TRANSNATIONAL COLLECTIVE
BARGAINING: PAST AND PRESENT

Final Report
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- The Group has been joined by Prof. Ulrich Zachert, professor of Labour Law at the University of Hamburg (Germany) as external expert. We would like to thank him very much for his generous and constructive contribution.
Objectives of the report

• (a) Provide a comprehensive overview of the current developments in transnational collective bargaining in Europe and to identify the main trends;
• (b) identify the practical and legal obstacles to the further development of transnational collective bargaining;
• (c) identify and suggest any actions that might be taken to overcome these obstacles and promote and support further development in the field of transnational collective bargaining;
• (d) provide the Commission with a sound knowledge basis to assess the need for the development of Community framework rules, complementing national collective bargaining and highlighting relevant aspects such rules would have to take into account.
Structure of the report

The report is divided into two parts:

(a) the first is dedicated to an appraisal of existing transnational tools in Europe;

(b) the second to the definition of reasons and means to develop an optional framework for transnational collective bargaining at EU level.
Transnational tools

- Transnational tools: purely voluntary collective sources adopted:
  (a) by actors whose power to conclude collective agreements is not legally recognised at EU level or
  (b) by actors that have such a power but decide to give only non-binding effect to their joint texts.

- Examples: guidelines, codes of conduct, framework agreements or policy orientations.

- Instruments not based on a legally recognised power to conclude collective agreements, but deriving from transnational collective negotiation.
Existing experiences of transnational collective negotiation have sometimes been encouraged through legislation or other forms of intervention of the EU institutions, but there is still a lack of a general legal framework in this area. Other experiences find their sources in initiatives taken autonomously by Social Partners, who may sometimes feel the need for negotiated transnational norms regulating labour relations rather than to rely on market forces or on norms imposed by public authorities.
Existing examples of transnational collective negotiation can be found both at the sectoral level and at the company level as a kind of collective negotiation in transnational companies.
Transnational tools at sectoral level

- According to Decision 98/500/EC 31 Sectoral Social Dialogue Committees (hereafter SSD Committees) have been established or recognised replacing the existing "comités paritaires" completing the building up of European sectoral social dialogue.

- However, differences remain in the way of functioning and in the stage of development they have reached, since only some of them have gained importance as a medium of consultation and negotiation on issues that are of common interest for the sector concerned.
Conclusion I (A)

- The success of European sectoral social dialogue is due to:
  (a) the active presence of EU institutions;
  (b) its further development on voluntary basis;
  (c) the establishment of a structured and representative bipartite body.
Nevertheless, as far as the binding effect of “agreements” reached under such procedure and the impact on working conditions, sectoral social dialogue still depends either on the initiative of EU institutions or on Social Partners action at national level.
Conclusion I (C)

- In our opinion, these conditions can hamper the further development of European sectoral social dialogue in the view of:
  
  (a) assuming an autonomous relevance from national collective bargaining or EU institutions;
  
  (b) guaranteeing a direct and homogeneous impact of “agreements” on working conditions;
  
  (c) introducing in SSD Committee bargaining agenda more specific and even “hard” topics.
Transnational tools at company level

- Transnational tools at company level have emerged more recently than at sectoral level.
- Developments are mainly related to:
  a) CSR;
  b) restructuring.
- A boosting role in the development of transnational tools at company level has been played by European Works Councils (EWC).
Transnational tools and restructuring

• Transnational negotiation is frequently mentioned in the context of restructuring. Transnational Agreements between Social Partners can be used:
  • (a) to improve the adaptability of firms facing rapidly changing circumstances;
  • (b) to manage restructuring with a view to avoid or mitigate negative consequences for workers and other stakeholders.
Conclusion IV

- Agreements on restructuring have been reactive rather than proactive, dealing with specific occasions of restructuring.
- An EU legal basis for transnational bargaining could contribute to facilitate agreements which can spread social risks of restructuring over time and over larger groups of workers and plants (transnational social plans).
EC directive with a potential transnational dimension - I

- EC directives (apart from EWC and SE) in which a transnational dimension of collective bargaining could be developed:
  (a) the Collective redundancies;
  (b) the 1992 amended Transfer of undertaking;
  (c) the Information and consultation directives.
- All provide for information and consultation of employees’ representatives (in case of restructuring) in view of reaching an agreement.
EC directive with a potential transnational dimension - II

• The Information and consultation Directive provides that consultation shall take place “at the relevant level of management and representation, depending on the subject under discussion” (art. 4.4 b).

• The above mentioned directives, if provided by an adequate legal instrument to be used for this purpose might:
  • (a) open a space for information and consultation at transnational level;
  • (b) led to a transnational collective negotiation process that could be developed.
Some EC directives allow national Social Partners to derogate from EC Law standards by collective agreement, confirming, in this way, the interest of EU institutions for Social Partners involvement in the regulation of working conditions according to the subsidiarity principle:

- (a) the Working Time Directive, (art. 18);
- (b) the Posted Workers Directive (art. 3 parr. 3 and 8).
EC directive with a potential transnational dimension - IV

- Furthermore,
- art. 11 of the Directive on Equal Treatment Irrespective of Race or Ethnic Origins and
- art. 13 of the Directive on Equal Treatment in Employment and Occupation

provide that Social Partners, without any prejudice to their autonomy, may conclude at the appropriate level, agreements laying down anti-discrimination rules.
Conclusion V

- The lack of a structured transnational response by EC Law represents a missing opportunity in the view of developing a reliable and uniform regulation of relevant social issues at the appropriate level, transnational included.

- Topics like restructuring, working time, equal treatment and information and consultation could be fruitfully dealt with in transnational agreements stimulated by existing EC directives yet potentially envisaging a transnational dimension.
General reasons in favour of the development of a legal framework on transnational collective bargaining - I

- Transnational tools can be considered, *prima facie*, as a kind of “self-regulation” either by traditional Social Partners or by management and employees’ representative bodies (EWC).
- Nevertheless:
  - (a) inputs coming from EU institutions have represented a precondition for the development of European sectoral social dialogue on a voluntary basis.
  - (b) the same can be said with reference to the company level in which a *kind of* transnational negotiation could develop mainly because of the transnational dimension of industrial relations produced by the EWC directive.
General reasons in favour ... - II

- Further relevant developments in a voluntary self-regulative perspective do not seem, at this stage, easy to envisage, at least in view of creating a transnational collective bargaining system:
  (a) as far as the binding effect of “agreements” and the impact on working conditions are concerned, transnational sectoral social dialogue still depends either on “spot” initiatives of EU institutions or on interventions of the Social Partners at national level;
  (b) even more complicate problems emerge from the company level since:
    (b1) the only negotiation process underpinned by EC Law is limited in its ends to the establishment of a representative body or of a procedure of information and consultation;
    (b2) the highly differentiated composition of EWC is likely to produce relevant consequences on:
      (b2.1) their legitimacy to go beyond information and consultation, and to negotiate with management;
      (b2.2) Trade Unions and Employers’ organisations aptitude towards the recognition of negotiating powers to EWC without a simultaneous formal recognition of Trade Unions role within them.
General reasons in favour ...

- To sum up, the existing experiences of transnational collective negotiations at all levels illustrate that there is a lack of a specific and comprehensive legal framework regulating:
  (a) the procedure;
  (b) the negotiating agents;
  (c) the conditions for the binding effect of concluded agreements.
General reasons in favour ...

- In our opinion, such a lacuna is likely to hamper further developments of the transnational dimension in the view of:

- (a) recognising to it an autonomous role in relation to national collective bargaining or EU institutions intervention;

- (b) guaranteeing a direct and homogeneous impact of “agreements” signed at transnational level which may also stimulate the parties to introduce more normative topics into their transnational bargaining agenda.
General reasons in favour ... - √

• Furthermore, the complexity of norm setting in some areas of working conditions which can give rise to competition based on labour standards rather than on the quality of products, makes the definition of a specific legal framework within which transnational collective bargaining may develop highly recommended.
Specific reasons in favour ... Weakness of existing transnational tools - \( I \)

The lack of a legal status for transnational collective “agreements”. We may say that, at present, transnational collective agreements just do not exist *de iure* and are not going to exist without a comprehensive and specific legal framework.
Specific reasons in favour ... Weakness of existing transnational tools - II

• An unclear status of sources on which transnational tools are based.
• None of those sources has been established with the specific purpose of creating a comprehensive transnational collective bargaining system. Some aimed at developing information and consultation (rights) through procedures or ad hoc bodies (SSD Committees and EWC) which have progressively gained a negotiating role just in order to fill, with a rather limited effect, the empty space of the transnational dimension.
Specific reasons in favour ... Weakness of existing transnational tools - \textit{III}

- Variety of negotiating agents which are now trying to gain mutual recognition at transnational level, both company and sectoral (SSD Committees, European Social Partners, EWC, transnational companies).

- In this view, we have to stress:
  - (I) as far as European Social Partners are concerned, the lack of a legally binding and thus effective instrument at their disposal in case they conclude a transnational “agreement”;
  - (II) as far as EWC are concerned, the lack of formal legitimacy to enter collective bargaining, a lack which makes highly controversial:
    - a genuine counterpart role in respect to management;
    - the legal status of the agreements reached and their enforceability.
Specific reasons in favour ... Weakness of existing transnational tools - IV

- The presence of so many different actors taking the initiative to develop transnational negotiation, is likely to lead, as a direct consequence, to unclear relationships among levels of decision making and will open the way to easily predictable overlapping or even competition and conflicts:
  (a) between the sectoral and the company level as far as transnational negotiation is concerned;
  (b) between transnationally negotiated rules or principles and nationally defined ones, above all in case the former try to lower protection levels agreed within the latter.
Specific reasons in favour ... Weakness of existing transnational tools - V

• Although existing transnational tools have proved to be reliable as policy instruments for Social Partners, it cannot be denied that they did not function in view of establishing a (legally) binding system of transnational regulation.

• Nevertheless, we have not to forget that Member States have confirmed, approving art. 28 of the Nice Charter of Fundamental Rights, the recognition of the right to collective bargaining, specifying that it can be exerted at any appropriate level. Such non binding principle is, although meaningful in inspiring the European Social Partners and in developing collective bargaining at transnational level.

• The development of an optional legal framework establishing a transnational collective bargaining system would represent a possible solution.
Specific reasons in favour ... Weakness of existing transnational tools - *VI*

- Other options, such as relying on self-regulation by Social Partners at any level will not be able to solve the problem of the direct binding effect of decision bilaterally agreed at transnational level, since they all need either EU institutions interventions or national bargaining transpositions. Both will alter the very meaning of “transnational” which, in our view, is strictly linked to a regulatory power directly recognised to transnational agents.