The group, gathering experts from Member States and the EU social partners, as well as academics and researchers, representatives of European institutions and company actors held six meetings between May 2009 and October 2011. The aim of the present document is to draw the main conclusions from the work of the group. Its focus is placed on the European dimension of transnational company agreements.

The document is structured around the main issues identified in the 2008 document and concludes with a review of the options considered to address them:

- I- Role and development of transnational company agreements
- II- Actors involved
- III- Form and transparency
- IV- Implementation and links between levels

¹ SEC(2008)2155 of 02.07.2008. In this document, a transnational company agreement was proposed as meaning an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives.

- V- Legal effects
- VI- Disputes.

This working document is mainly analytical and is meant to encourage debate. It has benefited from discussion and contributions given by members of the expert group on an earlier version presented at its last meeting on 11 October 2011. However, it does not represent the position of the group of experts, nor does it represent the final position of the European Commission.

I – Recognizing the role of transnational company agreements and contributing to their development

Resulting from voluntary initiatives, transnational company agreements have already gained in significance, as over 10 million employees work in the companies concerned. They play a positive role in identifying and implementing agreed solutions at company level to the challenges posed by a constantly changing business environment. They represent an interesting and promising development of social dialogue at transnational level and for that reason, they are increasingly a subject of analytical, legal and policy attention at EU level. However, companies and workers may face difficulties in the conclusion and implementation of particular transnational company agreements and a series of open questions is raised by their development.

I - A. The emergence of transnational company agreements and its drivers

Since the early 2000s, a new phenomenon can be observed at corporate level, consisting in a transnational negotiation processes. The joint texts resulting from this process cover situations located in the different countries where the European/multinational companies operate. These transnational company agreements stem from purely voluntary initiatives and there is no rule at national, European or international level to govern their negotiation or conclusion.

Mid 2007, there were already 150 texts known through public sources in companies employing 7.5 million employees, showing a significant development of these texts. End 2009, about 9.8 million employees worldwide were working in companies involved in TCAs, whereof 6.5 million in companies having texts with a European or mixed scope. Mid 2011, the database on transnational company agreements listed 215 agreements (some of them having been already renewed several times) in 138 companies employing over 10 million employees.

Companies involved in concluding transnational company agreements are mostly big multinationals in the metal, construction, chemicals, food and financial sectors, headquartered in Europe and having well established European Works Councils.

Of the transnational company agreements listed in the database mid 2011, 102 have a European scope, of which 15 include non EEA Member states, and 113 have a global scope. While global texts typically focus on fundamental rights or address the different aspects of corporate social responsibility, transnational texts for the European area tend to have as their core aim the establishment of partnerships to deal with restructuring, reorganisation and anticipative 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.

Transnational company agreements differ very much from each other, as parties adapt the text to their needs. They are issued under various titles, including declarations, joint opinions, guidelines, charters, framework agreements or European agreements and may or not be meant as legally binding documents.

Drivers for engaging in transnational negotiations include the company context, for example the need to favour corporate European integration after a merger, strategic Human Resources (HR) policy, for example as to anticipation or Health & Safety, active European Works Council (EWC) and trade union objectives.

Actual results depend on the agreements' substantive content, for example where training measures, job security or the maintenance of terms and conditions of employment in case of transfers are provided. In this respect, agreements with a European scope have shown greater capacity to attain their initial objectives than global agreements, since they may refer to a more homogeneous set of rules and traditions.

For those companies having engaged in transnational agreements, these were meant to

- Have a positive impact on understanding and facing challenges, for example as regards the need for and design of measures to anticipate and manage change;
- Promote new ways of thinking on both management and employee sides, notably a forward-looking approach to change or equal opportunities;
- Bring in a European dimension, contribute to a stronger sense of group-wide corporate common identity across borders;
- Constitute a driving force for further action on social issues and introduce managerial principles throughout the group;
- Give substance to the role of European representative bodies and link them more strongly to developments at the national and/or local levels;
- Improve mutual understanding and confidence between management and workers' representatives at both transnational and lower levels.

I - B. Opportunities in the development of transnational company agreements

The constant growth of TCAs confirms their relevance as instruments of social dialogue particularly when, in times of crisis, it appears more difficult for social partners at national or sectoral level to conclude successful negotiations.

Despite their concentration in a small number of companies, transnational company agreements already have acquired a significant dimension as they involve:

- At least 10 million employees and 100 multinationals headquartered in Europe,
- A significant part of the most important companies of the metal and financial sectors headquartered in the EU,
- Most European and international trade union federations and 10% of the European Works Councils.

Transnational company agreements are seen as having contributed to promote:

- Sustainable economic development and competitiveness, notably by developing best practices as to anticipation and management of change and skills needs in a coordinated way across Member States
- Socially agreed responses at European level to the challenges generated by the economic crisis
- Stronger European dimension in companies, notably by enabling the development of cross-border solidarity and facilitating cross-border mediation of interests
- Innovation in the social sphere at European level, for example in the areas of Corporate Social Responsibility, equal opportunities and Health and Safety at Work
- New forms of social dialogue adapted to an increased international integration of multinational companies
- A social dimension in international relations through the promotion of social dialogue, fundamental social rights and socially responsible HR policies alongside with economic, financial and trade relations

I - C. Challenges

Many companies have been successful in negotiating, in concluding and often in implementing transnational company agreements. This does not mean however that the emergence of these purely voluntary initiatives is free of problems and questions.

At company level, management and employee representatives face difficulties in negotiating, concluding and implementing transnational company agreements, in particular:

- Complexity, delays or even failure to start content-related negotiation due to the need to negotiate on the procedure before being able to negotiate on the content without any guidance or recognised reference;
- Disagreements between parties or problems in implementing the agreements resulting from the lack of clear capacity and/or legitimacy of the signatories;
- Lack of consistency in the implementation of TCAs between countries and subsidiaries resulting from the absence of rules or practice as to the effects and implementation of the agreements;
- Legal risks associated with uncertainties as to the legal effects of transnational company agreements and to a highly complex application of international private law rules to disputes relating to transnational company agreements;
- Resentment among managers and workers' representatives at lower levels about the top-down imposition of measures agreed at upper level, or even perceived interference with national systems of industrial relations and norms, resulting from the absence of mandating procedures and to mechanisms to link the levels of dialogue and norms.

The lack of specific regulations on TCAs at EU level can partly explain some of these difficulties. As a result, a series of open questions regarding actors, transparency, implementation, legal effects, links with other norms and dispute settlement have been raised. However, it has been recognized by stakeholders that the higher level of integration in European legal and economic environment can help to mitigate the uncertainties which companies and trade unions have to face when they are engaged in worldwide negotiations.

The difficulties will be described more in detail in the following chapters, together with the open questions and suggested options to be considered.

I - D. Recognising the role of transnational company agreements and providing for an adapted support to their development

The recent development of TCAs has given them an increasingly relevant position in social dialogue at EU level. Their role has been recognised by the social partners, academics and the ILO². They start to catch the attention of national authorities at least in those countries where transnational companies have their headquarters or are most strongly established.

Two issues may be raised at this stage. The first issue is whether the difficulties mentioned above are sufficiently important so as to hamper the development of the potential of TCAs. The second issue is whether it is justified for the EU to take a policy-related, rather than just an analytical interest, in this matter. It is undisputed that the phenomenon of TCAs is of EU-wide importance since the agreements are established between actors that have a representative status in a multinational context – management of transnational companies and EU Union federations or European Works Councils.

Is it justified to provide support at EU level to the development of TCAs by addressing at that level the difficulties and challenges just identified? The work of the expert group did not allow for generating a convergence of views around these central issues. On the one hand, employers' organizations held that no legislative action needs to be taken since such difficulties are not sufficiently serious and have not so far hampered the continuous growth of TCAs. Indeed, any legal instrument could have the opposite effect of discouraging transnational companies from entering into negotiations with workers' representatives, for fear of legal complications³. On the other hand, trade unions sustain that more clarity and better implementation of TCAs are needed and that there is still considerable uncertainty as to the effects of TCAs when they are applied in Member States with different internal regulations and industrial relations' systems. In their view, the further development of transnational company agreements would need adequate EU support, including by means of a legal framework that would address the challenges identified.

As an emerging factor in EU social dialogue, TCAs deserve to be promoted in line with the competences given by the Treaty (Article 152 and 153) and the Charter of Fundamental Rights (Article 28). It is also clear that they serve a useful goal – to identify and implement feasible negotiated solutions adapted to the structure and circumstances of each company, particularly in case of large restructuring processes. This is coherent with the principles and objectives underpinning the EU 2020 Strategy and the flexicurity agenda.

² See <http://www.ilo.org/ifpdial/information-resources/cross-border-social-dialogue-and-agreements/lang--en/index.htm> and in particular Papadakis, K. (ed.), *Shaping global industrial relations: the impact of International Framework Agreements*, Palgrave Macmillan, International Labour Organization, 2011

³ This opinion was not shared by some individual employers having taken part in TCA negotiations, who recognize the need for further legal clarity.

It is recognized that support to be provided at EU level could contribute to alleviate some of the difficulties faced by companies and workers when negotiating, concluding and implementing TCAs with a European scope. However, such a support would need to be:

- Flexible, adapted to the needs of the companies and workers concerned;
- Designed in close cooperation with the European social partners, or preferably still initiated by them;
- Optional, as companies and workers should be able to innovate and operate outside any instrument provided to support transnational company agreements; as parties should be free to negotiate and conclude agreements that are custom made to their needs and to a specific situation.

I - E Addressing open questions

A series of open questions are raised by TCAs and should be addressed, to provide an adequate support to their development. These open questions, detailed in the following chapters relate to:

- The actors to be involved in transnational company agreements, their capacity, their legitimacy, their role;
- The form and transparency of transnational company agreements and transparency;
- The implementation of transnational company agreements and the links between them and other levels of social dialogue and norms;
- The legal effects of transnational company agreements;
- Settling disputes over the interpretation and application of transnational company agreements.

II – Supporting the actors in transnational company agreements and clarifying their role

The issue of who the actors are is crucial in a transnational negotiation, as in any negotiation. The question is how to ensure actors have legitimacy and capacity in negotiating, signing and implementing transnational company agreements so as to facilitate their conclusion and develop their positive results.

II - A. Situation: Different categories of actors are involved in transnational company agreements

The following categories of actors play today a part in representing workers in the context of transnational company agreements:

- European Works Councils (EWCs) generally play a key role in practice. The initiative to start a transnational negotiation often takes its origin in the activity of the EWCs. They have also signed an important part of the texts, particularly the European ones, even though they have no negotiating powers under Directive 2009/38/EC.
- European and/or international workers' federations sign a majority of texts, notably global ones. Their role has increased, as a result of some union federations' strategies in triggering and organising transnational negotiation mechanisms in the European sphere.
- National workers' organisations, generally the ones active in the country of the company's headquarters, often sign global texts along with international workers' federations.

On management side, the involvement of national and local management, together with corporate one, varies from one company to another.

As to the process, it may be very centralised, being limited to the European HR Director and the coordinator of the European works council or actively involve local actors at various stages.

II - B. Problem: Actors face problems of legitimacy and capacity which hamper the conclusion and implementation of transnational company agreements

1. Before any real negotiation can start, it is necessary to determine who are the negotiating parties to the future negotiation, which in turn requires a negotiation. In concrete terms, the question is who will sit at the table on the employee side. As no rules or reference procedure exist, several worker representatives may feel legitimated to have a seat and the company management may feel free to choose its counterpart. The choice made risks to be perceived as

arbitrary, leave non-chosen parties dissatisfied or entail compensatory measures for the company or the actual negotiator on the employee side. In some cases, the negotiation between management and employee representatives cannot even start, as the negotiation on the process could not be successfully concluded.

2. In several Member States, none of the categories of actors on the employee side has the full legitimacy or the legal capacity needed to conclude transnational agreements with an effect equivalent to that of company agreements under national rules and/or practice:

- The competences of European works councils under Directive 2009/38/EC are information and consultation, not negotiation. Their membership is tailored to that end and determining their representativeness is problematic given the frequent lack of proportionality when set against the worker head count. Furthermore, their involvement in negotiations is at odds with national systems that make a clear distinction between the consultative role of elected bodies (works councils) and the negotiating mandates entrusted to trade unions (in France for example) or which utilise a single trade-union channel for worker representation (in Italy or in the Nordic countries for example);
- The representativeness of European and international workers' organisations and their mandates to negotiate and sign are not always clear. After the European Metalworkers' Federation has paved the way in this respect, several other European industry federations (EMCEF, EPSU, FSE-THC, UNI-finance, UNI graphical) have adopted internal rules of procedure to that aim, but not all have done so. The involvement of trade-union organisations in negotiations on matters such as restructuring also comes up against national systems under which the works council is responsible for such matters (in Germany for example);
- When it comes to concluding transnational texts, the crucial limitation affecting national workers' organisations lies in their national field of competence.

3. The further implementation of a transnational agreement is burdened with uncertainties. Negotiators need to innovate to ensure the text agreed is accepted as widely as possible and has the desired impact. Where the signatories' capacity to represent and enter into commitments is not recognized by the workforce or local management, the actual application of a transnational agreement is at risk. "Opt-outs" have also occurred in some cases, following disagreements between national actors and the negotiators. In further cases, the text remained simply ignored locally.

4. Where the process to conclude transnational agreements is unclear, conflicts of competence may occur between European-level and national-level bodies as well as between elected and trade union bodies representing the employees. In particular:

- In countries where works councils are competent to sign company agreements, the involvement of European or transnational trade unions in company-related issues is not well understood;
- In countries where trade unions are competent to sign company agreements, the signature of a transnational agreement by the European Works Council conflicts with the national system;
- The signature of a transnational agreement by European bodies which does not involve, in a way or another, all actors entitled to negotiate the issue at national level is seen as illegitimate or a threat to national prerogatives.

II - C. Options to be considered –Supporting the actors in transnational company agreements and clarifying their role

The issue of the actors is crucial for the development of transnational company agreements. How to develop the positive results that may be attained through transnational company agreements, by ensuring the actors have the legitimacy and capacity to negotiate, conclude and implement transnational company agreements while fully respecting parties' responsibility and autonomy is the purpose of the following options to be considered.

1. An optional reference (or framework) for the actors to be involved in the conclusion of transnational company agreements could be provided:

- Parties could use this reference/framework to avoid difficult pre-negotiations where they so wish;
- This should not prevent the negotiation and conclusion of transnational texts to take place outside this reference/framework where companies wish to innovate or to conclude texts which are not intended to produce the effects of company agreements;
- This reference/framework could be provided for example through guidelines; European social partners, at cross-industry or sectoral level, should be given a primary role in defining or contributing to this reference/framework.

2. The legitimacy of the negotiating and signatory parties would need to be ensured by the parties themselves, where appropriate with the support of procedures and arrangements worked out by the social partners at sectoral or cross-industry levels:

- Information, consultation and mandating mechanisms could be established to enable employee-side representatives to negotiate and sign on behalf of all employees of the multinational, its subsidiaries and, where relevant, its suppliers/contractors;
- Employees could be given greater assurance that management representatives are able to deliver the commitment of the multinational company itself, its subsidiaries and, where relevant, its suppliers or contractors;
- On the employee side, the respective role of trade-union industry federations with established procedures as to the negotiation and conclusion of transnational company agreements and European Works Councils could be clarified ;
- The actors negotiating on the issue at stake at national level should take part from an early stage in the negotiation and conclusion of a transnational agreement.

3. The capacity of the negotiating and signatory parties would need to be ensured where the agreement is intended to produce legal effects:

- The negotiators and the signatories could be given a clear mandate to do so on behalf of the employees and companies in scope;
- The mandating process could involve all actors entitled, under national rules and/or practice, to negotiate the issues included in the negotiation;
- The legal capacity of the signatory parties to take commitments could be checked.

III – Promoting transparency in transnational company agreements

Clarity about the aim and the consequences, identification and information of the persons affected are important for transnational company agreements to fulfil their purpose, as for any agreement. The question is how to give transnational company agreements the appropriate form and transparency to enable them to fulfil the objective assigned to them by the parties and respect the rights of any person they affect while fully respecting parties' responsibility and autonomy.

III - A. Situation: A variety in the form of transnational texts and in their dissemination

1. At present, particularly for the oldest transnational company agreements, there is a large diversity in titles given to the texts, without clear correspondence with the main issue addressed in the texts and their imperative or declarative nature.
2. Similarly, there is a large variety in the form and drafting of transnational company agreements even though standards have been established by European and international trade union organisation over time. Date, signatories, scope, addressees, duration are still not always clear and the texts mix often drafting as political declarations and as agreements.
3. In most cases, signatories to a transnational company agreement provide for means aiming at its internal dissemination upon its conclusion. In some companies, important efforts have been dedicated to the dissemination and implantation of the agreement. European and international trade union organisation have also started to establish procedures to this regard. The employees and management coming in the scope of a transnational company agreement are however not always informed about its existence and do not always have access to its content. This is even more the case for subcontractors and suppliers entering into its scope, although over one third of the agreements contain provisions covering them. The information of the addressees is also not always ensured over time.
4. Some of the transnational company agreements form a specific category, being drafted and treated as group or company agreements under national law and in some cases sent to national authorities and/or the Commission for “registration” in the same way as national collective agreements.
5. Many texts of transnational company agreements are available to the public through a series of websites, notably established by trade unions, research institutes or consultancy firms. As announced by the Commission in its 2008 documents and discussed in the expert group, the establishment of a searchable database on transnational company agreements has been commissioned to Planet Labor. The database has been made available in 2011 to the stakeholders and the public on the Europa website at <http://ec.europa.eu/social/main.jsp?catId=978&langId=en>. Mid-2011, it fully displayed 199 of the 215 identified transnational company agreements with additional information on the company concerned and possibility to search the agreements with criteria related to company,

country of headquarters, sector, type of text, employee signature parties, geographical scope, functional scope, main and other topics addressed as well as through keywords.

III - B. Problem of clarity and respect of the rights of the affected persons

1. There is a lack of clarity in the way many transnational company agreements are drafted, particularly the oldest ones, which may be a source of confusion:

- The title of the text does not necessarily reflect its content and the type of commitments it involves, which may create uncertainty in particular as to its declarative or binding nature;
- Basic and necessary information such as date, name and quality of the signatories, scope, addressees and duration are not always clearly displayed which makes it difficult to assess the consequences, ensure appropriate implementation or follow-up.

2. Transnational company agreements usually cannot produce the effects associated to collective agreements, in particular company agreements in any of the covered countries, even if the parties would wish so, because their form, content or process don't follow the rules or requirements for them.

3. For transnational company agreements comprising reciprocal commitments, especially where they are stated in the form of concrete and detailed provisions or where their inobservance may have consequences, the fact that employees, management or subcontractors coming in the scope of a transnational text are not always informed about its existence and do not always have access to its content directly affects their rights.

4. The absence of disclosure of the content of transnational company agreements comes up against national systems under which collective/company agreements are necessarily public documents and need to be put to the knowledge of all stakeholders (in France or Spain for example). The systematic disclosure of such content can on the contrary be perceived negatively by signatories coming from Member States in which company agreements –and even collective agreements at sectoral level- are generally considered as private documents (in Nordic countries or the Netherlands for example).

III - C. Options to be considered–: Supporting best practices, ensuring information of the affected persons and promoting transparency

1. When concluding a transnational text, signatories could give it a title clearly indicating the type of text it is, notably distinguishing between agreements comprising reciprocal commitments, process-oriented, declarative and procedural texts

2.. Where the parties wish them to produce effects other than declaratory, the drafting of transnational company agreements could observe certain principles, which could be developed in the form of a standard contract or good practice body of rules, in particular

- be dated and signed,
- show clearly the name and capacity of the person signing,
- indicate the persons to whom the text is addressed,

- provide for a date by which its provisions are to be implemented and the way this is to be done as well as rules for monitoring the agreement and settling disputes.
3. Management and employees falling in the scope of a transnational company agreement could be guaranteed information on its existence and access to its content.
 4. As to the public disclosure of transnational company agreements which favours transparency, knowledge and best practices in this area:
 - Signatories could always be in a position to refuse public disclosure of the text they have signed or correct incorrect information related to this text;
 - The database on transnational company agreements could be maintained and the parties invited to transmit new agreements or amendments for its update;
 - Notification of new or renewed texts to a public authority or a joint body promoted by the social partners could be encouraged.
 5. European social partners, at cross-industry or sectoral level could be invited to issue guidance or rules as to the form and transparency in transnational company agreements.
 6. A coordination could be organised between the EU and the ILO in view to improve information on transnational company agreements.

IV – Enhancing the implementation of transnational company agreements and the links with other levels of social dialogue

The quality of the implementation of a transnational company agreement depends on its provisions, on measures adopted to ensure ownership of the agreement in the company and also on the way it inserts itself in the landscape of social dialogue. The question is which link between transnational agreements and national, European and global social dialogue at cross-industry, sectoral and company levels already exist and would be useful as well as how to support and develop them while fully respecting parties' responsibility and autonomy.

IV - A. Situation: Diversity in implementing practices and links with other levels of social dialogue

1. At present, particularly for the oldest transnational company agreements, there is a large diversity in implementing practices ranging from the absence of any measure to follow-up the conclusion of a text to far-reaching projects to ensure an agreement is being "deployed" across all sites of the company.
2. European and international trade union organisation have started to establish procedures to ensure the involvement of the national trade union organisations and the European Works Councils or ad hoc committees/instances in the conclusion of transnational company agreements and their proper implementation.
3. As to the links of transnational company agreements with other levels of social dialogue, initiatives exist but they are not systematic not integrated:
 - As to the links with European social dialogue, some transnational agreements aim at implementing outcomes of European social dialogue at cross-industry level (e.g. on equal opportunities or on stress) or at sectoral level (e.g. on lifelong learning in the financial sector) or use the definitions and provisions of European texts as references. Transnational agreements are also of interest for European sectoral social dialogue through the negotiating and implementation procedures established by European trade union federations, the role of TCAs in certain sectors such as energy or civil aviation and the discussion about TCAs in certain sectoral social dialogue committees such as chemicals or electricity.
 - As to the links with national social dialogue in the company, one can note the involvement of national trade unions in some TCAs, the transnational scope of some national company agreements (e.g.. on financial participation), the negotiation of a TCA after a national agreement has been concluded (e.g.. skills planning in France/Europe), the implementation of some TCAs through national agreements and the effects of transnational agreements on establishment, improvement or reinforcement of local social dialogue.

- As to the links with national social dialogue beyond the company, one can refer to the objectives of international coordination of national trade unions, the decent work agenda of national social partners, the implementation of national sectoral or cross-industry collective agreements through some TCAs (e.g. equal opportunities), the effects of transnational agreements on establishment, improvement or reinforcement of national social dialogue (e.g. for some new Member states or non European countries).
- As to the links to global social dialogue, one can note that transnational agreements promote global social dialogue in companies, support international cooperation of trade unions and promote ILO Conventions and other international instruments relating to social dialogue. As to contents, topics such as training, restructuring, mobility, health and safety or equal opportunities are addressed at different levels of social dialogue.
- As to the links between transnational social dialogue in different companies, informal consultations are held between employers in what can be considered as a process of innovation. On employee side, the same actors are found in different negotiations and standard agreements are developed.

IV - B. Problems in implementing transnational company agreements and conflicts between levels of social dialogue

The following problems have been identified in the implementation of transnational company agreements, in addition to the ones related to the actors involved in such agreements and described under II-B. p 9.

1. Some transnational company agreements do not produce the effects intended by the signatories because of the lack of follow-up measures or conflicts with national norms or views of the actors at national level
2. The present approach as to the “implementation” of transnational company agreements into local company agreements is not satisfactory because it is too complex and leads to multiple national negotiations in a burdensome and often incoherent manner.
3. Incoherence and conflicts between different outcomes of social dialogue stems from the lack of organised links between transnational company agreements and other levels of social dialogue. TCAs may thus interfere with the application of collective agreements at national level and the absence of non-regression clause becomes a reason of concerns amongst social actors and raises issues for labour law.

IV - C. Options to be considered: Supporting procedures to implement transnational company agreements and promoting coherency between levels of social dialogue

1. Where the parties wish transnational company agreements to produce effects other than declaratory, they could provide for procedures to implement them.
2. An optional reference or framework for the implementation of transnational company agreements could be provided:

- Parties could use this reference/framework to avoid difficulties in implementation where they so wish;
- This should not prevent the implementation of transnational texts to take place outside this reference/framework, in particular where companies wish to innovate or to conclude declaratory texts;
- This reference/framework could be provided for example through guidelines; European social partners, at cross-industry or sectoral level, should be given a primary role in defining or contributing to this reference/framework.

3. The links and coherence between transnational company agreements and other levels of social dialogue, in particular European social dialogue, could be reinforced, notably through the promotion of best practices.

4. The interaction between the different levels of social dialogue could be subject to further work of the European Commission together with social partners at different levels and other stakeholders.

V – Improving legal certainty in the effects of transnational company agreements

To facilitate the development of transnational company agreements, parties should be able to determine and control the legal effects produced by the text they conclude, in coherence with national norms in place. What are the legal and practical obstacles to face and what could be done in this regard?

V - A. Situation: the legal status of transnational company agreements is unclear and varies from one Member State to another

1. The parties' intentions as to the effects of transnational company agreements may vary widely from declaratory texts to binding agreements producing direct legal effects.
2. The actual legal status of the text is unclear and may differ from the parties' intentions. The lack of norms and of case-law leads to the fact that an agreement might be considered as an employer's unilateral commitment or a contract under certain laws and that its legal status may vary from one country to another. In fact, the legal effects of an agreement are conditioned by the national framework applicable for which various elements could enter into consideration such as its content, the signatories and their representativeness or the procedure followed.
3. National rules as to what makes a collective agreement at company level differ, in particular regarding the capacity to negotiate, the link between company agreements and other norms and levels of social dialogue and the effects on individual working contracts. Two main types of personal enforceability exist: the provisions are applied to all employees in the scope of the agreement without regard to their membership to the signatory party or it can be limited to the workers affiliated to the trade union signing the agreement.
4. A study on the characteristics and legal effects of agreements between companies and workers' representatives has been commissioned by the Commission to Labour Asociados with the objectives to providing a comprehensive review of the characteristics and legal effects of company agreements under national rules; identifying practical and legal obstacles faced in the context of TCAs; and exploring options to overcome them. Results have been issued in 2011.

V - B. Problem: legal risks associated with transnational company agreements and absence of correspondence between wished and actual legal effects of the agreements

1. Legal risks are associated to the conclusion of transnational company agreements, particularly for company management.

2. There is no direct correspondence between the parties' intentions as to the effects of the transnational company agreement they conclude and the actual legal effects produced, which remain therefore largely uncontrolled by the parties .
3. There is no coherence across Member States as to the present legal effects of a given transnational company agreement.
4. Interferences may be created in the legal effects of national, local or company based collective agreements by the absence of links between TCAs and other levels of agreements.

V - C. Options to be considered: Improving legal certainty in the effects of transnational company agreements

1. The parties could clearly state their intentions as to the legal effects of the transnational company agreement they conclude in the agreement.
2. Where a transnational company agreement is intended to produce legal effects, certain rules could be observed:
 - The capacity of the negotiating and signatory parties could be ensured as described under II-C p.11;
 - The drafting of the agreement could observe the principles described under III-C p.13;
 - Procedures to implement the agreement could be provided as described under IV-C p.16;
 - Possible contradictions with other levels of norms and agreements could be subject to prior scrutiny and avoided, and derogations in peius could not be possible;
 - Particular attention could be given to ensure the legitimacy of the negotiating and signatory parties as described under II-C p.11, the information of management and employees falling into its scope as described under III-C p.13 and the link with other levels of social dialogue as suggested under IV-C p.16.
3. A mechanism aiming at giving controlled legal effects to transnational company agreements could be worked out:
 - Parties could use this mechanism where they so wish;
 - This should not prevent transnational texts to be concluded outside this mechanism;
 - The design of this mechanism could be worked out by or in close cooperation with European social partners;
 - Provided the signature of the agreement follows the rules described under 2, in particular as to the capacity of the parties, the mechanism could:
 - Either provide for automatic legal effects similar as the ones produced by company agreements under national law and/or practice
 - Or provide for an invitation or obligation for the appropriate /mandating bodies at national level to take the necessary measures to enable the agreement to produce the legal effects of a company agreement under national rules and/or practice.

VI – Enabling the prevention and settlement of disputes

Social actors should be able to implement and protect transnational company agreements concluded, to follow their development and to resolve any differences of interpretation and disputes that may arise in their application. How to do it while fully respecting parties' responsibility and autonomy?

VI - A. Situation: Few mechanisms in place to handle disputes

1. Some transnational agreements contain provisions addressing dispute settlement. This is usually done in vague terms but some agreements provide for more detailed provisions in this regard, notably through the involvement of joint monitoring committees established specifically for the agreement in case. The type of text is not a crucial criteria: dispute settlement provisions are not more frequent in texts addressing restructuring and/or anticipation of change at European level than in global agreements.
2. Some transnational agreements do specify the linguistic version to be referred to, as well as the applicable legislation and competent jurisdiction, preference being given in this case to the ones of the country of the company's headquarters. Most agreements however do not contain such indications and some of the last generation's agreements explicitly rule out the competence of any external body to settle disputes over the interpretation or implementation of the agreement.
3. In some transnational company agreements, penalties or compensatory payments are provided, for the employees or management, in the event of a failure to observe the provisions of the agreement.
4. As a result of a transnational company agreement, transnational transfer of employees' personal data may be necessary. In this case, EU legislation on protection of personal data would need to be complied with. It notably provides that, in order for "binding company rules" to constitute a valid instrument for making transfers of personal data processed in the Member States to other companies in a transnational group which are established in non-member countries, such rules shall be legally enforceable by data subjects whose personal data are processed by the group and by data protection authorities, so that they may have a right to enforce compliance with the rules by lodging a complaint before competent data protection authorities and competent courts issues⁴.
5. So far, no party to a transnational company agreement or person affected by a transnational company agreement seems to have brought a dispute before the courts or before an out of court dispute resolution body.

⁴ See Opinions and documents of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data lay down guidelines on how personal data are to be processed in accordance with the principles set out in Directive 95/46/EC

VI - B. Problem: Lack of awareness, complexity and difficulties as to the possibility to settle disputes in or out of court

1. Signatories of transnational company agreements and affected parties are rarely well equipped to prevent and resolve internally disputes that may arise on their interpretation or implementation.
2. The risks for management and employees concerned of someone 'going it alone', of action being taken by associations external to the company or of non-compliance with previous commitments following a merger or restructuring are not well addressed in the present situation.
3. For court settlement of disputes, the 2010 study on international private law aspects of dispute settlement related to transnational company agreements shows in detail the particular difficulties raised by the application of international private law rules to transnational texts in order to determine the applicable legislation and the competent jurisdiction. Main instruments are the Rome Convention, replaced by the 'Rome I' Regulation since 17 December 2009⁵ and the 'Brussels I' Regulation⁶.
4. For out-of court settlement of disputes, such as conciliation, mediation or arbitration, it is considered that parties would face major difficulties in using existing mechanisms. Although national industrial systems provide for developed mechanisms to that aim, those are not competent or adapted to transnational company agreements. A study commissioned by the Commission will explore further this aspect in the course of 2012.
5. As to data protection issues raised by transnational agreements, most actors are not aware of them and the obligation to provide for compliance enforcement rights when data are transferred outside the EU seems not implemented so far (See under VI-A).

VI - C. Options to be considered: Favouring prevention and out of court dispute settlement

1. To prevent disputes, where parties wish a transnational company agreement to produce effects other than declaratory, they could provide for:
 - Monitoring mechanisms and indicators to enable parties to assess results and control risks;
 - Adaptation mechanisms to enable improving provisions of the text that prove difficult to apply over time, adapting to changing needs, developing actions, addressing change in the structure of the company;
 - First-level dispute resolution mechanisms to enable fast resolution of problems or disagreements in interpretation or implementation of the agreement.
2. To limit the risks associated to court settlement of disputes over the interpretation or implementation of a transnational company agreement, parties to a transnational company

⁵ Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

agreement could consider stating the applicable law and the competent jurisdiction in the agreement.

3. The content of EU rules on data protection as well as results of the 2010 study on international private law and the forthcoming study on out-of court dispute settlement mechanisms could be further brought to the knowledge of the actors involved in transnational company agreements.

4. The European social partners, at cross-industry or sectoral levels, could be invited to work on guidance or negotiate agreements on dispute resolution mechanisms such as first-level dispute resolution mechanisms, conciliation or mediation so as to facilitate the prevention and out-of-court settlement of disputes on transnational company agreements.

5. The Commission could consider the recommendations contained in the 2010 study on international private law aspects of transnational company agreements to minimize difficulties in court settlement of disputes.

Conclusion

Transnational company agreements require policy attention at European level. They play a positive role in identifying and implementing agreed solutions at company level to the challenges posed by a constantly changing business environment, in particular in the context of corporate restructuring and over 10 million employees are concerned.

The work of the group of experts enabled to examine issues relating to transnational company agreements, identify difficulties when negotiating, concluding and implementing TCAs and explore possible ways to address them.

The dynamic of this work led to identify a series of options on the different issues raised by TCAs, addressed to the actors directly involved in TCAs, to European social partners or to the Commission. A review of such options is provided in annex, according to their addressees and to the instruments envisaged.

The area of transnational company agreements pertains to social dialogue and therefore requires as far as possible convergence, consensus and joint initiatives of the social partners. These conclusions stemming from the work of the group of experts are now meant to encourage debate, in particular between social partners, on support to be provided at EU level that could contribute to the development of TCAs in the European area.

ANNEX I:

REVIEW OF THE OPTIONS ACCORDING TO ADDRESSEES

Actors directly involved in TCAs are addressees of the options inviting them to:

- Ensure legitimacy and capacity of the negotiators and signatory parties
- Bring clarity in the title and the drafting of TCAs
- Inform the persons concerned by TCAs
- Provide for procedures to implement TCAs
- Check and avoid possible contradictions with other levels of social dialogue and norms
- State their intentions as to the legal effects of TCAs,
- Provide for monitoring and adaptation mechanisms to prevent disputes and provide for first level dispute resolution mechanism to enable fast resolution of disputes
- Consider stating applicable law and competent jurisdiction
- Transmit new agreements or amendments for the updating of the database

The European social partners, at cross industry or sectoral level, are addressees of the options inviting them to:

- Provide a reference or a framework at the disposal of parties wishing to use them, for the actors to be involved in the conclusion of TCAs so as to ensure legitimacy and capacity of the negotiating and signatory parties
- Transmit new agreements they conclude to maintain the database
- Issue guidance or rules, at the disposal of parties wishing to use them, as to the form and transparency in TCAs
- Provide a reference or a framework, at the disposal of parties wishing to use them, for the implementation of TCAs
- Identify best practices to reinforce and promote links and coherence between TCAs and other levels of social dialogue
- Work on guidance or negotiate agreements on dispute resolution mechanism so as to facilitate prevention and out of court settlement of disputes on TCAs

The Commission is addressee of the options to:

- Abstain from any further action
- Consult the European social partners on the options considered, in particular for the references, at the disposal of parties wishing to use them, on the actors to be involved in the conclusion of TCAs and on the implementation of TCAs; envisage initiatives should the social partners not wish to negotiate in these areas
- Work on form and transparency in TCAs and on the interaction between different levels of social dialogue, for TCAs intended to be other than declaratory, together with the social partners and Member States, should the social partners not wish to work autonomously in these areas
- Consult the European Social Partners and work in close cooperation with them to design a mechanism aiming at giving controlled legal effect to TCAs where parties so wish
- Maintain the database on TCAs
- Coordinate with ILO in view to improve information of TCAs
- Inform about the content of EU rules on data protection as well as results of studies in the areas of TCAs
- Consider the recommendations contained in the studies on International Private Law aspects of TCAs

REVIEW OF THE OPTIONS ACCORDING TO INSTRUMENTS

None = status quo

Optional References or frameworks at the disposal of parties wishing to use them, for example in form of guidelines

- Reference/framework for the actors to be involved in the conclusions of TCAs
- Reference/framework for the implementation of TCAs

Guidance, promotion of good practice and recommendation to the actors

- Invitation to the actors to take actions in order to
 - ensure legitimacy and capacity of the negotiators and signatory parties,
 - bring clarity in the title and the drafting of TCAs,
 - inform the persons concerned by TCAs,
 - provide for procedures to implement TCAs,
 - check and avoid possible contradictions with other levels of social dialogue and norms,
 - state their intentions as to the legal effects of TCAs,
 - provide for monitoring and adaptation mechanisms to prevent disputes and provide for first level dispute resolution mechanism to enable fast resolution of disputes,
 - consider stating applicable law and competent jurisdiction,
 - transmit new agreements or amendments for the updating of the database
- Guidance as to form and transparency in TCAs
- Guidance on dispute resolution mechanisms
- Identification and promotion of good practice on links and coherence between TCAs and other levels of social dialogue and norms

Maintenance of database of TCAs

Coordination with ILO

Further work on particular issues

- Interaction between levels of social dialogue
- International Private Law aspects of TCAs

Working out a mechanism aiming at giving controlled legal effects to TCAs where parties so wish

Information on

- National provisions regulating company agreements,
- Rules on data protection
- Rules of International Private Law

ANNEX II:

SUMMARY OF WRITTEN CONTRIBUTIONS RECEIVED FROM THE EXPERT GROUP TO THE ELEMENTS FOR CONCLUSIONS

A. GOVERNEMENTAL EXPERTS

Denmark, Finland and Sweden

The governmental experts of Sweden, Finland and Denmark issued joint comments. They considered that the Expert Group on TCAs has been an excellent opportunity to discuss and learn more about the different kinds of TCAs, their form, subjects, partners as well as their legal effects. They believe that the database on the agreements can be a very helpful tool and can provide inspiration for new agreements as was the intention. They do not believe, however, that the work in the expert group unequivocally has indicated a need for regulation of TCAs. The expert group was responsible for investigating a relatively new phenomenon in the labour market and the discussions in the group showed the difficulties we had even on defining the TCAs. It is their view that the need for supporting rules or systems for TCAs is a question that is best left to the social partners. Key elements in TCAs are the freedom to negotiate and conclude agreements that is custom made to a specific situation. The role of the social partners is crucial in this context and therefore they would recommend that any measures in this area should be initiated by the social partners, as they are best qualified to assess the best approaches.

Germany

The governmental expert of Germany considered that, given the important differences in labour laws across Member States, a single and binding legal framework for TCAs would be difficult to achieve. She stressed that, for future work on this issue, the involvement rights of national actors need to be ensured and noted that the German social partners are of the same view. She referred to the possibility developed in the study of Labour Asociados, to give legal effects to TCAs without major changes in national legal orders. Given these results and in view to address the German concerns, she suggested to clarify that the actors negotiating on the issue at stake at national level should take part from an early stage on in the negotiation and conclusion of a transnational agreement.

Poland

The governmental expert of Poland stressed the appreciation for the work done by the European Commission in the field of TCAs and ensured that Poland is open for discussion and welcomes initiatives which could play a positive role in developing social dialogue across border. As to suggestions for further activities, non-legislative intervention, such as social partners' guidelines, is preferred. From the Polish perspective, the priority in describing the way of concluding transnational company agreements should be given to signatory parties of such agreements. It should allow them to tailor flexible instrument appropriate for their needs.

Spain

The Director General of Labour at the Spanish Ministry of Labour and Immigration considered that the revised version of the draft elements of conclusions, circulated after its examination by the expert group, better reflected the situation and work carried out in the group, especially as to the indication that the work of the expert group did not allow for generating a convergence of views on the need to provide support at EU level to the

development of TCAs. He noted however a contradiction between the references to the respect of the autonomy and responsibility of negotiating parties and the consideration of actions to address difficulties by establishing a reference or framework through guidelines or more prescriptive instruments such as a recommendation, an agreement between social partners or a directive. He considered that any framework on TCAs has to be voluntary, not only to guarantee the autonomous exercise of the parties' will, but also because there are no EU instruments applicable to collective bargaining in the Member states and because it would be very questionable to introduce them where the negotiation takes place between actors located in different Members states or with third country actors. He therefore stressed that instruments such as a recommendation or a directive would not be adequate, but that, on the contrary, an agreement between social partners would be welcome.

B. SOCIAL PARTNERS' EXPERTS

European Trade Union Confederation (ETUC)

The trade union experts, under coordination of ETUC, considered that the first version of the draft conclusions reflected faithfully the debate held in the expert group. They suggested amendments to the text, so as to better specify some points raised during the meetings. In particular, it was suggested to refer to the role of TCAs in facilitating cross-border mediation of interests, promoting socially agreed actions to tackle social disruptions generated by the crisis and boosting social and contributing to the social and economic integration of the EU. Refercnes were made to the specificities of European agreements, in relation to the higher level of integration in the European legal, economic and social environment, leading to mitigate uncertainties and helping to attain the agreements' objectives. It was suggested to better take into account the role of European industry federations and the problems of capacity and legitimacy that can also arise on employer side. It was propose to highlight the need for non-regression rules of TCAs on national, local or company level collective agreements. It was further suggested to encourage notification of the new or renewed TCAs to a public authority or a joint body promoted by social partners.

The experts thanked the Commission for having considered these comments in the revised document.

BusinessEurope

BusinessEurope forwarded the statement made by its representative at the expert group meeting on the first draft elements for conclusions. It recalled that the discussion on TCAs started five years ago with the optional legal framework proposed by the Ales report. It considered that the draft conclusions presented by the Commission do not reflect the work in the expert group, do take on board the analysis carried out by employers, in particular the outcome of BusinessEurope's work with the ILO training centre on TCAs, are biaised and may be seen as an objective to reinforce the bargaining power of European trade unions in company negotiations. Employers' arguments against signing TCAs were considered as not being reflected. The fact that a very small minority of companies have engaged in TCAs and the absence of any need and wish of companies for a framework or reference were stressed. A series of arguments against EU action on TCAs was developed: the European level is not pertinent, the promotion of good practices discriminates against companies not wishing to engage in TCAs, concluding TCAs and social dialogue are not necessarily a good thing, there is no need for financial support to TCAs. It furthermore indicated that BusinessEurope has no intention in entering into negotiations on a European reference on the conclusion and implementation of TCAs. As a conclusion, it stated that TCAs need to be transposed in the

countries concerned to produce legal effects at national level so as to respect the diversity of rules and traditions that prevail across and acknowledged that some work may be necessary to ensure that management and workers better grasp the possible legal implications of the agreements. However, no EU action was considered to be required to that aim and the responsibility of each side of industry to provide support to their member companies and/or workers was highlighted.

CEEMET

CEEMET sent comments on the first draft elements for conclusions. It welcomed the Commission's initiative to exchange views related to the relatively new phenomenon of TCAs with different stakeholders and interested parties, in particular the presentation of company examples and of studies. However, the first draft elements for conclusions were considered as biased and not reflecting the experiences and views presented at the expert group. Given the fact that only a small number of companies and Member States are concerned by these initiatives and that TCAs are mostly international in scope, it considered that TCAs are not an issue for EU wide initiatives and that the EU level is not sufficient as a regulatory level when it comes to TCAs covering third countries. It felt that the draft failed to reflect diversity amongst TCAs and the fact that no common understanding of a TCA so far existed. It considered that TCAs should not be mixed up with European social dialogue, collective bargaining and EWCs and stated that CEEMET would not support the proposed option to give priority to financing TCAs on a budget line related to social dialogue. It stressed that TCAs stem from purely voluntary initiatives and the need to respect the parties' responsibility and autonomy was highlighted. It stressed that companies do not express any need or wish for an optional framework at European level which, on the contrary, would reduce the flexibility they need and their willingness to sign TCAs. It felt that more emphasis should be given to the needs of companies to get a more balanced view of the situation. It stressed that the option to set up a reference through guidelines or more prescriptive instruments is very far reaching and unnecessary, in particular as it was felt that TCAs can already be made legally binding if the parties so wish. It considered more realistic that the Commission aims at providing an updated database of TCAs, organising exchanges of experience and analysis, reviewing the effects produced by TCAs and how norms relate to each other in the MS as well as clarifying rules of international private law as regards TCAs of a legally binding character. It stated that CEEMET is not in favour of setting binding references at European level but looks forward to open and objective discussions on the role TCAs play and should play in the future, underlining that these discussions must be carried out in such a way that they are transparent and that they fully respect the autonomy of the social partners.

In commenting the revised draft elements for conclusions of December 2011, CEEMET said it regrets to see its major concerns were not taken on board. Even if presented as options, the suggestions to consider more prescriptive instruments such as a recommendation, an agreement between social partners or a directive led to deep concerns. It considered that the document ignored the comments made in first instance, in particular that many company representatives considered even an optional framework not necessary and potentially limiting the necessary flexibility in this area while maintaining instead the disconcerting idea of a possible directive on the topic. It considered the revised draft as still being biased and not reflecting experiences and views presented in the expert group and therefore saw a need for further revision.

C. OTHER CONTRIBUTIONS

European HRD Circle for social responsibility

In a written contribution to the group of experts, Mr Barou, coChairman of the European HRD Circle, composed of senior HR Directors across Europe, shared the lessons drawn from the experience of the members, who signed 20 TCAs covering 1 million employees. The first lesson is that TCAs are an opportunity to explore new fields not addressed so far in social dialogue. Secondly, by basing these agreements on the sharing of good practices, solid foundations are given to TCAs. Thirdly, a pragmatic move is happening from agreements on principles to more precise, realistic and clear commitments which can be checked and followed-up. The fourth lesson drawn lies on the way to negotiate: it is not for the EWC to negotiate but the EWC is a key actor before and after the negotiation. The national representatives in a negotiating body should be appointed according to national practice in order for this body to be the most effective and combine the strengths of trade unions and works councils. The last lesson refers to the importance of follow-up, often done by a convention meeting every six to nine months, which needs to be treated as seriously as other managerial responsibilities at all levels. As to the development of TCAs, it was stressed that TCAs are not to be considered as marginal but rather as the main event of this decade in Europe in the field of social Europe after EWCs had been the one of the former decade. It was pointed out that the European model is based on social dialogue, which has no equivalent in the USA or in Asia and insisted that this collective heritage has a great value. It was considered that social dialogue has to be positioned at the appropriate level in the company, at the level where decisions are taken, which is not happening at local or national level for key decisions in multinational companies. The belief of the members that the European Commission has a responsibility to support these actions, notably by providing a flexible optional framework, was stressed. This framework would lessen the uncertainty which weighs on companies, enable them to know the rules of the game and give them the possibility to use regulation rather than end up with litigation. In this view, the framework should be optional, thus leaving the decision up to each company, respect the national systems for collective agreements and should be very flexible to allow innovation and new ways forward.

(<http://european-hrd-circle.org/yves-barou-the-european-social-dimension/>).