



# **Transnational collective agreements: the role of trade unions and employers' associations**

A Thematic Working Paper for the Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: "Perspectives of collective rights in Europe"

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March 2018



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This publication has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020)

## **Abstract**

After having provided some background information, this paper focuses on the role social partners play in the establishment and regulation of transnational collective agreements (hereinafter TCAs), by clarifying the very notion of transnational and by advocating for the use of transnational in its supranational meaning. This allows highlighting its specificity and taking into account the European Works Councils (hereinafter EWCs) as necessary actors in the negotiating process of TCAs. This implies to ground (transnational) industrial relations on the continuum 'information - consultation - participation - collective bargaining', offering the possibility to use, in the view of regulating them, the Social Policy Title. Alternatively, the paper proposes to rely on the Economic and Social Cohesion Title. The adoption of the supranational perspective of transnational will also permit pointing out the specificity of employment relationships within Multinational Companies (hereinafter MNC's) that need to be regulated by TCAs which cannot be regarded as a multinational extensions of the national collective bargaining system.

## **Background information**

According to the database of the European Commission (last update 2015),<sup>1</sup> there are 283 identified Transnational Collective Agreement (hereinafter TCAs), signed by Multinational Companies (hereinafter MNC). As for their content, it ranges from very soft issues such as Corporate Social Responsibility, to very hard ones, such as tasks, control on workers, occupational health and safety, equal treatment. The extent to which they have influenced national collective bargaining systems is, for the moment, rather uncertain, also due to the lack of disputes in which they have been referred to. As for the signatory parties, from the workers' side National and European Trade Union Federations (hereinafter ETUF) as well as European Works Councils (hereinafter EWC) have been involved, depending upon their availability and the 'country of origin model' of the MNC. In general, one can argue that they represent another (problematic) fragment of the European multi-level industrial relations system.

## **1 Transnational as supranational or multinational**

Crucial for any discussion on TCAs is the definition of the term *transnational*. From a legal point of view, such a definition is extremely difficult to provide if intended to consist of something more than '*beyond national*'. On the other hand, upon the way in which the definition is constructed depends also on the way in which the very nature of TCAs is approached i.e. in a *supranational* or in a *multinational* perspective.

*Supranational* and *multinational* are both concepts well known to the legal discourse. *Supranational* is a prescriptive notion that refers to the establishment of a legal order partly substitutive of and partly additional to the national ones at stake. Where additional, it constitutes a *combined jurisdiction* based on the principles of *competence*, *subsidiarity* and *proportionality*. *Multinational*, on the contrary, is a descriptive notion indicating the fact that a physical or juridical person operates in and is subjected to two or more national jurisdictions that, in our case, are in turn part of the EU. We will come back to it at the end of this contribution.

However, one has also to be aware of the fact that collective agreements are expressions of *Collective Labour Law* that consists of the recognition by a *pre-existing*

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<sup>1</sup> Available at <http://ec.europa.eu/social/main.jsp?catId=978>. From the European Commission see also 'The role of transnational company agreements in the context of increasing international integration', COM(2008) 419 final and 'Transnational company agreements: realising the potential of social dialogue', SWD(2012) 264 final.

*national legal order* (jurisdiction) of the right to collective self-regulation of the employment conditions by workers' representatives and employers as individuals or through their organisations ('recognition perspective' of the right to coalition).

The *kind and extent of the recognition* by the pre-existing (national) legal order (jurisdiction), represents a key element for the establishment, consolidation as well as quantitative and qualitative development of Collective Labour Law. *Kind and extent of the recognition* are also decisive for the consideration of Collective Labour Law itself as a jurisdiction, in the meaning of a combined system of governance and government of the employment relationship. In any case, being a *recognition relationship* at stake one may say that Collective Labour Law should be regarded as a distinct jurisdiction *embedded* in the one recognising it.

If we approach transnational (collective agreements) from a supranational perspective, we have to take into account that, at EU level, Collective Labour Law does exist to the extent that we consider it as a *vertically and horizontally combined (national and supranational) embedded jurisdiction*, thus admitting a *double embeddedness* within the national and the supranational jurisdictions at stake. This means that, in order to understand TCAs as *supranational tools*, one should have already in place a *combined legislation* on the collective dimension of Labour Law.

## **2 Freedom of association and workers' involvement in 'transnational as supranational'**

One of the most promising fields in which such a combination has been realised is that of the EWCs. Although rather frequently signatory parties of TCAs, EWCs are deemed by many scholars and by the same ETUF as not entitled to the right to collective bargaining, being the expression of *workers' involvement*, not of *freedom of association*.

This is a very challenging point and has to do with the fact that, in some Member States, *workers involvement* and *freedom of association* are looked at as two separate issues, in the sense that the former is referred, at least formally, to works councils, the latter to trade unions only. This idea has been embraced by Article 153 TFEU that clearly distinguishes between "information and consultation of workers" (lett. e) as well as "representation and collective defence of the interests of workers and employers, including co-determination" (lett. f) on the one hand, from freedom of association (and collective action) on the other.

Such a perspective is typical of the *double channel approach* to workers representation and to the way in which employers and employees interact in terms of *cooperation* (works councils) or *conflict*, the latter to be exercised as last resort by trade unions only, in the light of freedom of association. This has also to do with the fact that, in those Member States, works councils are established, and their structures and prerogatives are regulated, by the law.

As relevant consequence of this approach, collective bargaining and collective action result as exclusive prerogative of trade unions with EWCs playing the role of mere *facilitators* of the negotiating process. This is a highly controversial point, since it presupposes to look at EWC only through the lens of the double channel approach. A conclusion that, at least at EU Level, is contradictory in itself. On the one hand, in fact, Article 28 CFREU, recognises, for workers and employers (or their respective organisations), "the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".

On the other hand, EU Law, to be regarded as benchmark of that right according to Article 28 CFREU, and namely the EWC Directive (as any other directive dealing with workers' involvement), leaves Member States the task of determining whom workers'

representatives are. Therefore, EU Law does not exclude the possibility that EWCs could be the direct expression of trade unions in Member States that have adopted the single channel model/approach. Neither does the EWC Directive explicitly deny EWCs "the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".

The exclusion of EWCs from the right to collective bargaining seems even more problematic taking into account that MNC's look at them as reliable negotiating partners, as confirmed by the rather high number of *transnational documents* signed with them since the Nineties. On purpose, I have used the word 'document' instead of 'agreement' since the latter recalls collective bargaining and its effects. Empirical analysis shows that in many cases what we name TCAs have neither the form nor the structure of a collective agreement, even if EWC and Trade Unions have signed it jointly.

If, on the one hand, this can sound as a confirmation of the lack of legitimacy of EWCs to collective bargaining, on the other, the fact that MNC's could have signed those documents just because they do not consider them collective agreements should not be underestimated.

### **3 A sound legal basis for the regulation of TCAs**

#### **3.1 Social Policy**

Whatever the conclusion one draws from the analysis of empirical data, from a pure legal point of view, it is clear that attaching collective bargaining exclusively to *freedom of association* and denying any link with *workers involvement* is rather counterproductive. In fact, although respectful of the double channel approach, it makes a juridical basis for the regulation of transnational collective bargaining at supranational level hard to find within the Social Policy Title of the TFEU. As well known, in fact, Article 153(5) TFEU does exclude freedom of association (as well as collective action) from EU concurrent competence.

On the contrary, an interpretation that would link collective bargaining also to *workers involvement* would produce the advantage to provide the regulation of transnational collective bargaining (hereinafter TCB) at supranational level with a sound juridical basis in Article 153(2)(f) TFEU.

Such a solution would not mean the exclusion of trade unions from the potential actors of TCB regulated at supranational level, since nobody can doubt the fact that they *represent and collectively defend the interests of workers*, as prescribed by Article 153(2)(f) TFEU. On the contrary, the result could be a synergy between EWC and ETUF as bargaining agents that will realise the continuum 'information, consultation, participation and negotiation' already recalled in the above as envisaged by EU Law ("in the view of reaching an agreement"<sup>2</sup>).

#### **3.2 Social cohesion.**

If one refuses this interpretation, as it seems to be the case with the same ETUF/ETUC, the alternative juridical basis on which a regulation of TCAs at supranational level can be envisaged could only be found outside the Social Policy Title, within the Economic, Social and Territorial Cohesion Title (XVIII).

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<sup>2</sup> Article 2 Council Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies.

In fact, Article 174 TFEU states: "in order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions (..)".

In relation to this, Article 175 TFEU provides that "... The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments...".

Furthermore, according to Article 175 TFEU, "If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions."

Referring to the cohesion policy, aimed at promoting the overall harmonious development of the Union, might have sounded inappropriate for social dialogue before 2005 when, while renewing the Lisbon Strategy, the European Commission proposed to the Brussels Spring Council the mobilisation of all Community resources, including the cohesion policy.

The result has not only been a shift towards the integration of broad economic guidelines (Article 121 TFEU) and employment guidelines (Article 145 TFEU) into the Europe 2020 (previously Growth and Jobs Strategy), European Semester, and European Pillar of Social Rights, but also towards the establishment of a direct link between that strategy and the cohesion policy.

The link is clear in Regulation 1303/2013 on the European Structural Funds and in Regulation 1309/2013 on the European Globalisation Adjustment Fund (EGF), which has been adopted on the juridical basis of Article 175 TFEU.

Even though no explicit reference is made to TCB, Cohesion Policy, strongly linked to the Europe 2020 Strategy, is likely to create a favourable environment for the adoption of actions supporting the development of transnational (in the sense of supranational) social dialogue.

Therefore, Cohesion Policy represents a suitable background for an intervention adopted under the scope of Article 175 TFEU. In fact, the regulation of TCB at supranational level can be regarded as a useful instrument for strengthening the economic and social cohesion of the EU, above all if oriented towards core issues of the employment relationship such as wages, working time and health and safety.

#### **4 An Optional Legal Framework for Transnational as Supranational?**

Moreover, the reference (now) made by Article 175(3) TFEU to the "ordinary legislative procedure" as regulated by Article 289 ff. TFEU, opens up to the widest range of EU instruments, i.e. "regulations, directives, decisions, recommendations". It offers, therefore, an interesting foothold for the Proposal made by the ETUF/ETUC on an Optional Legal Framework for TCA that envisages the decision as legal instrument to be used.

#### **4.1 The ETUF/ETUC proposal**

The ETUF/ETUC Proposal of a Decision on an Optional Legal Framework, formulated in 2016, (hereinafter the Proposal) has the undisputable merit to boost again a debate that the European Commission had triggered already in 2006 with the Ales Report, and never abandoned notwithstanding the doubts risen then by the same ETUC and the ongoing clear opposition of BusinessEurope.

The proposal is based on an impressive academic study that reacts to the issues raised in the conclusions of the Expert Group on Transnational Collective Agreements set up by the European Commission in 2009.<sup>3</sup> According to the Expert Group:

1. Legal risks are associated with the conclusion of TCAs, particularly for company management.
2. There is no direct correspondence between the parties' intentions as to the effects of the TCAs they conclude and the actual legal effects produced, which remain therefore largely uncontrolled by the parties.
3. There is no coherence across Member States as to the present legal effects of a given TCAs.
4. Interference may occur in the legal effects of national, local or company-based collective agreements by the absence of links between TCAs and other levels of agreement.

The Proposal, however, as substantiated within the "Concept Example of a Possible European Optional Legal Framework for Transnational Company Agreements", does not approach openly the crucial issue of the *effects* TCAs are going to produce on the single employment relationship. That issue is touched upon in an indirect way, based on the combination of the 'Opting-in clause', the 'Disclosure of mandate', the 'Non-regression clause' and the 'Non-interference clause'.

The 'Opting-in clause' is at the basis of the optional nature of the proposed legal framework: The Decision containing it will apply only if so stated by the parties of the agreement.

The 'Disclosure of mandate' obliges both parties to declare, at the beginning of the negotiation process, whom are they representing.

The 'Non-regression clause', further to its traditional meaning ("This Decision shall not constitute valid grounds for reducing the general level of protection afforded to workers."), can also be regarded as an 'Opening clause'. In fact, it provides that the Decision "shall not prejudice the right of social partners to conclude, at the appropriate level – including the European level – agreements adapting and/or complementing the provisions of this decision in order to take account of particular circumstances."

The 'Non-interference clause', probably the most important one as far as the effects of TCAs are concerned, states that "In case of conflict between the provisions of a TCA and any other applicable national agreement, the provision more favourable for the employee shall apply."

In the perspective of understanding which effects, in the view of ETUF/ETUC, TCAs are going to produce, one has to highlight the link among the 'Disclosure of mandate', the 'Non-regression clause' in its traditional meaning, on the one hand, and the 'Non-interference clause', on the other. The 'Disclosure of mandate' clearly aims at defining the personal scope of TCAs in the perspective of aggregating within the bargaining unit national trade unions whose signature can guarantee the application of the TCA at national level, as it were a national collective agreement. Such an impression is confirmed by the presence of the 'Non-regression clause', in its traditional meaning,

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<sup>3</sup> *Expert Group on Transnational Company Agreements. Final report, 31 January 2012, 112.*

and the 'Non-interference clause', both aimed at 'protecting' national (sectoral) collective bargaining from the negative effects of the TCA, if any.

If we look at this structure in a *supranational* perspective, we cannot doubt that the non-regression principle is a substantive part on the EU construction, as affirmed by Article 151 TFEU. On the other hand, one may wonder whether the *non-interference principle* is in line with that perspective or, more realistically, it has to be seen as a clear feature of *transnational as multinational* (or cross-border to recall the terminology used by the Concept Example). In the sense that transnational shall be seen as an extension of the national collective bargaining system, subordinated to the (national) branch level as far as its effects are concerned.

To look at the relationship between the transnational and the national level in terms of *interference*, although only in case of worsening working conditions, means not to recognise the autonomy of the bargaining unit at transnational level, even if made out of national trade unions. By consequence, it means to deny the *specificity* of the transnational company level, which remains subordinated to the national branch one.

One may wonder whether, in order to reach such a (minor or minimalist) result, an Optional Legal Framework at supranational level is needed. The question is even more meaningful if we take into account the fact that the Decision envisaged within the Proposal should be adopted by the same European Social Partners and, only alternatively, by the Parliament and by the Council. Also for this reason, the Decision does not identify to whom it should be addressed. In any case, neither the Member States, in which jurisdiction national collective bargaining is embedded, nor the European Institutions are mentioned.

## **4.2 The position of BusinessEurope**

Although in the perspective of excluding the need for any supranational intervention, even in terms of Optional Legal Framework, BusinessEurope too, in its Position Paper of 2012, has made the point of *specificity* of the employment relationship within MNC's. In fact, according to the Position paper, "TCAs are entered into at company level when it adds value for both parties. The agreements differ greatly from each other, as they need to be adapted to specific needs of the company and its contracting partner and respect different national industrial relations systems in which the company operates. The possibility to develop tailor-made arrangements is regarded as the strength of TCAs."

BusinessEurope puts the *specific needs* of MNC's at the centre stage of its reflection, emphasising, on the other hand, the relevance of the "different national industrial relations systems in which the company operates".

In such a perspective, one has to stress that BusinessEurope's position has changed since 2006, passing from a 'denying' to an 'accompanying' one. In fact, having realised that TCAs play an important role within national and transnational industrial relations, BusinessEurope has focused on the fact that MNC's may need support in their choice to enter a negotiation procedure not yet cleared as for its effects. In such a perspective the cooperation between ITC-ILO and BusinessEurope on how TCAs can support CSR and Human Rights at work, which has already produced some promising results also due to the financial support by the European Commission, is worth mentioning.

## **5 Conclusion**

A reflection on the *specificity* of TCAs and on their relationship with the national collective bargaining systems can be an appropriate conclusion for this paper, since it



entails a clarification of the role that (European) Social Partners are playing and may play for the future of transnational industrial relations.

The specificity of TCAs relies on the fact that, as already suggested in the above, they cannot be looked at as a mere cross-border extension of already existing national collective bargaining systems, since they serve the interests of MNC's and of their workforce.

In such a perspective, one has to emphasise the *specific needs* of the MNC's in respect of the *general priorities* that are regulated by national collective bargaining at branch level. The specificity is linked to the fact that MNC's, just because they operate within several jurisdictions, inevitably adopt a *glocal approach* to the employment relationship. *Glocal* means that, in regulating the latter, a balance should be struck between *homogeneity*, required by MNC's needs to carry on unitary company policies (the global dimension), and the local conditions of the labour markets in which each subsidiary is operating.

The question, therefore, is whether (national or European) branch social partners on their own are able to appreciate the *glocal* dimension of MNC's, without putting into question the transnational solidarity among workers employed within its different subsidiaries, in the name of national interests. We come back, therefore, to the question at the beginning of this contribution on the way in which the regulation of TCAs is approached i.e. in a *supranational* or in a *multinational* (cross-border) perspective.

In our view, only the supranational perspective is able to ensure an appropriate consideration of the *specificity* that characterises employment relationships within MNC's. To this end, however, European Social Partners should value properly the role EWCs, the transnational bodies *par excellence*, could act as bargaining partners within the negotiation process of TCAs. In fact, EWCs perfectly embody and voice the *glocal* dimension of the employment relationship typical of MNC's.

This does not mean to ignore the specific problematic aspects that such a solution may rise for national legal and industrial relations systems that have adopted the double channel approach. In those cases, the joint presence and signature of national branch trade unions will be, of course, imperative.

