

Towards a Legal Framework
for **Transnational
Company
Agreements**

Towards a Legal Framework
for **Transnational**
Company
Agreements

Report to the European Trade Union Confederation

Silvana Sciarra, Maximilian Fuchs & André Sobczak



With the financial support of the European Commission – DG EMPL
Project number VP/2012/003/0141



Summary

I. Introduction	05
II. Problem Setting	07
2.1. European Commission: Staff Working Document (2012)	09
2.2. The Resolution of the European Parliament	13
2.3. Further references to EU law and parallels with international law	15
III. A proposal for an optional legal framework for TCAs	19
3.1. 'Optional' and 'legal': no contradiction in these terms	19
3.2. A Council's Decision 'binding in its entirety'	20
IV. A legal act for the conclusion of TCAs and dispute settlement	23
4.1. Legal basis of a Decision addressed to Member States	23
4.2. Contents of an optional legal framework for TCAs	25
4.3. Advantage of accessing to an optional legal framework: the mediation procedure	30
V. Next Steps towards an optional legal framework for TCAs	36
Annex	38



1. Introduction

This Report deals primarily with EU law and attempts to offer legal perspectives to the controversial issue of Transnational Company Agreements (TCAs), in order to suggest an optional legal framework for agreements enforceable within the boundaries of the EU. However, references to international law will also be offered, in order to broaden the horizon of our work and add viewpoints to potential options in policy-making. This approach is related to the fact that TCAs are signed by Transnational Companies (TCs) and the latter operate within the EU as well as outside of it.

Over the last decade, the number of TCAs has increased among TCs having their seat within the European Union, illustrating the Europeanization of industrial relations. In August 2013, the TCA database set up by European Commission has registered more than 230 agreements.

TCAs have been negotiated in the absence of a specific legal framework. To a certain extent, this situation has certainly worked as an incentive to the development of TCAs, since the social partners enjoyed huge flexibility to explore innovative forms of negotiation. On the other hand, the lack of a specific legal framework for TCAs raises several questions regarding the negotiation process, the actors involved, the content of TCAs and their implementation.

This report to the European Trade Union Confederation aims at discussing the opportunities to develop an optional legal framework for TCAs and at defining the legal basis and the content of such a framework, as well as suggesting the steps that may lead to its adoption. The report takes into account both academic literature and political documents produced. Moreover, interviews have been conducted

with several representatives from transnational companies and European union federations involved in the negotiation and implementation of TCAs.

The report is structured into 5 sections (section I-V). After this introduction, section II builds on recent policy documents, in order to summarize the different legal problems at stake in the field of TCAs. Section III outlines the sources in primary EU law, relevant for supporting an optional legal framework for TCAs. Section IV contains and explains our proposal, i.e. the adoption of a Decision addressed to Member States, defining rules for the conclusion of TCAs and disputes settlement. Finally, in section V suggestions are made on initiatives to take in order to move forward towards the adoption of an optional legal framework for TCAs. The annex includes a presentation of the main outcomes of the interviews we conducted to support our proposal.

II. Problem Setting

It is well known that the conclusion of TCAs has begun and developed on a voluntary basis without precise guidelines set by the European Commission let alone a legal framework. When a rich body of TCAs has gradually emerged, they have become a subject of intense discussion. In the middle of the first decade of the new millennium the European Commission and the European trade union federations have made TCAs a focus of attention. In its Social **Agenda 2005-2010** (COM(2005) 33 final) the Commission paved the way for the definition of an eminent role of TCAs on the road to a European labour market. It clearly stated:

Providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training. It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses. Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy.

The Commission plans to adopt a proposal defined to make it possible for the social partners to formalise the nature and result of transnational collective bargaining. The existence of this resource is essential but its use will remain optional and will depend entirely on the will of the social partners.

The European Parliament (Resolution P6_TA(2005) 0210) and the European Economic and Social Committee (Opinion 846/2005) expressly supported this initiative and

asked the Commission to consider proposals in conjunction with the European social partners for drawing up a legislative framework on a voluntary basis.

A first study on the legal issues arising from the emergence of TCAs and the identification of obstacles to their further development and ways of resolving them was commissioned by the Directorate-General for Employment, Social Affairs and Equal Opportunity. The outcome was the report “Transnational Collective Bargaining. Past, Present and Future” (Ales-Report) in 2006.

In a **Staff Working Document of 2008** on the role of TCAs in the context of increasing international integration the Commission (SEC(2008) 2155) offered a first appraisal of the achievements made in this matter. The document emphasizes the key role and the potential of TCAs in an increasingly international business environment. It underlines that the growing international dimension of company organisation and of merger and take-over operations, the emergence of European companies, the increasing mobility of the factors of production and the ever more transnational scale of restructuring is bringing an ever greater need for transnational negotiation within firms.

The document mirrors the lack of certainty and the ambiguity in dealing with TCAs due to the diversity of collective bargaining systems in the European member states. The Commission prefers to adopt a different terminology and refers to transnational ‘texts’ instead of TCAs since there is no uniform interpretation on rules governing collective bargaining in Member States. Nevertheless the Commission shows its intention to further the discussion and asks for compliance with certain principles whenever the parties wish to accomplish legal effects, other than merely declaratory formulas, in signing transnational texts. The Commission marks a core of problem clusters, which should get the attention of the parties signatories to transnational texts:

- ▶ The first crucial cluster encompasses all issues concerning the actors in transnational company negotiations.
- ▶ The second and most comprehensive area of problems regards the legal effects of transnational texts. What the Commission presents in this area leaves no doubt that achieving legal effects of transnational texts requires to overcome numerous obstacles. This is what the Commission states: “At present, only texts bearing the signature of national trade unions may be regarded as collective agreements likely to produce legal effects as such, and only where they are concluded in accordance with the rules applying in the member states concerned”.

- ▶ The third topic, which is seen as crucial, is dispute settlement. The Commission picks up two aspects. The first is the reference to international private law the rules of which govern the decision on rights under transnational texts. Quite rightly the Commission speaks of a particularly complex and unclear legal situation and stresses the fact that the Rome I Regulation does lay down a special conflict-of-laws rule for individual employment contracts, but makes no provision for collective agreements. Furthermore, the Commission emphasizes the necessity to develop mechanisms for dispute resolution, since such mechanisms, which exist in national industrial relations systems do not apply in the case of transnational texts.

In its conclusions the Commission announced the setting up of an expert group dealing with TCAs, whose mission would be to monitor developments and exchange of information on how to support the process under way, and the invitation to the social partners, governmental experts and experts of other institutions to take part. The expert group issued its report in 2012 (<http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPagelId=214>). In addition two studies were commissioned, one of them dealing with international private law aspects and dispute settlement related to transnational company agreements (2009) (<http://ec.europa.eu/social/BlobServlet?docId=4815&langId=en>), the other one on the characteristics and legal effects of agreements between companies and workers’ representatives (2012) (<http://ec.europa.eu/social/BlobServlet?docId=7631&langId=en>). Moreover, the Commission has established a database containing the existing TCAs which can be found under <http://eu.europa.eu/social/TCA>.

2.1. EUROPEAN COMMISSION: STAFF WORKING DOCUMENT (2012)

Against the background outlined above and under the heading “Transnational company agreements: realizing the potential of social dialogue (SWD (2012) 264 final)”, the Commission published a second Staff Working Document in September 2012. It is at the moment the most recent document of the Commission in which it comprehensively explores and outlines the whole panorama in which TCAs are developing. Due to the importance of this document and the convincing outline and argumentation contained in it, we have decided to follow the lines of the document and build upon them.

Arguing that “it is now time to draw conclusions from the work of the expert group and take stock of developments since 2008” the SWD proposes operational conclusions and outlines options for further initiatives (underlining that it does not represent the position of the expert group). The SWD is expressly linked to the Commission’s Green Paper on restructuring (COM (2012) 7 final) which means:

Transnational company agreements are therefore one of the tools available to cope, at the level of companies, with social and economic effects of restructuring in a socially responsible way. Building on the experience of social dialogue on the enterprise level, they may contribute to a fair distribution of the costs of adjustment within multinational enterprises and groups in advance or in critical situations and thus help prevent, mitigate or shorten industrial conflict.

Analysing the existing TCAs, the SWD conceives TCAs as

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

Despite the success of TCAs, the SWD detects a lot of challenges due to the manifold difficulties and obstacles, which the conclusions of TCAs have to face. In this context the SWD draws a list of five items, which reflect these obstacles:

- ▶ the lack of procedural rules (leading to complexity and delays in starting content-related negotiation)
- ▶ 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 such agreements
- ▶ risks associated with the uncertainties as to the legal effects of TCAs and to the application of private international law rules to disputes
- ▶ resentment among managers and workers “representatives” at lower levels about the top-down imposition of measures agreed at an upper level.

The SWD explains, at least some of these difficulties, with the lack of specific regulations on TCAs at EU level.

With the subsidiarity principle in mind, the SWD begs the question of whether it is justified to provide support at EU level for the development of TCAs by addressing at that level the difficulties and challenges identified. In this context, the Commission refers to the work of the expert group, which did not build consensus around the central issues. The majority of experts from employers’ organizations took the view that no legislative action needs to be taken, since it could have the opposite effect of discouraging transnational companies from entering into negotiations. On the other hand, trade union experts are clearly in favour of a legal framework that would address the challenges identified in order to overcome uncertainty as to the effects of TCAs, when they are applied in member states with different internal regulations and industrial relations’ systems.

Commenting on these divergent views, the SWD gives an interesting and very important answer:

As an emerging factor in EU social dialogue, TCAs deserve to be promoted in line with the provisions of the Treaty (Art. 152 and 153). This would also have a positive impact on rights enshrined in the Charter of Fundamental Rights of the EU (Art. 27 and 28). It is also clear that they serve a useful purpose – to identify and implement feasible negotiated solutions tailored to the structure and circumstances of each company, particularly in the case of large restructuring processes. This is consistent with the principles and objectives underpinning the Europe 2020 Strategy.

After giving a positive answer to the usefulness of support at the EU level, the SWD provides criteria for such a support. It needs to be

- **flexible, adapted to the needs of the companies and workers concerned**
- **designed in close cooperation with the European social partners or better still initiated by them**
- **optional, as companies and workers should be able to innovate and operate outside any instrument intended to support transnational company agreements; parties should be free to negotiate and conclude agreements that are custom-built to their needs and to a specific situation.**

Against this background, the SWD concentrates on five problem areas, which are seen as crucial in the elaboration of an optional framework. In the following, we offer a short summary of the main ideas and proposals contained under these five headings.

a) Identifying the actors involved in TCAs and clarifying their role

Emphasis is laid on clarifying the legitimacy and capacity of the social partners involved. Legitimacy requires the establishment of information, consultation and mandating mechanisms to enable employee-side representatives to negotiate and sign an agreement to become binding for employees within the transnational company. The parties negotiating on the issues at stake at the national level should take part from an early stage in the negotiation and conclusion of a TCA. If the agreement is intended to produce legal effects, the capacity of the negotiating and signatory parties needs a clear mandate to do so on behalf of the employees and companies concerned.

b) Promoting transparency of TCAs

With a view to TCAs concluded in the past, the SWD calls upon the parties involved to ensure clarity about the contents, the aims and the consequences of the TCA (in particular the identification of those affected by it). If these standards are met, the next very important step is the effective dissemination of the TCA. Information has to be provided at every level of the transnational company. European social partners, at cross-industry or sectoral level are invited to issue guidance or rules, as to the form and transparency of TCAs.

c) Implementation of TCAs

The SWD sums up its analysis of published TCAs by showing that there is a wide variety of implementation mechanisms (top-down, bottom-up proceedings). It identifies the main problems in implementing TCAs in conflicts between the different levels of social dialogue. This may lead to interference in the application of collective agreements at national level, and the absence of non-regression clauses may become a reason for concern. Otherwise, the present approach, i.e. the implementation of TCAs by local company agreements, is not considered satisfactory, because it is too complex and leads to multiple national negotiations in a burdensome and often incoherent manner. But what the SWD offers for improvement of the present situation is anything else than concrete.

d) Improving legal certainty with regard to the effects of TCAs

The problem of legal certainty with regard to the effects is first of all a problem of the determination of the legal status of a TCA. To determine such a status is not an easy task, due to the fact that the nature and the functions of a collective agreement at company level are very differently defined in national labour law.

The SWD offers a way out of this dilemma by underlining the necessity to ensure the legal capacity of the negotiating and signatory parties and their legitimacy, the observation of transparency principles, the establishment of implementing procedures and finally to avoid conflicts with other levels of norms and agreements through prior scrutiny and the avoidance of derogations in peius.

e) Prevention and settlement of disputes

The text under this heading of the SWD shows that the Commission places emphasis on prevention strategies. Preference is given to monitoring, adaptation and first-level dispute resolution mechanisms. This proposal is convincing in view of what has been shown by the PIR-study and its references to the particular difficulties resulting from the Rome I Regulation and the Brussels I Regulation. The existing mechanisms for out-of-court settlement of disputes (conciliation, mediation or arbitration) at national level are not sufficient for dispute settlement of TCAs.

2.2. THE RESOLUTION OF THE EUROPEAN PARLIAMENT

It is of the utmost importance for further discussion on TCAs to turn our attention to the Motion for a European Parliament Resolution on cross-border collective bargaining and transnational social dialogue, presented by the Committee on Employment and Social Affairs (rapporteur: Thomas Händel) in June 2013 (PE508.017v02-00). This document underlines the ever-growing importance of TCAs, notwithstanding the absence of a legal framework both at international and European level. The motion proposes a consideration by the Commission whether an optional European legal framework for TCAs could be essential in providing greater legal certainty, greater transparency, and foreseeable and enforceable legal effects (see point 2).

Following this motion the EP has now adopted a Resolution, which basically confirms the points we summarised¹.

In the Explanatory Statement attached to the Motion an important argument is put forward: businesses generally extend their production systems and business structures to all companies that form part of the transnational undertaking. In view of this increasing transnationalisation of management within transnational companies it is consequent to develop cross-border labour-relation systems to solve problems.

The Motion and the Resolution make a decisive step forward, if we compare them to the discussion developed up to now. The Commission has proposed far-reaching reflections about TCAs, and continues to show an interest in developing an optional framework. But at no place it has used the term optional 'legal' framework. Therefore, the Motion and the subsequent Resolution add a clear statement towards the adoption of a legal solution.

As far as the realisation of such an optional legal framework is concerned, compliance with the following basic premises and contents is required:

- The optional legal framework has to be optional for the social partners. Therefore, the autonomy of the social partners to enter into negotiations and conclusions of agreements at all levels has to be guaranteed (points 3 and 6).
- TCAs shall be negotiated and concluded only by representative European trade union federations (point 1). European works councils (EWCs) should be fully involved in the negotiations with European trade union federations where applicable (point 7). The preference given to European trade union federations is motivated by the fact that they can get a democratic mandate by national trade unions and only they represent recognized national trade unions (Motion's explanatory statement).
- To guarantee full respect of national existing agreements, most favourable clauses and non-regression clauses have to be inserted into TCAs (point 8).
- Introduction of alternative dispute settlement procedures is requested.

The Motion's Explanatory Statement ends with a passage on regulatory alternatives, to be kept in mind when elaborating on a legal framework:

¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-386>

So far, there are no provisions concerning European transnational agreements. The subject falls under international private law, but Brussels I and Rome I do not provide for any collective agreements. Even an agreement concluded in an area not subject to regulation would then be fully enforceable at law. Such a radical development would be too extreme and would take insufficient account of the autonomy of the social partners and disregard the social dialogue. Nor would a directive or a regulation which was not of an optional nature be the right solution, as they would be bindingly applicable. Agreeing that the national legal order of a member state applies is not a solution, as this legal order would be alien and inapplicable for all parts of an undertaking located in a different country. Moreover, it would not take into account the originally European transnational character of these agreements and the transnationalisation of industrial relations at European level.

On these grounds we have based our own reflections, in proposing a regulatory solution.

2.3. FURTHER REFERENCES TO EU LAW AND PARALLELS WITH INTERNATIONAL LAW

In this paragraph we highlight some developments in international law, which, in our view, run parallel to the discussion in EU law and may help to put forward suggestions in policy making. We maintain that States must play a role in shaping the transnational phenomenon we are dealing with in this Report, in a way that should be coherent to their obligations under international law.

First of all, in a large number of existing TCAs the enforcement of fundamental rights is at stake. Although not necessarily responsible for the violation of all such rights, or for non-compliance with other labour standards dealt with in TCAs, States have the duty to prevent abuses from private actors and to create the conditions for the enforcement of the standards agreed upon. They follow, in such a way, a well-developed legal tradition, whereby issues of public policy must be preserved and enhanced as core values of national legal systems. This tradition irradiates the transnational scene, in view of preserving social values, while pursuing economic development. Thus, it is no surprise that the EP's Resolution, mentioned in the above section, should make reference to relevant ILO sources, as well as to art. 11 ECHR and art. 5 and 6 of the Revised European Social Charter.

TCs are referred to in this Report in a broad and encompassing context, namely as economic actors performing in the global legal system, including the EU. The fact that they operate as non-state actors does not diminish their role as subjects empowered with very specific duties and obligations.

In international law sources it is ascertained that TCs may create special rules within themselves, as for the distribution of responsibilities, related to control or ownership of productions (**ILO Tripartite declaration of principles concerning multinational enterprises and social policy 2006**, sec 6), or for establishing an 'investment nexus' (**OECD Guidelines for Multinational Enterprises 2011**). All such criteria do not necessarily produce results in terms of joint liability.

In EU law criteria of individual liability are recalled for TCs, when infringements of competition law are at stake. Sanctions are addressed to individual companies, with no automatic implications for subsidiaries, unless there is a clear and undisputable notion of the TC being a unitary economic entity. **Council Regulation 1/2003**, on the implementation of the rules of competition law, empowers the Commission to act by Decision, in order to require the 'undertakings and associations of undertakings concerned' to bring infringements to an end' (art. 7). It is now debated that, following the EU accession to the Convention, the Regulation should be revised, in view of providing compliance with Art. 6 ECHR.

In the framework of the **Global compact** and of the **Ruggie principles**, it is worth mentioning that the Human Rights Council of the UN endorsed the Guiding Principles in its Resolution 17/4 of 16 June 2011. The three pillars on which the Principles are built are: States duties to protect against abuses of human rights, corporate responsibilities to act diligently, in order not to infringe all such rights and access to remedies for victims of abuses. Multinational companies are addressed in the Ruggie Report as 'specialised organs of society', required to comply with all existing applicable laws and standards, without creating new international law obligations. Here again rights and obligations are constructed in such a way that they can be matched with specific remedies. For example, the obligation to communicate progress on enforcement of the Principles brings the UN Global Compact to sanction companies who fail to communicate, by expelling them.

It is also relevant to recall that a web of customary international law rules is built around the TC as a result of:

- a) obligations towards states, in compliance with specific standards and with international law sources
- b) repeated and continuous practices unilaterally adopted

- c) responsibility and accountability when entering agreements

Customary rules in international law are not comparable to binding legal norms, but are widely perceived as directions to be followed, or standards to be enforced, whenever an objective is set. They become a mean to an end and contribute in building a framework of virtuous behaviour. This is why enforcement mechanisms – be they aimed at preventing disputes, monitoring, or enhancing consensual decision-making – become equally important in the construction of a well functioning transnational system of norms.

Within the EU there is no harmonised law on groups of companies. However, it is relevant to recall that the Directive on the approximation of laws of the Member states relating to collective redundancies (**Council Directive 98/59/EC**) has given rise to interpretations whereby the company where dismissals will take place is the one to start consultation with workers' representatives, regardless of the fact that the strategic decision has been taken by the mother company (sec.11 of the Preamble). Another relevant source for the discussion developed in this Report is the **Recast Directive 2009/38 EC**, establishing European Works Councils (EWC) in 'Community-scale undertakings and Community-scale groups of undertakings'. The aim of this Directive, introducing substantive changes to Directive 94/45 EC, is to ensure 'the effectiveness of employees' transnational information and consultation rights'. This language is very precise, since it acknowledges that the enforcement of transnational rights must run parallel to the transnationalisation of the undertaking, which, according to the Directive, must be based in two or more Member States.

Art. 3 of the EWC Directive offers the definition of 'controlling undertaking' as the one exercising 'a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation or the rules which govern it'. Specific presumptions are laid down, in order to clarify such a dominant position, all having to do with rules intervening to shape the corporate structure of the undertaking.

References to EU law, in connection with international law developments, would not be complete without mentioning **Article 2 TEU**, which guarantees full respect for human rights, in continuity with values and constitutional traditions common to the Member States. The level of awareness at this regard is currently very high, as indicated by the EP Committee on civil liberties, justice and home affairs, stating the urgency to develop efficient instruments to guarantee compliance with fundamental rights within the EU (Working document II, 21.6.2013 PE514.699v01-00). The Committee suggests that a Commission's Decision should

specify indicators and criteria to measure compliance with fundamental rights.

Following this indication, we argue that all fundamental rights enshrined in the Lisbon Treaty and in the Charter of Fundamental Rights, including the ones dealt with in Title IV on ‘Solidarity’, deserve to be fully respected. **Art. 27** (Workers’ right to information and consultation within the undertaking) and **Art. 28** (Right of collective bargaining and action) must especially be mentioned, since they are pivotal to the subject matters covered in the present Report.

To complete references to EU law, the horizontal clauses dealt with in **Articles 8 and 9 TFEU** must be taken into account, to suggest that the promotion of employment and the improvement of working conditions are objectives of the EU to be pursued by social dialogue in all its facets, be it sectoral or transnational. Articles 8 and 9 bind EU institutions in their initiatives. It must be maintained that they pose an equally binding obligation on Member states, when they are asked to conform to the objectives set at EU level.

III. A proposal for an optional legal framework for TCAs

3.1. ‘OPTIONAL’ AND ‘LEGAL’: NO CONTRADICTION IN THESE TERMS

We need to state what is meant by ‘optional legal framework’, an illustration that may appear self-contradicting. **The ‘option’ to enter a legal framework is left to autonomous bargaining agents**, namely those who choose to comply with certain conditions, when signing a TCA.

Meanwhile it is worth clarifying what we mean by ‘legal’. **The framework must have a legal basis in the Treaty and be formally adopted with a legal act of the Union.** It will thus produce obligations for Member states and for the bargaining agents, while still leaving them the choice to ‘opt in’. The obligations will result in granting a legally binding nature to TCAs, namely recognising to them a normative function.

The optional legal framework should operate in full compliance with primary EU law. Its scope, among others, is to avoid distortion in competition, by enhancing choices and opportunities of the economic actors involved. **Art. 173 TFEU**, dealing with the ‘conditions necessary for the competitiveness of the Union’s industry’, aims at ‘encouraging an environment favourable to cooperation between undertakings’. **We maintain that this provision is very relevant when discussing ways to enhance the diffusion of TCAs and is complementary to the provisions dealing with the social dialogue, mentioned before and included in TFEU, Chapter X on Social Policy.**

What we argue for is legal support to be provided to a free option, left entirely to the initiative of the transnational negotiators. Such an option should be driven by the idea that better contractual relations will follow and legal certainty will be achieved.

Law should be ‘auxiliary’ to collective autonomy. It should not pre-empt autonomous choices of the negotiators, as for the inclusion of subject matters to be dealt with in TCAs, neither interfere with national collective agreements at all levels.

Law should simply set the scene for TCAs, indicating the essential and qualifying clauses to be considered by the signatory parties.

3.2. A COUNCIL'S DECISION 'BINDING IN ITS ENTIRETY'

To exercise the competences of the Union and legislate on the subject matters described so far, namely the adoption of an optional legal framework for TCAs, a Decision would be the most suitable legal act (**section I, Chapter 2 TFEU, Art. 288.4**). A Decision 'shall be binding in its entirety', if not specifically addressed to those who should then be the only ones to be bound. The 'ordinary legislative procedure' should be followed, whereby the joint adoption by the EP and the Council should follow a proposal from the Commission (**Art. 289 TFEU**).

Furthermore, **Art. 290 TFEU** provides that 'a legislative act may delegate the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non essential elements of the legislative act'.

The solution we offer, for a broader discussion to be continued among EU institutions and relevant stakeholders, puts an emphasis on the role of Member States in defining and implementing the rules for the conclusion of TCAs and dispute settlement, while still leaving the parties signatories to them fully free to 'opt in' the legal framework.

The follow up we expect, after the adoption of a Decision binding for all Member States, is the construction of a coherent and solid legal context in each national legal order. One advantage would be to create undisputable legal obligations in order to pursue the aims of transnational social dialogue. Respect for fundamental social rights – primarily the right to associate and bargain collectively, the right to information and consultation, which are enshrined in international law and in EU law – should be seen as core elements of virtuous States' behaviour. This would not infringe upon the autonomy of the social partners; on the contrary States would have, as in the best European traditions, nothing but an auxiliary role in supporting collective deliberations. States could also encourage best practices first related to the signing of TCAs and then to their implementation, in particular with regard to mediation. All such solutions would follow similar practices in international customary law, when it addresses multinational companies as relevant actors in the international and national legal orders.

The Decision 'binding in its entirety' should include the definition of a TCA as

well as all the essential and qualifying clauses that we shall indicate further on (section IV.2). This normative model should be phrased in general and abstract terms, in order to be suitable for all potential negotiators of TCAs and consequently for all potential TCAs to be enforced in each Member State.

In other words the 'framework' would consist of the essential elements qualifying the transnational and collective nature of the agreement. Member States would be responsible to implement TCAs according to national legal traditions and to trace relevant changes affecting them. Member States would be at the same time promoters and guardians of these new transnational voluntary sources.

For example, should a new subsidiary be included within the scope of the TCA, following the original signature of the same, the Decision binding on Member States would allow for an immediate legal effect of the existing TCA. The Member State in which the new subsidiary is located should be responsible to receive this information and comply with it, in force of the binding force of the Decision.

Furthermore, making Member States responsible for the collection of all data related to the administration of TCAs would facilitate the role of the Commission in elaborating indicators. The optional legal framework should in fact include, among other clauses, the duty to notify to national authorities (to be conceived in analogy with the alert mechanisms provided for by the OECD guidelines) all changes in the composition of the TC, namely the inclusion or the exclusion of a new subsidiary based on that national territory. It would then be the responsibility of the Member State to notify to the Commission all changes in the composition of the bargaining agents, as well as to disclose recourse to mediation and other alternative dispute resolutions.

The Decision, should empower Member States in supporting both normative and procedural functions of TCAs, contributing to their enforcement in each national legal order, once the 'opting in' of the signatories has been independently and clearly manifested. As a EU legal act, the Decision should serve the purpose to support Member States' initiatives within a unified system of legal criteria, provided for in the optional legal framework.

Art. 290 TFEU provides that 'a legislative act may delegate the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non essential elements of the legislative act'. This provision could prove useful in shaping best practices for the enforcement of TCAs in a uniform way for all Member States. **A website administered by the Commission should become the reliable source to refer to, for all relevant informa-**

tion. This mean of publicity should become the recognition of the Member States' virtuous behaviours and a sign of effective cooperation among state administrations, following the inspiration of the Lisbon Treaty. It is worth recalling that the above-mentioned EP' Resolution (point 11) refers positively to the Commission's role in collecting and disseminating data and information.

Art. 156 TFEU offers a wide ground of intervention for the Commission, in view of pursuing the objectives set in Art. 151 TFEU. The Commission 'shall encourage cooperation between the Member States and facilitate the coordination of their action' in a number of social policy fields. Apart from promoting research and studies, the Commission takes initiatives 'aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation'. These are the fields in which the Commission can be delegated, following art. 290 TFEU.

The stable and relevant legal framework referred to by the Commission and by the EP's Resolution, is fortified by the previously mentioned sources of international law, dealing with Multinational Companies and making them responsible for the enforcement of principles and guidelines. The conclusion that we suggest is the following: European **social dialogue must be interpreted as an expression of binding fundamental social rights enshrined in the Treaties and conceived in such a way to become complementary to an equally binding customary international law.**

Taking into consideration this overall context, the Decision 'binding in its entirety' and addressed to Member States should be based on Articles 152 TFEU. The function pursued by this legal act does not affect the autonomy of the parties signatories to TCAs. EU Social dialogue would thus include TCAs, among other existing expressions of collective autonomy, while empowering Member States to enforce the agreements according to national legal traditions.

Furthermore, Art. 152 para.1 TFEU aims at elevating to an institutional level what used to be considered a soft law technique. This relevant innovation is manifold, since it implies on the one hand a European standing of the social partners and, on the other hand, it confirms their emanation from diverse national traditions. Hence the notion of 'autonomy' of the European social dialogue emerges in a comprehensive way, not split among different levels, but intrinsic to parallel legal orders. In addition art. 27 and 28 of the Charter of fundamental rights represent the – now binding – legal pre-conditions for a full enhancement of collective fundamental social rights.

IV. A legal act for the conclusion of TCAs and for disputes settlement

4.1. LEGAL BASIS FOR A DECISION ADDRESSED TO THE MEMBER STATES

In its SWD 2012, the Commission saw TCAs as an emerging factor in EU social dialogue, which deserves to be promoted in line with the provisions of the Treaty, Art. 152 and 153 (see above, section II. 2.1). The Committee on Employment and Social Affairs in its Motion for a European Parliament resolution on cross-border collective bargaining and transnational social dialogue encouraged the European social partners to promote EU agreements, as provided by Art. 155 TFEU, and, at the same time, to preserve their autonomy (see under no. 14 of the Motion). These points are now part of the above-mentioned Resolution. Against this background, it is quite obvious that the search for a legal basis of TCAs has to be found within the legal framework of EU social dialogue and its provisions (Art. 152 to 156 TFEU).

It is worth mentioning that **Art. 152** constitutes an important innovation, brought about by the Lisbon Treaty. However, its structure can be considered an anomaly, when compared with other Council's 'configurations', as indicated in art 16 TEU. In fact, Council's Decision amending the configuration of the Council, to reflect changes brought about by the Lisbon Treaty², does not mention the 'Tripartite Social Summit for Growth and Employment'.

Social partners, despite the innovation introduced in Art. 152, seem confined in a marginal role, which disempowers them from taking formal assessments on broad economic matters and on all other matters affecting the integration of the internal market. The lacking recognition of the Social Summit as a special configuration of the Council collides with the relevance of social and employment policies for major decisions to be taken at an institutional level. Despite this anomaly – which should be the object of specific consideration at an institutional level – we agree with the Commission, when it refers to Art. 152 and considers it a relevant source to refer to, in order to include TCAs within European social dialogue.

² European Council Decision 16 September 2010 (2010/594/EU)

Reference should also be made to **Art. 156 TFEU**, whereby the Commission has the task to ‘encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields’ including ‘the right of association and collective bargaining between employers and workers’. The Commission fulfils its role by establishing guidelines and indicators and favouring the exchange of good practices, so that ‘periodic monitoring and evaluation’ becomes possible. The EP must always be informed³.

A connection can be established between the Commission’s initiatives under Art. 156 TFEU and the vigorous role played by the same, over the years, in collecting data on TCAs⁴, disseminating information, carrying on its own research and promoting the work of experts groups. It is also relevant that investigation conducted under the auspices of a EU institution should become strictly interwoven with research meanwhile promoted by the ILO⁵ and by ETUI⁶. There is convergence among international actors and research institutions in promoting similar standards, when it comes to framing transnational collective deliberations within clearer schemes of reference.

There could even be ground to maintain that a similar initiative – namely to foster the dissemination of common standards – could be taken by the ILO, with an aim to provide legal certainty for TCAs at a global level.

We argue that all such activities should be further enhanced. They should be thought of as parallel actions aimed at reinforcing social dialogue and pushing for the adoption of an optional legal framework. The Chapter on social policy in the TFEU offers a coherent set of norms for further developments of the European social dialogue, such as the ones we deal with in this Report.

The role of the Commission as a dynamic facilitator of social dialogue has also been institutionally recognised and coherently pursued over the years in adopting a Decision to establish ‘sectoral dialogue committees’, in compliance with the obligation under the Treaty (TEC at the time) to ‘develop the dialogue between management and labour at European level’.⁷ This source proved to be extremely

useful in shaping a new level of European bargaining, well beyond the previous practice of ‘Joint Committees’. Rather than provoking a mere spill over effect, the 1998 Decision served the purpose to determine clear criteria of representativeness and institutionalise the initiative of social partners. The latter are required to ‘make a joint request to take part in a dialogue at European level’ (Art. 1). It is well known that, because of this legal intervention, sectoral social dialogue flourished significantly over the years.

This Report intends to highlight the intuitions standing behind the launch of sectoral social dialogue and adjust them to the much more complex scene of transnational collective bargaining. **In particular, the most relevant point to stress is that, in order to enter a legal scheme, provided for in a European act, the initiative has been left so far to the social partners.** A similar initiative – we shall argue further on – is the one that transnational bargaining agents should take to enter an optional legal framework.

4.2. CONTENTS OF THE OPTIONAL LEGAL FRAMEWORK FOR TCAS

a) Opt-In Clause

The social partners have to express clearly their willingness to benefit from the optional legal framework set up by EU law. The opening clause of the TCA thus has to specify this choice as well as the possibility for the signatory parties to access the mediation process we suggest to create at the level of the European Commission.

It is up to the social partners negotiating TCAs to choose whether or not they want to opt in the legal framework we suggest to establish in EU law. This is, after all, the position expressed by the Commission in its SWD of 2012 (above II.1).

TCs and workers representatives may perfectly decide that this legal framework does not represent an added value for them and thus continue to negotiate texts that will not be governed by it. This choice precludes legal certainty as to the effects of the TCA and does not allow to access clear criteria for the signature of TCAs and the adoption of the mediation procedure that we suggest to set up.

³ References to art. 156 in A. Alaimo (2012), *Transnational company agreements and sectoral social dialogue: parallel lines, no convergence?*, in S. Leonardi (ed), *Transnational company agreements*, Roma, p.81-82

⁴ <http://ec.europa.eu/social/main.jsp?catId=978&langId=en>

⁵ K. Papadakis (ed.) (2008), *Cross-Border Social Dialogue and Agreements : An emerging global industrial relations framework?*, Geneva, International Institute for Labour Studies/International Labour Organisation.

⁶ I. Schöman, R. Jagodzinski, G. Boni, S. Clauwaert, V. Glassner and T. Jaspers (eds.) (2012), *Transnational collective bargaining at company level. A new component of European industrial relations?*, Brussels, ETUI.

⁷ Commission Decision of 20 May 1998 on the establishment of Sectoral Social Dialogue Committees promoting the dialogue between the social partners at European level, (98/500 EC)

b) Signatory parties of the TCA

Today a broad variety of actors negotiate and sign TCAs. To be coherent with the legal base chosen (see above IV.1), we suggest that the access to the optional legal framework should be limited to certain actors.

On the employers' side, we suggest that the legal representative in the TC's headquarter may sign the TCA in the name of all subsidiaries. Of course, this does not prevent the legal representatives of the subsidiaries to co-sign the text. Legally the headquarters are not the employers of the workers in the different subsidiaries, but it would be practically impossible to expect that the legal representatives of all subsidiaries co-sign the TCA. As we will explain below, the TCA has however to specify that the TC's headquarter legal representative has a mandate to negotiate in the name of the subsidiaries.⁸

On the workers' side, we suggest that at least one European trade union federation or two national union federations sign the TCA. Of course, EWC should be involved in the negotiation process or even co-sign the TCA if the other signatory parties agree on this. In this way the co-operation between ETUF and EWC, which often was a successful strategy and led to the successful conclusion of TCAs, is secured. But in order to access to the optional legal framework, they may not be the only signatory party on the workers' side. This would be too high a risk for establishing rights and duties in a TCA since EWC do not own legal capacity outside their competences under the EWC Directive. We agree, at this regard, with the position taken by ETUC in several occasions.

With a view to the specific competences of works councils in countries like Austria, Germany, Netherlands and possibly other countries negotiating parties should make sure from the very beginning of the negotiating process that the envisaged TCA does not interfere with the legal position of such national works councils.

c) Disclosure of the mandate

We suggest that TCAs should reflect autonomous choices of the bargaining agents, as for the mutual recognition of bargaining powers and representativeness. However, the optional legal framework should clarify that

8 A similar position is taken by A. Lo Faro (2012), *Bargaining in the shadow of 'optional frameworks'? The rise of transnational collective agreements and EU law*, European Journal of Industrial Relations, p.11. Legal certainty – this author maintains – is relevant in collective agreements not assisted by recourse to conflict.

a pre-condition for the TC to enter a TCA is disclosure of the agreed mechanisms of control exercised by central management on the other entities dislocated within the EU and outside of it⁹. We do not think, unlike in the EWC Directive, that a threshold should be established, with regard to the workforce employed by the TC. This suggestion follows various examples emerging in international customary law, whereby the headquarters of TCs take the initiative as legal entities exercising control, regardless of the workforce employed.

It is reasonable to say that procedural rights, such as information and consultation, – similarly to the already mentioned Directive on collective redundancies – should be exercised within the controlled companies, mostly affected by expected correlated effects. For example, should mobility of workers within the TC be dealt with in the TCA, to enhance working opportunities, or to avoid dismissals on economic grounds, information and consultation should be directed to workers' representatives within all companies involved in such procedures.

If we now turn our attention to bargaining agents representing workers employed within the TC – namely within all legal entities falling under the control of central management – we notice that guidelines have been adopted by some European trade union federations (ETUFs), in order to bind their own members to specific duties.¹⁰ These choices are, by all means, expressions of the positive freedom to organise exercised by supranational unions, who operate as a second level organization, with respect to membership. National federations are, following the specific mandate given to ETUFs, bound for the enforcement of TCAs at national level. When a ETUF signs a TCA, the formal conclusion of a dynamic process of negotiation is reached and the enforceability of the TCA must be guaranteed at national level.

Disclosure of the mandate on the workers' side is an essential element to qualify the agreement as collective and to implement all collective interests at stake. **However, rules to operate the mandate – majority voting, cross-industry representation, homogeneity of the rules across all sectors; vetoing powers – should entirely be left to unions' self-regulation.**

9 I. Schöman (2012), "Transnational collective bargaining: in search of a legal framework", in I. Schöman, R. Jagodzinski, G. Boni, S. Clauwaert, V. Glassner and T. Jaspers (eds.), *Transnational collective bargaining at company level. A new component of European industrial relations?*, Brussels, ETUI, p. 221.

10 IndustriaAll, EMF, EMCEF, EPSU and TLC-ETUF have adopted procedures for the negotiation of agreements with TNC.

d) Scope of application of the TCA and changes in the composition of the TC

The TCA should clearly define its scope of application. It should mention the conditions under which a subsidiary will (or will not) be covered by the content of the TCA. **We recommend that the TCA should contain an appendix with a nominative list of all subsidiaries covered by the TCA. The TCA should also specify the applicable procedure in the case of a subsidiary leaving the TC or whenever a new one enters into it.**

e) Non-regression Clause

Typical features of the current bargaining practice are: expansion of subject matters dealt with in TCAs; adoption of policies and guidelines within ETUFs for disclosure of the mandate and duty to sign TCAs, if necessary in conjunction with EWCs; recourse to clauses on ADR and in particular to mediation; monitoring and evaluation with regard to the enforcement of clauses – be they procedural or normative – in TCAs. There is also uncertainty as to the coordination of TCAs with other levels of bargaining at national level, which might cause overlapping among different collective agreements. **Hesitations and fears run against the promotion of efficiency in collective bargaining and impede further integration of the European internal market.** TCAs should instead be seen as a potential device for an increased mobility of business and labour and for stimulating employment and growth.

Hence, we suggest that a TCA occupies a level of its own, distinctively different from national sectoral collective agreements and company agreements. In order to support this point, we argue for the inclusion in TCAs of non-regression clauses. We borrow this terminology from secondary EU law and in particular from social policy Directives and from selected rulings of the CJEU. The non-regression clause is better described as a ‘transparency clause’. It puts on national legislatures, while transposing EU law into national legal systems, the burden to prove that, should legal standards be lowered, this outcome is not to be interpreted as an obligation under EU law. It is rather an expression of sovereign national parliaments, which independently choose to change the balance of legal guarantees within national legal orders.

TCAs, in a similar way, cannot impose pejorative changes of labour standards and working conditions agreed upon at national level, be it sector or

company. National bargaining agents are nevertheless free to enter, if necessary, concession bargaining or other forms of negotiations related to temporary measures, for example to fight the effects of economic and financial downturns.

Furthermore, TCs are bound by principles of public policy in all States in which they operate. With regard to fundamental human and social rights, States have the obligation to prevent abuses and assure full compliance of individual and collective rights within their territories.

f) Internal dispute settlement

The TCA should specify the signatory parties’ common responsibility in its implementation. It should also indicate the internal complaint mechanisms for workers covered by the text.

We suggest that in every country in which a subsidiary or a legal entity of the TC is located, ‘mediation structures’ should be established. This should be the place where managers and workers’ representatives are brought together, in order to solve potential conflicts. If, within these structures, no consensus is reached, it is up to the signatory parties to try to find a solution. If they cannot reach one, they may decide to access to the external mediation procedure set up by the European Commission, as it is suggested in this Report (see below IV.3).

g) Date and venue of the signature

The TCA should specify the date and venue of signature.

h) Expiry date and rules to promote renewal

The TCA should specify whether it is signed for a definite or indefinite period of time. In the first case, it has to clearly indicate the expiry date and any relevant rules that may conduct the signatory parties to conclude a new TCA. In the second case, the TCA should explain the rules regarding the termination of the agreement.

i) Duty to notify the TCA and subsequent amendments

Once the optional legal framework has been entered and the TCA has been signed accordingly, all changes intervening afterwards, in particular with regard to the

disclosure of the mandate on both sides, renegotiation of the TCA after its expiry date and possible expansions in the scope of the TCA should be notified to the European Commission, or to national authorities – possibly the ‘mediation structures’ previously mentioned – to be set up for this purpose and to be in charge of monitoring European transnational negotiations. The text of the agreement should specify the signatory parties’ responsibility to respect this notification.

4.3. ADVANTAGE OF ACCESSING TO AN OPTIONAL LEGAL FRAMEWORK: THE MEDIATION PROCEDURE

The negotiation of TCAs aims at developing social dialogue at the level of transnational companies. Beyond the definition of common principles that apply to the employees of subsidiaries in different EU Member States, TCAs illustrate the importance the signatory parties attach to social dialogue as a way to strengthen a common corporate culture and to enhance the company’s economic performance. Building relationships based on trust between management and workers’ representatives is one of the priorities for signatory parties of TCAs.

In this context, signatory parties clearly affirm (and we report this in the interviews that have been made to selected negotiators of TCAs (see Annex to this Report) that their intention is not to go to court, even if difficulties may arise in the implementation of the TCA. Workers’ representatives are convinced of the added value of a transnational level of social dialogue and aware of the challenges the implementation of TCAs may constitute for the central management of transnational companies. Their priority is thus to ensure that the TCA creates an on-going process of improvement towards the principles defined in the agreement, as well as an honest dialogue about the challenges and the ways to overcome them, rather than to expect their immediate respect throughout all subsidiaries of the company. Going to court to ensure the respect of the TCA is thus not considered as an option for workers’ representatives. As for company representatives, they are also very sceptical towards any kind of intervention of courts, if difficulties are met in the implementation of a TCA. They clearly affirm that there is a risk that companies will refuse to sign new TCAs, if workers’ representatives start going to courts.

There seems thus to be a broad consensus among the signatory parties of TCAs on the fact that it is up to them to solve conflicts that might arise from their implementation. Indeed, many TCAs contain provisions on dispute settlement that

involve the signatory parties. Nevertheless, for the hopefully rare cases where this internal mechanism fails, it is interesting to analyse the advantages of an optional method of dispute settlement and to describe its potential content.

After having defined the relevant terms and having presented the provisions related to this issue in TCAs, we will explain why an external mechanism for dispute settlement is useful and outline the possible content of such a mechanism.

a) Definitions

In industrial relations, it is possible to distinguish two kinds of disputes: rights disputes and interest disputes. A **rights dispute** concerns the implementation or interpretation of rights defined in an existing agreement. By contrast, an **interest dispute** concerns the determination of rights and obligations or the modification of those that already exist. Interest disputes typically arise in the context of collective bargaining where a collective agreement does not exist or is being renegotiated. Our report on TCAs focuses on rights disputes linked to the implementation or interpretation of TCAs.

According to the Green Paper on alternative dispute resolution in civil and commercial law (COM(2002) 196 final), alternative methods of dispute resolution may be defined as out-of-court dispute resolution processes conducted by a neutral third party. In certain cases, a court may entrust an alternative dispute resolution to a third party. Our report concentrates however on conventional alternative dispute resolutions that are decided by the parties to disputes linked to TCAs.

Alternative dispute resolution mechanisms may potentially take three different forms: conciliation, mediation and arbitration. While all three forms involve the intervention of a third party, its role differs between the three:

- **Arbitration** aims at replacing judicial decisions. The third party is asked to make a decision that is binding for the parties to the dispute. According to the Green Paper on alternative dispute resolution in civil and commercial law, arbitration is closer to a quasi-judicial procedure than to alternative dispute resolution. Signatory parties of TCAs, as well as social partners in general, are reluctant to the use of arbitration to resolve their disputes, since it clearly weakens their autonomy. We will thus not retain this option.
- **Conciliation** is the most informal of the three forms of dispute resolution. The third party does not adopt a formal suggestion on how to resolve the dispute, but simply brings together the parties to the dispute and helps them to come to

an agreement. In theory, conciliation may be used for both rights disputes and interest disputes. In practice, however, it is almost exclusively used for interest disputes. We do thus not think that conciliation is appropriate to resolve rights disputes linked to TCAs.

- **Mediation** is the most widely used form of alternative dispute resolution. The third party just makes a recommendation to the parties to the dispute that they are free to follow or not. It protects social partners' autonomy and is commonly used to solve rights disputes between them. Among the three different forms of alternative dispute settlement, we consider thus mediation as the most appropriate mechanism for the signatory parties of TCAs.

b) Provisions on dispute settlement in TCAs

Currently, only very few TCAs contain provisions on dispute settlement, and if they exist these provisions are usually rather vague, without defining clear procedures. The only clear principle that TCAs establish is that it is up to the signatory parties to resolve any disputes arising from the implementation or interpretation of the agreement.

For example, the European framework agreement on professional integration of young people concluded between Safran and IndustriAll states:

In the event of any disputes arising out of or in connection with the application and interpretation of this Group agreement, the parties shall endeavour to settle them between themselves. IndustriAll and Management shall endeavour to find an amicable solution to any such disputes, within a reasonable amount of time and in a spirit of cooperation.

In a similar vein, the European agreement on professional equality between women and men concluded between GDF-Suez and the European trade union federations IndustriAll and EPSU explains that, if conflicts may not be resolved at the local level, the signatory parties will meet to find a solution:

In the case of a grievance (non-compliance with the agreement and its application) and if the local discussion process has not led to an agreement, the file may be presented to the European federations along with all the necessary documentation related to the grievance. A meeting will then be arranged between a delegation from the European federations and the board in order to study the matter and the appropriate measures for finding a solution to this grievance.

Finally, another example is the dispute settlement procedure defined in the agreement on managing and anticipating at ArcelorMittal signed with the European Metalworkers Federation:

A conciliation body with equal representation on both sides is established at the ArcelorMittal headquarters in order to conciliate in any potential disputes resulting from the interpretation or implementation of this agreement. Only this conciliation body can settle such a dispute and its decision is final. It is made up of the negotiating teams of this Agreement. (...) Before submitting the dispute to the conciliation body, management and trade unions should first address it through national follow up committees, following national practices and traditions.

In some cases, the European Works Council is also involved in dispute settlement linked to a TCA, even if it has not co-signed the agreement.

Some TCAs specify the applicable legislation and the competent jurisdiction, as well as the linguistic version to be referred to. If the TCA stipulates that it is governed by a national law, any disputes that arise from the agreement will fall in the competence of the respective courts.

c) Advantages of an optional external method of dispute settlement for TCAs

In order to strengthen even further the provisions on dispute settlement in many TCAs, it is important to develop in parallel an optional external method to solve such disputes. This option would offer the signatory parties an additional chance to maintain social dialogue and save the TCA, even if they cannot reach a consensus among themselves on a solution to a conflict linked to the TCA.

Currently, in such cases, the signatory parties may either ignore the conflict because the TCA continues to produce other positive effects or decide to break the mutual scheme of obligations underlying the TCA. Workers' representatives may also consider going on strike to influence the company. We acknowledge that the right to strike is guaranteed in EU primary law (Art. 28 Charter of fundamental rights) and can be exercised within the limits set by national laws. However, resort to conflict should be structured as an 'ultima ratio' option for the unions signatories to TCAs. Offering an alternative method of dispute solution may thus be considered as a way to maintain and strengthen transnational social dialogue. Furthermore, the development of such a method may constitute an additional

element preventing signatory and third parties from going to court in the case of conflict linked to a TCA.

The development of an alternative method of dispute resolution for TCAs may be based on the experience of similar methods that exist for industrial relations at the national level in several EU Member States and that have shown their usefulness with regard to the resolution of conflicts. Most alternative methods of dispute resolution are provided for by the social partners themselves. In case of failure, they may however have access to structures offered by public authorities. In most cases, these methods are voluntary as regards both the decision to adopt them and then to accept their outcome.

In the following section, we will outline the main elements of an alternative method for dispute resolution for TCAs.

d) Proposal for a mediation process for signatory parties of TCAs

Building on the positive experience of national systems, several EU documents highlight the interest of creating an optional alternative dispute settlement mechanism at the transnational level to help social partners to resolve their conflicts. It seems particularly appropriate to use such a mechanism in priority for conflicts linked to TCAs.

In the section on anticipation and management of change of its Communication of 28 June 2000 ("Agenda for Social Policy" COM (2000) 379 final), the Commission points out the need to create tools to prevent and mediate conflicts between social partners. In the same document, it announces thus to consult the social partners on the need to establish, at European level, voluntary mechanisms on mediation, arbitration and conciliation for conflict resolution. In line with this, the European Council of 14 and 15 December 2001 in Laeken underlined "the importance of preventing and resolving social conflicts, and especially transnational social conflicts, by means of voluntary mediation mechanisms concerning which the Commission is requested to submit a discussion paper".

In 2002, the Commission has published a Green Paper on alternative dispute resolution in civil and commercial law (COM(2002) 196 final). This Green Paper contains a section on alternative dispute resolution in the field of labour relations. Building on the Green Paper, a Directive on certain aspects of mediation in civil and commercial matters has been adopted on 21 May 2008. While this directive does not cover labour or industrial relations, certain of the principles it contains

may inspire a possible framework for an alternative dispute resolution mechanism for TCAs:

- ▶ The mediation process should apply only to disputes related to TCAs and not replace any kind of mediation among social partners at the national level. It should not apply to rights and obligations on which the parties are not free to decide themselves.
- ▶ Only signatory parties of the TCA may use the mediation process. It is thus not open to employees of the transnational company, nor to other third parties.
- ▶ The mediation process should be voluntary. Both parties have to agree on using the process and may terminate it at any time.
- ▶ The Commission should encourage the provision of information to signatory parties of TCAs on how to contact mediators and organisations providing mediation services.
- ▶ To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, the Commission should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.

The access to this mediation process should be limited to signatory parties of TCAs that had chosen to apply the optional legal framework. The possibility to use this voluntary mediation process is indeed one of the advantages of respecting this framework.

As for the mediators, the signatory parties of each TCA should choose them freely. In order to help the signatory parties, the Commission may establish a list of mediators among legal experts or staff members of the Commission and offer such a list to the negotiators of TCAs as a first option for exercising their choice.

Whenever the solution of a dispute proves too complex at national level, the case should be brought to the Commission. The latter should provide mediators, chosen by a list of independent experts and handle the settlement in Bruxelles at DG Employment.

V. Next steps towards an optional legal framework for TCAs

Different EU institutions have underlined the need for an optional legal framework for TCAs, as long as the latter respects the social partners autonomy, does not restrict the development of transnational social dialogue, nor interferes with national levels of collective bargaining. Several of the actors we have interviewed, involved in the negotiation and implementation of TCAs, have also confirmed their interest in such an optional legal framework, in particular if it should offer the possibility to access an external mediation process, in case of conflict between the signatory parties.

This Report aims at offering a solution for the development of such an optional legal framework for TCAs. The search for a sound legal base in primary EU law, accompanied by the recognition of the role played by soft law, are both essential pre-conditions for social partners who aim at increasing legal certainty, when they enter collective agreements.

The proposals we make do not imply modifications of the Treaty. On the contrary, they rely on sources to be interpreted in an innovative way. We recall, for example, the reference to provisions in the TFEU, Title XVII on Industry and Title X on Social policy, all relating to the enhancement of circulation of businesses and labour within the internal market and to the dissemination of best practices. Thus, reference to acts to be delegated to the Commission, in order to supplement or even amend the legislative act adopted, is of focal relevance in the overall architecture of our proposal.

We suggest that the proposal is discussed in the coming months between the European Trade Union Confederation and federations that are the most active in negotiating TCAs. In a second phase, this discussion should be extended to academics, to the experts of the European Commission, to members of the European Parliament and to representatives from small and medium enterprises, TNC and Business Europe. These different discussions may lead to complete or

amend the proposal on several points, in particular on the contents of the optional framework and the organisation of the mediation procedure.

If a convergence should be reached on the essential clauses to be included in TCAs, the Commission could choose to circulate such information among the social partners, favouring the adoption of best practices, when entering negotiations. An experimental phase could thus be started in view of further initiatives to be taken. Guidelines and indicators could nourish European transnational bargaining and let it develop even further.

Such an open and flexible exploration, which should bring together the main stakeholders interested to the optional legal framework for TCAs, could subsequently lead the European Commission to propose the adoption of a Decision to the Council.

This is the auspice vigorously expressed by the authors to the present Report, written on the request of ETUC.

ANNEX:

Lessons from interviews with social partners

To complement and support our analysis concerning an optional legal framework for TCAs we decided to conduct a small number of phone interviews with company and union representatives that have been personally involved in the negotiation and the implementation of TCAs. The interviews took place in June and July 2013 and followed the same interview scheme*. In this section, we present the main outcomes of these interviews regarding the motivations of the social partners that negotiate TCAs, the negotiation process, the implementation process of TCAs and their experiences and expectations related to dispute settlement.

1. MOTIVATIONS OF SOCIAL PARTNERS

All our interviewees agree that the negotiation of TCAs is only possible in transnational companies that have a long tradition and culture of social dialogue at the headquarters as well as a good experience of information and consultation on the European level. The vast majority of TCAs has indeed been negotiated within companies that have an EWC. This does not mean that the EWC is necessarily part of the negotiation team, but it often takes the initiative of suggesting the negotiation of the TCA and is at least consulted by the European union federations. The scope of the TCA may include other EU countries than those covered by the EWC, since the application of the TCA does usually not require a minimum number of employees in the country.

Trust between the social partners is indeed a key condition for the negotiation of TCAs. The importance of trust is reinforced by the lack of a legal framework. Having already shown the potential and the added value of social dialogue at the European level is thus a factor that clearly favours the negotiation of TCAs. This also explains that companies may negotiate several TCAs. After having tested this tool for a

certain aspect of labour relations, the signatory parties often open new negotiations on other subjects. In general, the negotiation of the second or third TCA is easier since the social partners can build on the experience of the first TCA.

A common motivation for the signatory parties of TCAs is to strengthen social dialogue at the European level. They consider that social dialogue strengthens the involvement and commitment of employees and thus the companies' competitiveness. Moreover, TCAs are considered to have a greater legitimacy and thus a greater effectiveness on the practices at the local level than unilateral management decisions.

For the central management, the negotiation of a TCA contributes to the development of a common corporate culture among the employees of the different subsidiaries. This is particularly important for companies that have recently merged or acquired subsidiaries in other countries, as well as for companies that have a very decentralized organization. The definition of common principles in the field of labour relations is a concrete way to show the employees the added value of belonging to a transnational group of companies. This motivation has an impact on the choice of subjects for TCAs. Many TCAs concern health and safety, diversity and restructuring. These subjects are sufficiently concrete for the employees and allow the definition of general principles that have to be applied to every specific context.

2. NEGOTIATION PROCESS

Given the lack of a legal framework, the negotiation process differs to a large extent from one TCA to the other. While some of our interviewees would welcome a legal framework that clearly indicates the signatory parties, others appreciate the current freedom that allows them to find the solution that is the most appropriate to their specific context. It seems thus important that the legal framework remains optional.

On the employers' side, it is usually the central HR management that conducts the negotiations. The central managers may of course inform the local HR managers about the negotiation of the TCA, but this is far from being the case within all transnational companies. In many cases, the local managers only learn about the TCA, when the social partners have signed it. On the workers' side, different actors may be involved in the negotiations.

Many TCAs are negotiated with the members of the EWC. The advantage of this solution is that the members know the specific context of the company as well as the members of the central management. It may also favour synergies between the implementation of the TCA and the general information and consultation

procedures within the EWC. The problem is however that the EWC has no power to negotiate agreements. This is why, in certain companies, the central management has asked the national unions to designate representatives for the negotiation of the TCA among the members of the EWC. In these cases, the members of the EWC do not negotiate in the name of the EWC but in the name of the national unions, which is more in line with the traditions of labour law.

Some of our interviewees mentioned however a second problem linked to this solution. Negotiating a TCA with the members of the EWC or with representatives of national unions necessarily conducts to a very large negotiating team. It is not rare to have more than 30 workers' representatives around the table. While the involvement of a large group of workers' representatives in the negotiation process may favour the collective ownership of the TCA and thus its future implementation, it presents certain challenges. First, a large negotiating team composed of representatives from different subsidiaries involves important costs linked to transport and translations. Second, it complicates the negotiation process without necessarily guaranteeing an added value for the final text of the TCA. Up to 8 meetings may be necessary to reach an agreement on the final text of the TCA.

An increasing number of companies decide thus to negotiate the TCA with one or several European union federations that obtain a mandate to negotiate from the national unions where the company has subsidiaries. For the central management, this solution presents the advantage of negotiating with a small team of professionals that have an experience in the field of TCAs. Usually, such a negotiation process takes less than 6 months and is finalized within 3 or 4 meetings. The European union federation often presents a draft of the TCA to the central management that has been approved by the national unions.

Furthermore, negotiating with the European union federations allows the enlargement of the scope of the TCA to European countries that are not covered by the EWC. For example, ArcelorMittal's TCA on management and anticipation of change, negotiated with the European Metalworkers' Federation, covers 21 European countries, while the EWC includes only representatives from 9 countries.

Negotiating with the European union federations does not mean that the EWC plays no role in the process. First, the European union federations refuse to negotiate TCAs if the EWC is against it. Second, the EWC is informed about the process and consulted about the content of the TCA. In some cases, the secretary of the EWC is even integrated in the negotiating team. Finally, the EWC is involved in the implementation and monitoring of the TCA.

3. IMPLEMENTATION OF TCAs

Our interviewees recognize that the implementation of TCAs is not an easy task, since labour law and traditions of social dialogue differ a lot from one EU country to the other. Companies that negotiate TCAs have a central management that believes in the value of social dialogue, but some local managers in the subsidiaries may not share this analysis and consider the principles defined in the TCA as a constraint or at least not as a priority for strengthening the company's economic performance. It is thus essential that central management and workers' representatives first underline the strategic importance of the TCA and second encourage and support the local managers in its implementation.

The lack of a legal framework for TCAs pushes the signatory parties to set up specific monitoring procedures. In many cases, the local managers have to report on the projects developed in line with the TCA. This information is discussed in meetings between the signatory parties that take place at least once a year. Such reporting mechanisms are a clear signal to the local managers that the central management pays attention to the TCA.

TCAs contain general principles that have to be transposed through concrete projects at the local level. For example, TCAs dealing with equal opportunities may suppose that the local managers develop specific actions to promote diversity among certain categories of employees, or TCAs dealing with training may suppose the organization of appropriate training programmes to adapt to future changes at the local level. Rather than defining a set of precise rights, the idea is to stimulate social dialogue at all levels of the company. This does not mean that the TCA has necessarily to be translated into national collective agreements. It seems however important that the national agreements, if they exist, are in line with the principles defined in the TCA. This long-term approach also explains why all our interviewees declared that, even if there may be some difficulties in the implementation of the TCAs, the aim is not to go to court.

Several of our interviewees pointed out that changes in the economic context may have an impact on the implementation of TCAs. In some cases, new economic difficulties may create problems for the local managers and prevent them from implementing the TCA. It is thus important to integrate some flexibility in the TCA, in order to allow adaptations to new economic circumstances, without terminating the agreement.

4. DISPUTE SETTLEMENT

All our interviewees affirmed that there are few conflicts between the signatory parties of TCAs. Since there is no obligation to negotiate TCAs, companies that decide to do so have a central management that is motivated to develop social dialogue at the European level and do their best to respect their commitments. Even if it is not possible to go to court, the non respect of a TCA would have a bad impact on the corporate image, both among the employees and the general public. If some local managers do not immediately implement the TCA, the central management will thus usually intervene quickly to solve the problem. Progressively, these examples show the local managers the importance of the TCA and conduct them to revise their behaviour. The number of conflicts tends thus to reduce over time.

Several of our interviewees agreed that the development of an external mechanism for dispute resolution could be useful. They insisted that such a mechanism should involve the social partners as well as a neutral third party accepted by the signatory parties of the TCA. They mentioned positive experiences with mediation at the national level and at the European sectoral level (High-Level Roundtable on the Future of the European Steel Industry) that might inspire the mechanism for TCAs.

Interview scheme

A - Negotiation of the Transnational Company Agreement

1. Who took the initiative of negotiating the TCA?
 - If the initiative came from the company, who inside the company?
 - If the initiative came from the workers' representatives, who among them?
 - Was it difficult to convince the other party to start the negotiations?
2. What were your objectives in negotiating the TCA?
 - Do you think these objectives differed from those of the workers' representatives?
 - Did you achieve these objectives?
3. Before negotiating, did you contact other companies that had signed TCAs?
 - If yes, what was their feedback?
 - Did you contact other actors?
 - Did you read other TCAs?
4. Who was involved in the negotiation process?
 - On the management side?
 - On the workers side?
 - What about the local actors on both sides?
5. How were these actors selected?
 - Were there any discussions on the composition of the negotiation team?
 - If yes, how were they solved?
6. How long was the negotiation process?
 - When did the negotiations start?
 - How many meetings were organized?
 - Did you meet any difficulties during the negotiations?
7. Who signed the TCA?
 - Were there any discussions on who should sign?
 - If yes, how were they resolved?
8. According to you, what are the most interesting elements of the TCA?

B - Implementation of the Transnational Company Agreement

9. How did you disseminate the TCA?
 - What actions did the management take?
 - What actions did the workers' representatives take?
10. Did the TCA lead to any negotiations at the national level?
 - If yes, which actors were involved?
 - Do the national agreements differ from the TCA?
 - If yes, to what extent?
11. How do you monitor the implementation of the TCA?
 - Who is involved in the monitoring?
 - Did you set up indicators?
 - Did you set up a specific dispute settlement process?
12. Have you met some conflicts concerning the implementation of the TCA?
 - If yes, on which subjects?
 - How do you resolve these conflicts?
13. Do you plan to renegotiate the TCA?
 - Will this negotiation involve the same actors as for the initial agreement?
 - What would you like to achieve in the renegotiation?
14. According to you, to what extent a TCA differs from a national collective agreement?
 - If you see a difference, do you think that it would be helpful if TCAs were considered as collective agreements?
15. Do you think an external mediation process could be helpful to solve conflicts between the signatory parties of a TCA?
 - If yes, who should be involved in this mediation?
 - Who should be able to access to such a mediation process?
16. Do you have any further remarks?

List of employers representatives interviewed

- Stéphanie BERTHOM, GDF-Suez, 18 July 2013.
- Giulia GEMMITI, ENEL, 23 July 2013.
- Hugues FAUVILLE, ArcelorMittal, 2 July 2013.
- Leva IVANDOUST, AREVA, 18 June 2013.

List of workers' representatives interviewed

- Isabelle BARTHES, IndustriAll, 3 July 2013.
- JACQUET, Schneider Electric, 15 July 2013.



CONFÉDÉRATION
SYNDICAT
EUROPÉEN
TRADE UNION

Boulevard du roi Albert II, 5 | B 1210 Bruxelles
Tel + 32 2 224 04 11 | fax + 32 2 224 04 54/55
etuc@etuc.org | www.etuc.org