

## Chapter 7

# Effective transnational collective bargaining Binding transnational company agreements: a challenging perspective

Teun Jaspers

### Introduction: the binding nature

International or transnational (collective) agreements have become increasingly common in our globalising world, with their number rising to more than 130 (Schömann 2011: 129)<sup>1</sup> within the last two decades. Nearly half of them have been concluded at company level and they cover more than 6 million employees.<sup>2</sup> A great variety of transnational collective agreements currently exists, ranging from Agreements to Codes of Conduct, Charters and Commitments and Guidelines, with “International Framework Agreements” used as the generic term. An important issue is the effectiveness of these agreements in terms of their actual application and I will focus on this aspect in my contribution, discussing the conditions under which transnational agreements can have a (legally) binding effect.

This focus on the issue of whether such agreements have a binding effect implies that I will be looking at agreements that could have this kind of effect, i.e. they are binding not only for the signatory parties but also for the management of subsidiaries and the employees employed in the various constituent companies of the multinational company (MNC) in question. We are talking here about *agreements* subject to private

- 
1. Agreements concluded with European Works Councils are as such not included in this figure. If we include them, the numbers would be much higher. For figures on EWC Agreements, see the ETUI database: <http://www.ewcdb.eu/index.php>
  2. Source: ICT, 3th May 2011.

law, implying firstly that they are concluded between entities subject to private law – an employer or an employers' association on the one hand and trade unions on the other - and secondly that they can be applied directly to the parties bound by them on the basis of a contractual commitment of the signatory parties. Taking this focus allows me to steer clear of all kinds of transnational (framework) agreements (TFAs) lacking this effect. By implication I do not include European-level agreements concluded on the basis of Articles 154-155 TFEU.<sup>3</sup> Within the broader category of transnational (framework) agreements I restrict myself to those most suitable to gain this effect, i.e. transnational company agreements (TCAs), agreements concluded between the board of an MNC and trade unions<sup>4</sup> at transnational level and specifying the rights and responsibilities of both parties.

The effectiveness of TCAs in the sense defined above can be approached from several angles. The legal approach is not the only one. A TCA is seen to be respected when an MNC acts according to what has been laid down in the TCA, even without a strict legal obligation to do so.<sup>5</sup> Codes of conduct or similar regulations usually dealing with core labour standards set forth in ILO Conventions or with specific human rights (such as equal treatment) are often respected by MNC management as part of their corporate social responsibility policy even when a legal obligation to do so is lacking (Schömann 2011: 129).

The effect of a TCA does not necessarily have a legal basis. The legal approach to the subject of the effectiveness of a TCA chosen in this contribution means that I look solely at the provisions of a TCA that can have legally binding effect. I do not talk about a TCA as a whole since as such a TCA has no legally binding effect. Whether a TCA provision has such effect is dependent on certain conditions being fulfilled. First and

- 
3. These agreements need an implementation measure or an implementing legislative act or an additional collective agreement to transpose the content of the TFA. Besides agreements based on Articles 154-155 TFEU I also do not address sectoral-level agreements concluded between the European social partners.
  4. More in particular the focus will be on transnational framework agreements at European level (EFAs).
  5. The potential effect of adverse publicity on a company's reputation can for instance be very effective. The Nike case is a good example. Consumer pressure is also effective, as are state actions, for instance in the field of procurement.

foremost the content of the provision must be clear. Without this it is impossible – legally speaking – to apply the provision to a concrete case.

Binding nature as I use it in this contribution means that not only are the parties to the agreement legally bound by it but also individual employees. That is not obvious at first sight because, in order to be able to be applied in a concrete case, an agreement has to fulfil certain essential requirements. Since the agreement has to be applied in accordance with the legal system of the country in which the MNC or its subsidiaries are located, it is dependent on the legal system of the country concerned and any specific features thereof. Two fields of (labour) law are involved: alongside the law on collective bargaining and its results, collective labour agreements are also subject to private international law, the various obstacles of which have been discussed by Van Hoek and Hendrickx (Van Hoek and Hendrickx 2009). In addition, for a TCA to be applied uniformly in all countries in which the MNC operates, the conditions under which a TCA can be considered as a collective agreement pursuant to the laws of any particular country have to be taken into account, i.e. it has to be recognised as a collective (labour) agreement in terms of domestic (labour) law. Since legislation on collective agreements differs from one country to the next - as is the case within the EU -, there can be no guarantee that the TCA can be applied uniformly in all countries the MNC operates in.

A last question is whether the enforceability of a TCA is an essential element of its direct legal effect (Coleman 2010). It seems logical that the requirement for TCA provisions to be enforceable is a necessary element. If not, the actual application of a TCA in the various countries is at least questionable and therefore not guaranteed, thus weakening it as an instrument for the transnational regulation of industrial relations. Therefore, when examining the direct effect of a TCA for all persons concerned, it is necessary to also look at the conditions under which the TCA provisions can be enforced in the different legal systems. Again we are faced with private law problems, in this case regarding jurisdiction. As this issue is too complicated to deal with here, I have to leave the question unanswered, merely referring to the study mentioned (Van Hoek and Hendrickx 2009).

To ensure direct legal effect several requirements have to be met. But even when the problem of the differing labour law systems is solved, other obstacles related to the TCA itself remain, the most important of which are:

1. the identification of the legitimised bargaining parties and their competences (are they in a position to conclude legally binding agreements);
2. the content of these (legally binding) agreements;
3. the nature and scope of their application.

Without a legal framework the problems seem insurmountable, as seen by the many problems in the field of private international law referred to by Van Hoek and Hendrickx.<sup>6</sup> Though the establishment of such a framework at global level is totally inconceivable, even in the EU context it would be difficult though not impossible to achieve. Aware of the future importance of such transnational arrangements, the European Commission is paving the way, searching for ways of establishing an EU legal framework. The Ales group has come up with a proposal for an optional framework on which transnational bargaining could be based (Ales *et al.* 2006)<sup>7</sup>. More recently a study was conducted exploring the possibilities of granting TCAs legal effect.<sup>8</sup> Avoiding the many obstacles from a private international law perspective, it could be worthwhile exploring the possibility of creating such a legal framework within the EU for the purpose of directly granting legal effect to a TCA or its separate provisions. The means available to achieve such a goal depend on the nature of the obstacles to be overcome. Taking into account the status of current research and the restricted scope of this contribution, I will analyse the main obstacles and outline possible solutions. For a (European) legal framework to be a possibility it has to be elaborated within the context of the legal systems of the EU Member States. This means that we need to first look into these national systems, checking

---

6. See also Isabelle Schömann in this volume, *infra* p. 226.

7. In this context other studies have also been carried out. Moreover the whole issue is under discussion within a group of experts on Transnational Company Agreements, established in 2009 with the 'mission of monitoring developments and exchanging information on the subject'.

8. The author was a member of the group of experts dealing with the question of legal effects of TCAs commissioned by the European Commission; its report has not yet been published. The author is fully responsible for the content of this contribution.

the possibilities and the main obstacles to a framework giving direct effect to TCA provisions.<sup>9</sup>

To ensure that a TCA can be applied effectively in all countries in which the MNC operates, it first has to be verified whether TCA application can be blocked by specific regulations (statutory law or case law) in a Member State in which the MNC operates. In considering the possibilities of a European framework guaranteeing the direct applicability of a TCA, it has to be investigated whether existing obstacles are insurmountable or whether and how they can be overcome.

Whether a TCA has to be provided with this kind of direct effect is essentially a political question rather than a purely legal one. Though the feasibility of any regulation aimed at attaining this objective cannot be the subject of this contribution, at the end of the day it is the most important question to be answered. One crucial element of any such answer is whether such a regulation is realistic from a legal point of view. Even if the legal obstacles are insurmountable the political question can still be put and answered, though at least part of its meaning or relevance will be lost. In such a case TCAs will probably become a tool for a corporate governance approach (Schömann 2011).

My main question is therefore: under which conditions can a TCA and its provisions be granted direct legal effect?

## 2. The bargaining and signatory parties

In order to be able to provide a TCA with direct effect I will investigate the conditions under which a TCA is bargained and signed by MNC management on the one hand and workers' representatives on the other, and what has to be done for it to be legally recognised and accepted as a collective agreement with direct legal effect. Although the legislation in the various Member States reveals differences it can be

---

9. It is impossible to go into a thorough analysis here. I will rely on work done in the group of experts (see previous note) and on other sources such as a project led by Silvana Sciarra on *The evolving structure on collective bargaining in Europe 1990-2004*; and a project led by Fernando Valdés Dal-Ré, *Freedom of association of workers and employers in the countries of the European Union*.

stated that in nearly all Member States collective agreements can be concluded by the employer (or an employer association) and trade unions. On the employers' side there would seem to be no problems, with all EU Member States entitling individual employers to bargain and conclude collective agreements. The question could rise whether a group of enterprises has the competence to bargain and to conclude a collective agreement on behalf of the group. There is a debate going on whether an MNC's corporate management can conclude collective agreements binding (the management of) its subsidiaries (cf. Sobczak (2008), p. 117). This could be dependent on the statutes of the MNC and its formal hierarchy (Ales *et al.* 2006). It should to be noted that in a number of Member States this issue has been explicitly regulated.<sup>10</sup>

Turning to employees the situation is more complex. Where trade unions exist they are generally the competent employee representative bodies to bargain and conclude collective agreements. In some countries, such as Germany and Austria, works councils explicitly have this competence though not to an unlimited extent.<sup>11</sup> In other countries without company-level trade unions it is possible for an elected body, whether a works council or another body representing employees, to have the competence to bargain and conclude an agreement with the management of the (group of) company/companies.<sup>12</sup>

Obviously country differences will cause problems with regard to the overall legal validity of a TCA unless a remedy to this deficit can be

---

**10.** In a country like Germany additional requirements have to be met: corporate management needs to be authorised by the member companies of the group; in Slovenia and Sweden the management of the separate group members have to sign the agreement in order to be bound by it.

**11.** In Austria works councils are the exclusive bargaining parties, at least at company level. In Germany works councils may bargain, but in cases where a trade union has concluded an agreement the works council has to give precedence to the trade union(s). In countries like Greece and Lithuania where trade unions are absent at company level, the works council acts as the bargaining party. In Slovenia it is dependent on the applicable legislation, with only company agreements coming under the 'Workers' Participation in Management Act' able to be concluded by a works council; all others are concluded by trade unions.

**12.** In Poland elected employee representatives or a special negotiating body is competent and entitled to conclude an agreement with management. Since 1993 Italy has a noteworthy system at company level: workers' representatives are elected by and from the midst of all workers constitute the signatory party.

found.<sup>13</sup> Moreover in certain countries there are formal rules to be complied with, for instance the legal requirement for a trade union to be officially recognised before being allowed to bargain and sign a collective agreement. In TCA terms the party concluding and signing the agreement on the employee side – the European trade union(s) – has to be recognised under the national law of the state concerned as a legitimate party to do so. The recognition procedure (where such exists) varies from country to country, possibly even dependent on the position taken by the employer.<sup>14</sup> A (legal and possibly also a practical) problem can occur when a European trade union signing a TCA is not recognised in certain Member States as a party competent to conclude and sign a collective agreement applicable within the company in question. In that case the TCA cannot have legal effect at all.<sup>15</sup>

Apart from this formal requirement, there are other – in most cases surmountable – requirements to be met. Where a bargaining party needs to be registered, registration is generally easily done once proof has been provided that the trade union is independent. Sometimes legal personality and/or (civil) liability are required. Where national laws stipulate that only trade union(s) are competent to conclude and sign collective agreements – the case in several countries – a TCA cannot be concluded by a (European) works council or other employee representation body, at least when they fail to be endowed with legal effect. In this respect two obstacles can be identified. TCAs concluded by a European Works Council – in the majority of countries not a legitimate party to a fully binding collective agreement – can only be granted direct effect in Austria and Germany, perhaps Italy, and also Slovenia, Spain and Greece under specific circumstances. This means that if works councils (and in particular EWCs) take part or even lead TCA negotiations,

- 
13. Within the bounds of this contribution it is impossible to give a complete picture of the specific features of all 27 EU Member States. I will refer to a selection of elements found in the legal systems of Member States as a kind of illustration. Otherwise I will rely on studies and surveys conducted by others. In the context of a study commissioned by the European Commission an inventory has been made of the various core elements of the legal systems governing collective agreements in all 27 Member States.
  14. A well-known example is the UK; but in countries characterised by freedom of choice of the bargaining party such as the Netherlands and Sweden, the employer actually decides whether a trade union can function as a bargaining and signing party.
  15. One solution to this problem would be for the management of the subsidiary to unilaterally impose the TCA or its provisions (or some of them) on employees. The possible problems arising from this transcend the bounds of this contribution.

official support by a 'recognised' trade union is indispensable for the agreement to gain direct legal effect. To overcome this obstacle, it is necessary for the European trade union acting as the concluding and signing party to the TCA to be recognised as such under the national law of the country concerned. In practical terms, this is no real problem.

In summary it can be said that in most cases problems can be overcome. This does not however mean that the problems cease to exist. Where a TCA does not fit in with a Member State's national (legal) system, there is a question-mark over whether the TCA can be uniformly applied in all countries in which MNC operates. To reduce such doubt, a solution has to be found. Staying within the European Union, the best option would seem to be to leverage the EU's legislative capacity. This is however out of question on a global scale. I will come back to this aspect at the end of my analysis.

### **3. The content of TCAs**

When approaching the issue from the angle of the (legal) effect a TCA can have, it is important to take a closer look at the subjects generally addressed in a TCA. International or European Framework Agreements usually have a broad scope of possible subjects.<sup>16</sup>

Looking at these figures<sup>17</sup> we see that most agreements refer to fundamental (social) rights based on or adhering to the respective ILO Conventions on freedom of association and collective bargaining, equality and non-discrimination, forced labour and child labour. This picture is confirmed by other studies. It also reveals that more concrete issues relating to actual business developments in MNCs - such as restructuring, training and mobility - tend to be found in EFAs, whereas the IFAs focus more on fundamental rights as shown in the figure table below:<sup>18</sup>

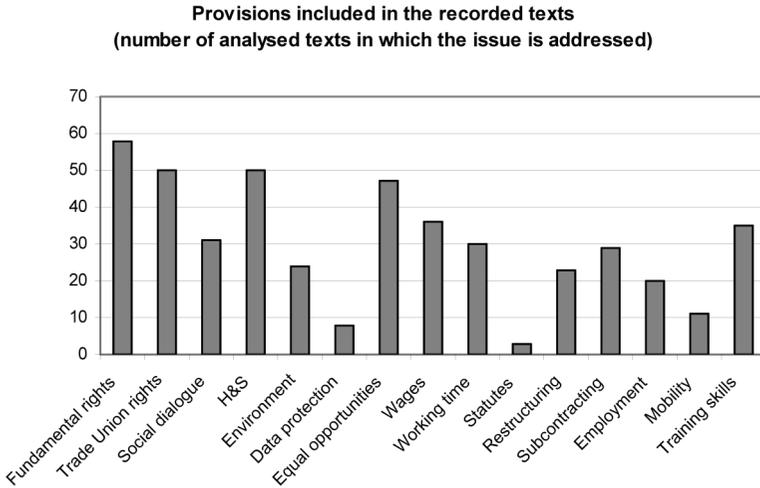
---

**16.** Within the bounds of this contribution, this is restricted to agreements at company or group-of- companies level.

**17.** An initial study by Isabelle Schömann on this issue provides an impressive – with regard to numbers – picture of developments; cf. Schömann, I. (ed.), *Corporate social responsibility: a threat or an opportunity for the trade union movement in Europe? Transfer* 3/2004, Brussels 2004.

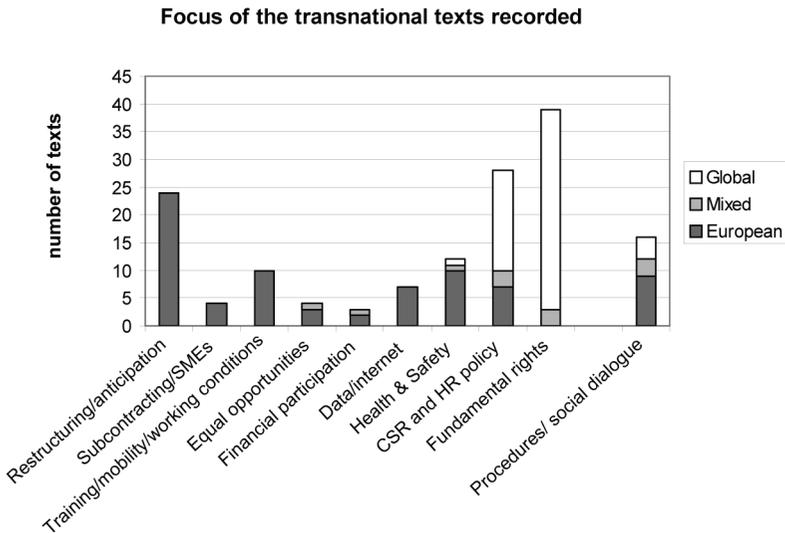
**18.** N.B. The figures in this table differ from Table 1 in respect to the number of texts. The reason is unknown.

Figure 1 Subjects covered in I/EFAs



Source: Study seminar "Transnational Agreements", 17 May 2006-Working document, European Commission (E. Pichot)(2006), p. 11

Figure 2 Subjects covered in I/EFAs



Source: Mapping of transnational texts negotiated at corporate level, Brussels 2 July 2008 (EMPLF2EP/bp2008(D)14511), p. 16

These figures show that a substantial proportion of EFAs involve subjects that – at least on paper – could be granted direct effect. To better assess this, the content of these provisions needs to be examined in greater detail. With regard to the topic discussed here, we can focus on agreements with potential direct effect, leaving aside all other types of I/EFAs without direct effect in the sense we are discussing here.

When assessing the potential direct effect of TCA provisions two distinctions have to be made. Generally speaking, the provisions of (transnational) collective agreements can be divided into what are called ‘programmatically’ rights and identifiable ‘subjective’ rights. The first category does not require concrete achievement<sup>19</sup>, having no addressee conferred with – potentially - enforceable subjective rights.<sup>20</sup> This distinction can be and has to be made to TCAs, as they generally contain both types of provisions.

A second distinction relates to the wording of the provisions in the sense that the content of a TCA provision has to be clear not only with regards to whom the provision is addressed but also in terms of concrete content. This means that the content of the provision has to be identifiable as a provision conferring a right on the addressee of the agreement or imposing a concrete duty on (one of) the parties. In other words, the TCA provision should entail a ‘subjective’ right (be it for an individual, a corporation or an organisation such as a trade union<sup>21</sup>) imposing an obligation on the other party, usually the employer. The addressee of the agreement is granted a concrete and enforceable right. To assess whether a TCA provision can be considered as such, the formula (for providing direct effect) used by the Court of Justice of the EU is helpful,<sup>22</sup> stipulating that four requirements have to be met: the provision has to be sufficiently clear and precise, unambiguous, unconditional and

---

19. In international law the objective of ‘programmatically rights’ is to impose on the party or parties a duty to “promote, encourage, and support” the issues/measures in questions.

20. ‘Enforceable’ does not imply *per se* that the addressee can automatically initiate court proceedings. A private international (procedural) law problem can still exist. Cf Van Hoek and Hendrickx in their report (Van Hoek and Hendrickx 2009);

21. In some Member States trade unions do not have a legal personality, for instance in Belgium.

22. I refer here to the first CJEU decision which was subsequently followed by many others: CJEU 5 February 1963, Case 26/62 (Van Gend & Loos)

conferring rights on individuals.<sup>23</sup> The direct effect of these kinds of provisions is more easily conceived when they concern the signatory parties. A clear example is the obligation imposed on an employer to start negotiations with the trade unions (and the works councils) in the case of major restructuring measures in an MNC and its subsidiaries affecting employees in ways explicitly listed in the agreement. In principle such a provision is enforceable.<sup>24</sup> It becomes more difficult when we talk about the direct effect of TCA provisions for individual employees employed in an MNC subsidiary. Even though the wording might meet the requirements for granting direct effect to these provisions, one wonders whether an employee of a subsidiary in a Member State can effectively have recourse to law to have it enforced. This depends greatly on the legal system applicable. This topic is discussed further in the next section.

#### **4. Nature and scope of application**

Having established the existence of a transnational company agreement (TCA) duly signed by MNC corporate management and European trade unions and specifying identifiable subjective rights in the sense explained above – obligatory/contractual as well as normative/individual<sup>25</sup> – the question remains whether this TCA has a direct effect in subsidiaries located in various Member States. This question has to be answered taking into account that no EU-level regulation to this effect exists. In our attempt to find a satisfactory answer we find ourselves faced with a variety of Member State rules and regulations governing not only the capability of the parties to conclude and sign such agreements but also the effects collective (labour) agreements have on the signatory parties and individual employees. The most striking points in respect to the subject of this contribution are which parties and persons are or can be bound and secondly which agreement will grant direct effect in the case of contradicting agreements concluded at different levels. We have to

---

**23.** The element/requirement of not being subject to further legislation can be left aside in this context as it is not relevant.

**24.** I refer to the previous remark on private (procedural) law problems reported by Van Hoek and Hendrickx (Van Hoek and Hendrickx 2009).

**25.** I use here the usual qualifications: obligatory or contractual means that they refer to rights and obligations between the parties signing the TCA: the MNC and the trade unions. Normative or individual refers to rights conferred on individual employee.

deal with these problems in order to be able to answer our main question. If no solution can be found in the sense of a provision's uniform application throughout the EU, one option would be EU intervention to provide a legally binding framework at least guaranteeing the uniform application of TCA provisions in all MNC subsidiaries within the EU. This is the challenge we are facing.

To put it in terms appropriate for this contribution, the three main obstacles to be overcome are:

1. Who will be (legally) bound by these provisions? In order to properly respond this question I distinguish between the signatory parties and individual employees.
2. How will TCA provisions affect (local) agreements to which the local management of a subsidiary and the trade unions are parties to (the obligatory or contractual effect)?
3. How will TCA provisions affect an agreement between the management of a subsidiary and an individual employee (the normative effect of TCA provisions)?

I will go into these three questions in just two sections, since the second and the third ones are strongly related.<sup>26</sup>

#### 4.1. Who is bound?

It is quite obvious that the TCA signatory parties are bound to the TCA's provisions. If the TCA has been concluded and signed by corporate management and the European (or even international) trade unions, these parties have to actively apply and respect the TCA provisions granting them rights or imposing obligations on them. Another question is whether the management of an MNC subsidiary is also bound by the TCA as similarly national trade unions will be. One may argue that national trade unions belonging to the European or international trade

---

**26.** As explained above I (have to) leave out an important, if not crucial issue in this context: enforceability. For this question of jurisdiction – i.e. which court will be competent to hear and decide on the case - see the study of A. van Hoek and F. Hendrickx (Van Hoek and Hendrickx 2009).

union organisation that signed the TCA have to respect and apply the TCA provisions applying to them. Where however this is not explicitly set forth in the statutes of the European and/or international trade union organisation, this requirement has no sure basis. One solution remedying this would be for national trade unions to explicitly mandate their European and international trade union organisation. This can be done not only by national trade unions affiliated to a European or international trade union organisation, but also by non-affiliated trade unions. The mandate would need to be precisely worded in order to avoid conflicts over the scope of the mandate. A – perhaps more theoretical – question involves whether the European or international trade union organisation can refuse to accept such a mandate.<sup>27</sup> Since the mandate is governed by private law, I assume this will be possible. On the other hand the non-affiliated (national) trade union is not bound by the TCA, retaining its ‘traditional’ trade union rights.<sup>28</sup>

Looking at the MNC, the problem is usually less complicated. Due to the (usually) hierarchical structure of an MNC, the management of the subsidiary generally has to toe the line set by corporate management (Ales *et al.* 2006).<sup>29</sup>

Whether the employees employed in the MNC subsidiaries are bound in a positive as well as a negative way is a question not so easy to answer. To start with, this is obviously dependent on the wording of the TCA provisions. But even when employees are explicitly addressed and their subjective rights (or concrete duties) are involved, national legal systems determine the legal status. Generally speaking, there are two systems:

1. only employees belonging to the signatory trade unions are bound by the agreement; the others are not - unless they have accepted the agreement as ‘fulfilling’ their individual employment contract<sup>30</sup>;
2. all employees are bound.

---

**27.** This question will arise when a non-affiliated national trade union is involved.

**28.** For instance, they retain the right to initiate collective actions, subject to national legislation.

**29.** An exception could be when national law imposes mandatory obligations on local management. Such obligations cannot be ignored by corporate management. This would be different under a harmonised European company code covering such issues.

**30.** This can be determined explicitly or tacitly, for instance via an incorporation clause in the employment contract between the employer and the employee; see hereafter.

From the point of view of being bound by a collective agreement (CA)<sup>31</sup>, the second option is the easier one, with simply all employees bound by definition.<sup>32</sup> In all other cases we have to look into the different mechanisms foreseen in the national systems. I will be looking at this question in Section 4.2.

Even more important for our analysis is the effect a TCA can have on a local CA. Can provisions set forth in the local CA be replaced by TCA provisions targeting the same issue? One of the main objectives of introducing TCAs with direct legal effect is to guarantee uniform application. This question is particularly interesting when a TCA contains a provision less favourable to the employee than the local CA is (in technical terms: *in pejus*). A related question is whether a TCA provision in violation of a mandatory statutory provision may replace that statutory provision. This question is of particular relevance in those countries where the law allows deviations from the statutory law by collective agreement, also *in pejus*.<sup>33</sup> This could mean that cases where the TCA contains a provision deviating *in pejus* (for the employee) from the statutory law could be valid in some countries and not in others.

## 4.2. Effect of the TCA on local agreements

As said before we have to distinguish between two situations: a. the (legal) effect of a TCA provision on a local agreement concluded and signed by national trade unions at the level of an MNC subsidiary; b. the legal effect the TCA has on individual employees of that subsidiary.

Both situations have in common the legal relationship between a TCA and a local CA in case they are contradictory. Is there a hierarchy

---

**31.** I use the term 'collective agreement' (or CA for short) generically, with no difference being made between transnational and national collective agreements. The issue here at stake are the general rules on the binding effect of CA provisions.

**32.** This could be either for specific TCA provisions or for all provisions. Both forms are possible in the majority of EU Member States. Another possibility for covering all employees regardless of trade union membership is the extension by law or by a government decision. This possibility exists in nearly all Member States. The UK is an exception.

**33.** To give some examples: The Netherlands and Portugal, but only in cases where explicitly allowed by law.

between the two? Since there is no general regulation at European level we have to look to the national level.

There are three general legal principles governing the possibilities: a. *lex posterior derogat lege priori*; b. *lex specialis derogat lege generali* and c. *deviation from the higher regulation is only allowed when the higher regulation admits so*. The first-mentioned principle does not give rise to misunderstanding, with the date of entry into force being decisive. The TCA does not *per se* have priority over the local CA when the latter is of a later date than the TCA. Nevertheless the question arises whether this principle can be applied in the field of collective agreements, as it is of a constitutional nature and was developed for state regulation. In this field it is logical since there is a clear hierarchy in time and in legislative capacity. But can this principle be easily transferred to the field of collective agreements signed by the social partners, where there is no self-evident hierarchy? The application of this principle to a potential collision between a TCA and a local CA is thus at most parlous.

The application of the second principle is also not simple, being dependent on which agreement, the TCA or the local CA, is to be defined as *specialis* or *generalis*. Where the TCA – being a company agreement – deviates from the local sectoral CA, it can be justifiable to state that the TCA has priority since it regulates the situation at the specific MNC level. But in cases where the TCA competes with a local company agreement, it can be argued – pursuant to the second principle – that the local CA has priority over the TCA since the local agreement applies to the lower level, the subsidiary. But applying this principle means that the objective of uniform TCA application in all subsidiaries cannot be achieved.

The application of the third principle corresponds best of all to the objective of granting direct legal effect to the TCA. It guarantees TCA priority. A similar situation exists at national level, where a national or sectoral collective agreement has priority unless it allows local deviations (opt-outs). This way of reasoning holds true when stating that the TCA is the higher level of regulation. That is the case in an MNC, where it can be assumed that, on the basis of the hierarchical structure of the transnational company, the TCA is the dominant ruling

which can only be deviated from by a local CA where the TCA explicitly allows such.<sup>34</sup>

There is no simple conclusion to this issue. If we follow our main route, the wish for uniform application of TCA provisions with direct effect, the two first-mentioned principles are clearly lacking in expediency. Adherence to the last principle, which is certainly possible, is a much better way of ensuring uniform application to all subsidiaries. But since this legal hierarchy does not actually exist and since there is no guarantee that this principle can be applied in all Member States, any solution requires EU-level intervention.

### **The relationship between a TCA and a local CA in terms of legal effect**

Assuming that the TCA has priority over the local CA, we can be sure that the TCA has to be applied in the case of contradictory provisions. In this sense the TCA has legal effect, taking precedence over the contradictory local CA provisions. This means that national trade unions, as members of the European trade union(s) signatories to the TCA, cannot reach agreements contrary to the TCA.<sup>35</sup> Even if they were to do so, the deviating provisions in the local CA would be overruled by the TCA. The national trade unions have to respect the TCA provisions insofar as they confer rights and duties on the parties. It should be noted that no collision between a TCA and a national CA can occur in countries where no collective agreement exists, either at sectoral or company level. Even so, there is no legal or *de facto* guarantee that a TCA will be applied on the basis of a legal effect accorded to the TCA. This depends wholly on the domestic law of the country concerned.

Does this necessarily lead to (national) trade unions being bound by a TCA regardless of whether they are members of the signatory parties at MNC level? The answer to this question depends - again - on the national legal systems governing collective agreements. Where the national trade

---

34. A problem exists when the TCA does not explicitly state such. Whether deviation from the TCA is (legally) possible is dependent on the interpretation of the TCA's wording in the overall context of the agreement. Here again the jurisdiction issue arises. In this respect judicial culture and a tradition of national judges using interpretation methods can be decisive. For this reason, the question of in which Member State the case will be heard can be of great importance.

35. Unless the TCA explicitly provides for such.

union is party to the local CA but not affiliated to the European trade union(s) signatory to the TCA, the question arises whether the TCA will affect its bond to the local CA in the sense that it has to accept the TCA provisions as the applicable ones, overruling the provisions of the local CA. According to Member States' national legal systems this is very unlikely to be the case, as the trade union was not party to the TCA. Consequently the local CA is the one whose application they can demand from local management. This in turn means that the TCA cannot be uniformly applied. As this contradicts the hierarchical structure of the MNC in question, the latter will find such a situation unacceptable, unless the national trade union(s) not affiliated to the trade unions signatory to the TCA - and therefore not bound by it - voluntarily accept the TCA by signing it, this binding them to it.

The question is much easier answered when the national trade union is neither a signatory party to the local CA nor affiliated to the European trade union(s) signatory to the TCA. It is free to act as a trade union representing and defending the interests of their members, irrespective of the TCA. It must however be kept in mind that this is not very likely to happen since such a trade union will have to convince the management of a subsidiary to negotiate and conclude an agreement deviating from the TCA.<sup>36</sup>

Once again the conclusion is not completely satisfying from the angle I have chosen for this contribution. This can be no guarantee that the TCA will be applied uniformly in all MNC subsidiaries in all Member States. It is dependent on the national legal systems governing collective (labour) agreements, again raising the question whether EU intervention is required.

### **Legal effect on individual employees**

The second crucial issue of the (legal) effect of TCA provisions relates to the position of individual employees. As explained earlier, the starting point is that the TCA contains identifiable subjective rights for individual employees in MNC subsidiaries. Though we have discussed

---

**36.** Whether they have the right to take collective action aiming at forcing local management to start negotiations and to conclude a collective company agreement deviating from the TCA, is dependent on the legislation of the Member State concerned.

several requirements for granting legal effect to TCA provisions, the question remains: under which conditions can TCA provisions have direct legal effect on individual employees? There are two aspects to be taken into consideration here: a) is an individual employee bound by a collective agreement and if so how; and b) by which mechanism can the content of the relevant TCA provisions be implemented in or transposed into an employee's employment contract in such a way that he can benefit from the collective agreement provisions? As this is a matter of national law, again we have to look at the national mechanisms.

The first issue is easier to deal with. In nearly all national legal systems of EU Member States an employee is bound by a collective agreement (CA). Though the ways may be different<sup>37</sup>; the result is generally speaking the same. Without going into further details, it needs to be pointed out that the UK is a special case here

More interesting and important from a practical point of view is the second question: the mechanism linking CA provisions to an employee's (individual) employment contract in such a way that the employee can benefit from them.

Generally speaking there are four different mechanisms.<sup>38</sup>

1. The law provides direct effect to employees covered by the CA in question, on the basis of their membership of a signatory party, i.e. (one of) the signing trade union(s). The binding effect results from the CA itself: the employee can depend on the CA to have it applied to him or her. This implies that only trade union members can take direct recourse to the CA. In a number of EU Member States (e.g. Bulgaria, Germany, the Netherlands and Sweden) this is the general rule.
2. The law provides for automatic transposition of CA provisions into individual employment contracts, i.e. the employee can claim application of the CA content on the basis not only of the CA itself but also on the basis of his or her individual employment contract.

---

**37.** In all Member States employee members of the signatory party are by law bound to it. The other employees are bound to a collective agreement in different ways.

**38.** Other mechanisms also exist and can be used. One of them is the transposition of CA provisions into the individual contract by i) a longstanding custom, or ii) by the employer applying the CA to his employees with their tacit consent.

*De facto*, the CA provisions become part of the individual contract. One of the few EU Member States applying this mechanism is the Netherlands.

3. The law stipulates that the CA provisions are applicable to every employee covered by the CA, i.e. the CA provisions are generally binding regardless of whether the employee is a member of the signatory party (the signing trade union). Within this mechanism we have to distinguish between two possibilities. The first is that the law itself stipulates that (parts of) the CA has to be applied to all employees (as is the case for instance in Austria, Belgium, Estonia, Greece and Poland). The second one is the extension of the CA by government decree. This is usual practice in nearly all Member States.
4. The use of a so-called *incorporation* mechanism. That could be either by a general regulation in law or by an incorporation clause in the contract of employment. In both cases the CA provisions – under the above-mentioned conditions - become part of the employment contract. This mechanism is practiced for instance in Germany, the Netherlands and the UK.

EU Member States use one or two of these mechanisms. The second mechanism and the first possibility listed in the third one are usually restricted to certain CA provisions, in particular wages.<sup>39</sup>

Since EU Member States have different mechanisms and some of them are using two of them, the direct effect of a TCA on individual employees becomes confusing. As no harmonised system exists, it is left up to national systems to determine the way a TCA –even when it has direct legal effect – is applied to an individual employee. With TCAs treated on an equal footing with national CAs, what this means with regard to possible options or scenarios for provide TCAs with legal effect will be discussed in the last section.

The conclusion here is not very encouraging when striving for the uniform application of TCA provisions in all MNC subsidiaries in all Member States. The obstacles analysed above seem to be too high to be overcome in an easy and simple-to-accept way, possibly opening the

---

**39.** France is the most striking example.

door to a need for EU intervention. I have to remind readers that at the end of the day this is primarily a political decision. My aim here is merely an analysis of legal obstacles, and what can be done to contribute to a solution. In the next section I attempt to develop options or scenarios for such intervention.

## **5. Removing the obstacles: a need for European intervention?**

In the previous sections I have gone through the obstacles to be overcome before being able to grant direct legal effect to a TCA and its provisions when applying it in all MNC subsidiaries regardless of which EU Member State the subsidiary is located in. It can be assumed that the MNC will have concluded a TCA because it expects to benefit from it in one way or another.<sup>40</sup> Another starting point for this analysis concerns the willingness of the parties to negotiate an agreement that could be effective in legal terms as well as in practical terms. That does not imply a firm standpoint in the political debate on the desirability of a TCA covering issues we are discussing in this contribution.<sup>41</sup> But one has to keep in mind that since a TCA is an agreement under private law, it is the free choice of the negotiating parties to decide on the topics to be covered by the agreement. It is part of the autonomy of social partners, guaranteed by international treaties and the national law of Member States. Moreover there is an ideological debate on the division of powers between the different levels involved in concluding and implementing a TCA. The debate on the autonomy of national trade unions and their handing over of competences and powers (maybe not voluntarily) to a higher (European) bargaining level has to be continued. This debate has direct relevance on the search for European scenarios aiming at granting legal effect to TCAs. Legal research is a stepping-stone in the development of such a strategy and – I assume – a precondition for the success of a TCA. It cannot however be ruled out that a TCA will be applied without the legal obligation to do so - i.e. voluntarily,

---

**40.** The increasing number of TCAs concluded in the last ten years as well as the number of EWC agreements that has been concluded in recent years, may give an indication of the value attached to these agreements.

**41.** That means identifiable subjective rights in the sense as has been defined.

with the management of an MNC subsidiary simply toeing the corporate line and applying the TCA.<sup>42</sup>

Having said this I now turn to the issue of possible options for EU intervention. The first question needing to be answered is how far the EU is willing to go in intervening in the autonomous system of collective bargaining and the corresponding legal and practical systems of collective agreements, as we know them in Europe. A further basic question is whether the EU has the legal competence to intervene at all. This is a very wide-ranging question, and I will keep it short by arguing that EU legislation does not *per se* rule out legal intervention in this field. However the extent of intervention has to be subjected to the subsidiarity and proportionality principles.

Though there are many options possible, I will restrict myself here to the one option that seems to be the most effective and - at least in my view - not unrealistic. This option, with its two conceivable alternatives, would grant uniform legal effect to TCAs throughout the Member States by a European ruling.

## 5.1 EU intervention providing uniform application

This option would ensure that TCAs are *uniformly* applied in all EU Member States. By uniform legal effect I mean that the TCA, or more correctly its various provisions<sup>43</sup>, will be applied uniformly in all individual cases regardless of which Member State the MNC subsidiary is located in. Studies of the characteristics of collective agreements concluded at sectoral and company level show that the systems of collective agreements (in legal and practical terms) of the various Member States differ in many aspects and particularly – from the point of view of this contribution - with regard to the legal effects of the collective agreements, meaning that there is no

---

**42.** Cf. the study of E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré (2006). There are more reasons to do so. One can be the existence of compliance mechanisms within the MNC.

**43.** Legally speaking it is always the application of TCA provisions and never of the TCA as a whole.

guarantee that they will be uniformly applied in all Member States.<sup>44</sup> Therefore EU intervention seems indispensable.

### **EU legal instrument: a directive**

If the EU wants to intervene it theoretically has two options: to adopt a regulation or a directive. A regulation would provide the most certain outcome, ensuring the binding effect of a TCA in all Member States without any interference from Member States. However this option is not very likely (if at all possible) taking into account that a legal ground for issuing a regulation on this subject is at least seriously questionable. The Treaty (TFEU) does not provide a special legal ground for it<sup>45</sup> and other legal grounds such as Articles 114 and 115 and Article 308 TFEU seem not to be appropriate for this goal.

The other option is the use of a directive. But here again the problem can rise whether a solid legal ground exists for issuing a directive on this topic. This I will discuss briefly.

The role the EU attaches to social dialogue as a pillar of a social Europe speaks in favour of the existence of an EU legislative competence. According to Article 152 TFEU the EU not only recognises and promotes the role of the social partners, but also facilitates dialogue between the social partners, while respecting their autonomy. This approach is implemented in the two following provisions: Article 155 TFEU empowers social partners to conclude collective agreements on EU level.<sup>46</sup> Article 154 TFEU underlines the position of social partners even more by stating that before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action and if the social partners declare they are in favour of bipartite action, this shall have priority over the

---

44. A similar conclusion has been drawn in the Ales report ( E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré 2006).

45. Article 153 TFEU provides only for the instrument of a directive.

46. Well-known overall examples pertain to parental leave, part-time work, and fixed-term contracts. The social partners have also concluded several agreements at sectoral level. The number of agreements is increasing. Following the lead of the metal industry, other industries are becoming increasingly active in this field. Cf. Eurofound, Dynamics of European sectoral social dialogue, 2009. Agreements concluded at European Union level can gain European Law status pursuant to the procedure defined in Article 155, 2 TFEU. One could say that the social partners have a kind of legislative power.

Commission's activity. Taking this into account one can argue that the EU is supporting the option of social partners regulating their own affairs where they are in agreement. Following this path it seems logical for the EU to pro-actively promote bipartite arrangements including ones at MNC level. That could support EU intervention in the field of uniformly applying transnational agreements concluded by social partners. Article 153 §§ 1.b TFEU indicates fields in which the social partners could negotiate agreements<sup>47</sup>.

Article 28 of the EU Charter of Fundamental Rights on the right of collective bargaining supports this approach.<sup>48</sup> However whether this is a sufficient base for intervention via a directive giving TCAs direct legal effect can be disputed. Article 51.2 seems to restrict the meaning of Article 28, stating that 'This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. For any legislative intervention a legal ground has to be found in the TFEU. Is Article 153 TFEU a sufficient ground? There are two arguments against this. The one is Article 153.5 TFEU, which states: 'the provisions of this Article shall not apply to (...) the right of association (...)'. A directive providing direct legal effect to transnational agreements can be considered as an EU intervention going beyond the competence, in particular when it is explicitly excluded by that paragraph since it is or can at least be considered as an interference in the national systems of collective bargaining and concluding collective agreements, a 'prohibited access' area. From there it can be argued that a European directive granting direct legal effect to TCA provisions could possibly overrule domestic law, and is consequently unlawful. The second argument can be derived from the qualifying phrase used in Article 152 TFEU: 'The Union recognises and promotes the role of the social partners at its level, *taking into account the diversity of national systems*'. The underlined phrase could be interpreted as a requirement to respect the existing national systems. On these grounds one can argue that the EU lacks competence in this field. It is therefore questionable whether the EU can adopt legislation, *in casu* a directive, directly affecting a Member

---

47. In this contribution I focus on this specific provision (employment conditions) being related to the subjects of TCAs with direct effect.

48. The adoption of the Lisbon Treaty saw the provisions of the Charter becoming part of primary EU law.

State's national legislation on collective agreements. But if we look more carefully at Article 153.5 TFEU in relation to Article 152 TFEU a directive granting direct legal effect to TCA provisions is not necessarily contrary to these competence provisions. All will depend on the type of intervention. I prefer to argue that the EU may legislate on this, provided that legislation is limited to the transnational nature of the TCA, avoiding intervention in a Member State's legislation on collective agreements. For this reason the obstacle may not be insurmountable.

However when calling for a directive based on Article 153 TFEU, we have to take into account that Article 153 itself imposes a restriction on its use. Apart from respecting the principles of subsidiarity and proportionality a directive may not go further than setting down 'minimum requirements'. The subsidiarity rule is met since it seems obvious that, provided the objective is justified, a regulation of this subject cannot be left up to the Member States simply because their systems of hierarchy differ substantially. The proportionality rule is respected when the European legislator does not go beyond what is appropriate and necessary as to achieve the objective. In this context the objective is to give legal effect to TCA provisions, thereby ensuring their uniform application in the Member States in which the MNC has subsidiaries. The content of a directive must thus be part of any assessment as to whether these requirements are fulfilled.

In conclusion one can say that if the EU is of the opinion that TCAs need to be regulated in the sense discussed above, it is obviously first and foremost a political decision, with a directive being a real option.

#### **A directive: several modalities**

I will now look at what such a directive would need to contain. There are several options available, all of which have in common that they aim for a framework directive<sup>49</sup> obliging Member States to grant direct legal effect to TCAs or TCA provisions by law in such a way that a TCA can be uniformly applied in all Member States covered by its scope.

---

49. A frame work directive because it only will give a framework and therefore does not go into a more specific content. Its objective is creating a procedure.

1. A first option could be a framework directive calling for national collective agreements systems - obviously including the relevant legislation – to be framed in such a way that they result in the uniform application of eligible TCA provisions in all MNC subsidiaries in all Member States. This option implies that national legislation would have to be adapted in a way that the national law provides for uniform application by granting direct legal effect to TCA provisions. Since this is a far-reaching option - far-reaching in terms of the result achieved and of the possibility of getting such a directive adopted in the EU -, it does not seem very realistic. It would directly encroach on national legislation on collective agreements, a field for which Member States usually claim to have exclusive competence and in which the EU indeed lacks competence. Such a directive would have a direct influence on the hierarchical system of national collective agreement legislation by stipulating that the TCA would have direct effect – in the sense described - regardless of whether the provisions of a national collective agreement were or could be applicable. Such intervention by the EU legislator would neither meet the requirements of proportionality nor respect the requirement of being minimal by nature. I therefore regard this option merely as theoretical.
2. A second, less far-reaching and therefore more acceptable option is a framework directive granting direct legal effect through a priority rule to be inserted in the national law on collective agreements. This would mean that the directive obliges Member States to adapt their laws, stipulating that TCA provisions have priority over provisions in (local) collective agreements that deviate from the TCA provisions. Such a mechanism would leave national systems intact, instead adding a further level above the national hierarchy of collective agreements. In the (national) laws on collective agreements a provision would have to be inserted giving priority to TCA provisions. Obviously this option would have no effect when no local CA (sectoral or at company level) exists in a Member State.<sup>50</sup>

---

**50.** In a number of Member States, in particular certain new Member States but also in some 'old' Member States such as the UK, no domestic CAs exist. In such cases the priority rule would have no relevance. Another question in this respect is whether a TCA can become effective through a decision of the employer, unilaterally regulating employment conditions. I have to leave out this –interesting- issue as well.

Though this option is easier for both the EU and the Member States to accept, it is still possible that it would only receive a lukewarm welcome. This is because it encroaches on Member States' hierarchy rules regarding collective agreements concluded at different levels.<sup>51</sup> In response to this the framework directive could have an optional nature, in the sense that, once an MNC and its counterparts – the European trade union(s) - have opted for a TCA, the TCA and its provisions - insofar as they meet the requirements for having direct legal effect - have to be applied fully and uniformly in all subsidiaries covered by the TCA.<sup>52</sup> Consequently the MNC and the European trade unions that have opted for the conclusion of a TCA containing identifiable subjective rights know beforehand that these provisions will prevail over the provisions of a national or local agreement. The contracting parties have deliberately and voluntarily opted for a TCA, and have determined its scope, both substantive and with regard to the employees covered. The obligation for the Member States transposing the framework directive into national body of law involves nothing more than giving the TCA priority over a national collective agreement<sup>53</sup> in the case of a conflict between the content of the TCA and the national CA.

This solution seems to be preferable since it is clear and unambiguous. The consequences would be clear for the parties wanting to conclude a TCA including this kind of provision. The law of the Member State would guarantee that once that choice had been made, the result of the bargaining would be uniformly applied in all subsidiaries of the MNC concerned, in all Member States including the one concerned. It is to be expected that the European trade unions in particular, as confederations of national trade unions<sup>54</sup>, will be aware of the impact of the

---

51. These hierarchy rules differ from country to country. In certain countries there is a clear hierarchy, in others the situation is more complicated: for instance Greece, Italy, the Netherlands and Portugal. In another group of countries no hierarchy exists at all: for instance Ireland, Malta and the UK.

52. Since it is an agreement between two parties, they are free to decide on the scope of coverage in respect of the parties as well as the content. This provides the flexibility the parties wish to have. This can be seen as an advantage for this option.

53. Either a sectoral or cross-industry collective agreement where MNC subsidiaries in a Member State are covered or bound by such an agreement.

54. Usually an MNC does not face the same kind of problems since the MNC will be more homogenous as an organisation.

arrangements made, taking into consideration the opinions of their members, the national trade unions.<sup>55</sup>

This option is likely to meet the requirements of proportionality and of not going beyond the minimum requirements. It has a restricted objective and respects national legal systems.

In response to arguments that this option goes too far, the introduction of the *ad favorem* principle – the *most favourable* principle – could help, providing greater flexibility and avoiding collisions between the various levels of CAs. Under such a principle, if a provision in a (local) company agreement was more advantageous for the employee than a similar provision in the TCA, the local provision would prevail. All parties involved would know where they stand when they conclude a TCA. Even so, this principle would not solve all problems, as discussed below.

It is not always clear what is ‘most favourable’. Who can choose what is ‘most favourable’, at which moment and between what? It is obvious that the employee has the choice the moment the TCA is signed. The question remains open whether it is possible for an employee to change his choice when a new local CA enters into force, or does he have to stick with his original choice until the TCA expires. A further problem is whether the TCA and CA are considered as a collection of separate provisions out of which one can ‘pick and choose’, or as a ‘package deal’, to be accepted as a whole because it is the result of a negotiation process in which a balance of interests has been struck by the bargaining parties. Taking the first option implies that every single provision of a (T)CA can be taken separately and can be chosen by the employee because this provision is more favourable for the employee concerned, whereas in the second option the CA has to be taken for granted.<sup>56</sup> Analyses of the legal systems of the Member States show that in some countries (such as Poland) an agreement has to be taken as a whole

---

55. For this reason the internal decision-making procedures of the European confederations are important.

56. When the ‘most favourable’ principle is used and applied as expressed in the first option, it could actually become a disincentive for MNCs to conclude a TCA since it causes uncertainty on what will be applied and jeopardises efforts to develop an enterprise-wide human resources policy.

whereas in other countries, such as Estonia, Romania and Slovakia, it can be examined provision by provision. The Dutch example is interesting since the case law dealing with this question shows ambiguity as to the choice of one or the other option. The Supreme Court has ruled that when applying the ‘most favourable’ rule the comparison of the different provisions can be done on a provision-by-provision basis, whereas decisions of some lower courts have gone in the other direction.<sup>57</sup> But apart from this, differences exist among Member States as to whether a collective agreement is considered as a package deal or as a body of individual provisions. That can be an obstacle for the uniform application of TCAs. In conclusion, the ‘most favourable principle’ would not seem to be *the* solution. Hence a study going into greater depth on this and other related issues is necessary.

What we learn from this analysis is that a framework directive of an optional nature seems to be the most likely solution for granting TCA provisions direct legal effect. As the analysis has also shown, certain problems remain to be solved.

## 5.2. Core rules of a directive

In proposing a directive as an instrument to grant direct legal effect to TCA provisions, I will outline which rules need to be included. The *core of the directive* will be that TCA provisions - insofar as they contain identifiable subjective rights and duties – are given priority over national agreements (company or sectoral). That is the most effective and realistic way of reaching the goal of having the TCA uniformly applied in all Member States.<sup>58</sup>

However this will not be sufficient. More provisions have to be included in the directive as minimum requirements for its legal validity. In order to qualify as a valid regulation the EU framework directive has to

---

**57.** Supreme Court (HR) 14 January 2000 NJ 2000, 273. This decision has been greatly criticized in literature, because it negates the ‘package deal’ nature of a CA and opens the door for a ‘pick and choose’ approach by the employee. In a decision of 24 April 2009 (JAR 2009/130) the Supreme Court nuanced its previous decision. Lower courts took the position of the CA being a package deal.

**58.** Realistic from the point of view of being accepted as a directive at EU level.

contain certain core requirements qualifying a TCA. These are related to certain basic features of collective agreements in general which are common in nearly all Member States.

As a collective (labour) agreement, the TCA must be an agreement:

1. Based on mutual consent.
2. Between representative European parties. On the employers' side there is hardly a problem. The corporate management board of a European-based MNC is – usually – the employer party representing the MNC. There are greater difficulties defining the employee side. In European (labour) law a definition of representativity is missing. Even in the context of collective agreements based on Article 155 TFEU the requirements of representativity are absent. The Court of Justice of the EU bridged the gap in its decision on the UEAPME case.<sup>59</sup> The European Commission has developed a number of rules, considered as the main, the general requirements.<sup>60</sup> Knowing that the regulations in the Member States differ quite substantially it would seem to be necessary to include some rules in the directive, resembling the rules developed by the CJEU and the Commission.<sup>61</sup> There is a question-mark over whether existing rules are sufficient to guarantee that signatory European trade unions are – sufficiently - representative and competent to determine TCA provisions covering and binding national trade unions and MNC employees.<sup>62</sup> To avoid a running dispute over the representativity of European trade unions, certain rules will need to be developed.<sup>63</sup> In addition

---

**59.** Court of First Instance 17 June 1998. Case T-135/96 (*UEAPME*). An employers' association, representing the interests of small and medium-sized undertakings, contested the validity of the directive on parental leave (Directive ), claiming that it - as a representative employers' association - had not been involved in the bargaining and conclusion of the Framework agreement on which the directive was based. The European Court rejected the claim of the employers' association, providing certain rules for assessing whether an association was to be considered as representative.

**60.** It has to be kept in mind that the requirements for qualifying as bargaining and signatory party in some Member States differ from this set of requirements. One example is Germany.

**61.** Elaborating on this important issue goes beyond the scope of this contribution.

**62.** In the Ales report some proposals have been developed ( E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré 2006).

**63.** On this important issue see authors contribution to a book honouring Darcy Du Toits' contribution to labour law (Jaspers 2012).

the position of European Works Councils (EWCs) in negotiating and concluding agreements in MNCs in the sense of the EWC Directive can be included in a study on EWC competence to conclude legally binding agreements, including TCAs. It must also be taken into account that in a number of Member States an EWC is legally not competent to conclude a legally binding agreement.<sup>64</sup> In fact only Austria and Germany allow such. This is an important and interesting point since EWCs have become a kind of a motor for negotiations at MNC level and in a lot of cases sign or co-sign agreements with the MNC board. It is clear that *de facto* EWCs play an important role in TCA negotiations.

3. On issues with a cross-border impact: i.e. general issues important for the MNC and its subsidiaries in at least two Member States and to be applied in the subsidiaries. In this context it would be worthwhile studying the transnational nature of the content of TCAs. The discussion on this topic has been started in the context of the recast EWC directive and can be enriched by including TCAs.
4. Granting priority over national agreements either at company or sectoral level. As discussed above, the question is whether to introduce the most favourable principle for national (company) agreements, with two possibilities available:
  - a) Taking the national (company) agreement as a whole, as an indivisible ‘package deal’, i.e. either the national or local (company) agreement will be applied or the TCA. The employee has to make a choice the moment the TCA comes into force.
  - b) Applying the most favourable principle to individual provisions of either the TCA or the national or local (company) agreement.  
Since in my view a collective agreement has to be considered as a ‘package deal’, the first option is preferable and would need to be explicitly included in the framework directive, thereby overcoming the problem of differing national systems and making the TCA uniformly applicable.

---

**64.** The competence of the EWC representing MNC employees to conclude legally binding agreements is at least disputable.

5. A final requirement needing to be included in the text of the framework directive is the mandatory publication of the TCA by the signatory parties or at least by MNC management, allowing the TCA to be made known to all employees.
6. An additional requirement regarding transparency would involve TCA registration or notification with the European Commission and with the national government of the Member State concerned.

### 5.3. Outlook

Assuming direct legal effect of TCA provisions is the preferred option, the analysis shows that the realisation of this option is not simple. Apart from the political obstacles mentioned at the beginning of this contribution, there are more hurdles to be taken. An important one is of course the willingness of both parties: the multinational company and the trade unions. For the latter this may represent a dilemma, possibly jeopardising the autonomy of national trade unions in such a way that they prefer to stick to their national-level powers and competences and refuse to cooperate. On the other hand they cannot stop at their borders developments caused by the globalisation and ‘Europeanisation’ of the economy and the increasing cross-border impact of company activities.

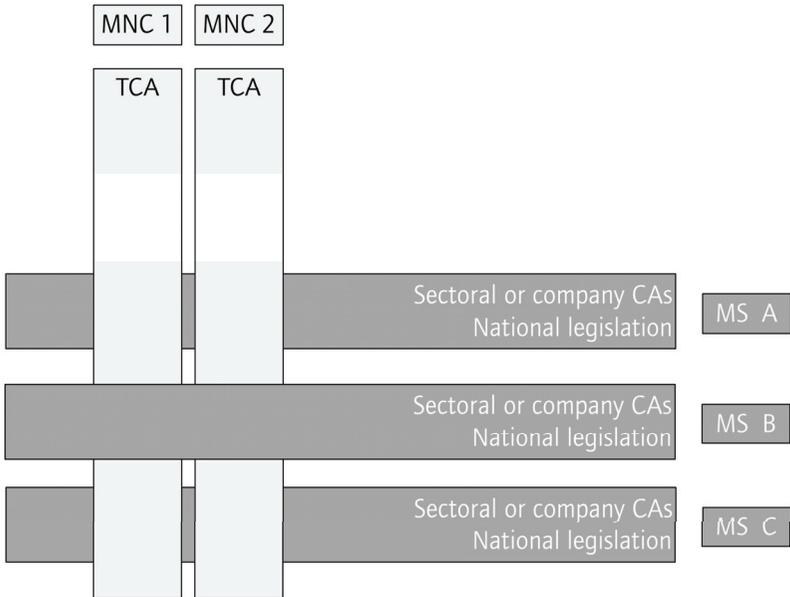
Guaranteeing the effective application of TCA provisions uniformly in all MNC subsidiaries in all Member States through granting direct effect to ‘subjective’ rights and concrete duties laid down in a TCA can obviously only be achieved through EU intervention. All other possibilities fail to achieve this objective due to the substantive differences in the legal systems governing collective agreements in the Member States. Even when EU intervention is rejected and competences remain with the national legislators, no result can be achieved without European-level legislative coordination in the Member States.<sup>65</sup> On the basis of my analysis I have proposed developing a European path showing the direction we can take. Though not solving all problems, it

---

**65.** Even when opting for the solution of national trade unions co-signing TCAs, legislation is needed to ensure that all trade unions in the Member States with MNC subsidiaries will do so.

can be a starting point for a broader discussion aimed at the uniform application of TCA provisions throughout the EU. An effective TCA can and will appear on the horizon.

Figure 3 Uniform application of TCAs



## References

- Ales, E., S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdes Dal-Re (2006) *Transnational collective bargaining: past, present and future. Final report*, Brussels: European Commission.
- Coleman, S. (2010) ‘Enforcing international framework agreements in U.S. courts: a contract analysis’, *Columbia Human Rights Law Review*, 41, 601-634.
- European Foundation for the Improvement of Living and Working Conditions (Eurofound) (2009) *Dynamics of European sectoral social dialogue*, Luxembourg: Office for Official Publications of the European Communities.
- Jaspers, T. (2012) ‘The future of the collective labour law agreements’ system challenged!’, in K. Malherbe and J. Sloth-Nielsen (eds) *Labour law into the future*, Juta Cape Town.
- Schömann, I. (ed.) (2004) ‘Corporate social responsibility: a threat or an opportunity for the trade union movement in Europe?’, *Transfer*, 10 (3), 351-479.
- Schömann, I. (2011) ‘Transnational framework agreements: new bargaining tools impacting on corporate governance’, in M. Serrano, E. Khafa and M. Fichter (eds) *Trade unions and the global crisis*, Geneva: ILO, 129- 143.
- Sciarra, S. (2003) *The evolving structure on collective bargaining in Europe 1990-2004*, research project co-financed by the European Commission and the University of Florence (VS/2003/0219-SI2. 359910).
- Sobczak, A. (2008) ‘Legal dimensions of international framework agreements in the field of corporate social responsibility’, in K. Papadakis (ed.) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: ILO, 115-130.
- Valdés Dal-Ré, F. (2006) *Freedom of association of workers and employers in the countries of the European Union*, Madrid: Ministerio de Trabajo y Asuntos Sociales.
- Van Hoek, A. and F. Hendrickx (2009) *International private law aspects and dispute settlement related to transnational company agreements*, study undertaken on behalf of the European Commission, contract no. VC/2009/0157 .