

Chapter 6

Transnational collective bargaining: in search of a legal framework

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Over the last two decades, international and European social dialogue in the form of transnational company agreements or TCAs (using the European Commission's terminology and also find referred to as transnational or international framework agreements) between MNCs and global and/or European trade unions federations has steadily increased, with a peak in the late 1990s and early 2000s. This has all been done without any legal framing. At first glance the lack of legal support seems logical, as TCAs were originally rooted in corporate social responsibility (CSR), being unilateral MNC management initiatives based on voluntary action usually inspired by philanthropic or public relations motives. However, CSR initiatives lacked legitimacy and credibility. To transform their unilateral involvement into more committed actions, MNCs therefore began taking part in transnational negotiations initiated by global and European trade union federations as well as by national trade unions. This gave trade unions involved in TCAs the opportunity to become actively involved in dealing with the social consequence of globalization, well aware that negotiated tools could complement existing domestic and international labour standards as well as increasing trade union representation.

As in the case of national collective bargaining, practices precede law (Daugareilh 2005). Consequently a new regulatory framework is needed. This is particularly true for TCAs, which do not fit into any of the different legal categories of either domestic or international labour law. They have developed in an international, European and national legal "no man's land", from which they gain inspiration and which they reciprocally influence. On the other hand, TCAs represent a new form of collective, social (private) regulation raising a number of questions with respect to their legal nature, legal value and legal impact.

I. Do TCAs fit into any existing categories of domestic and European collective labour law?

Currently no legal order has explicitly conferred any power on MNCs and trade unions to create such a norm as TCAs, whereby the legal nature of any norm is dependent on the powers given by (labour) law to its actors (their legal capacity). In the absence of any legal framework, trade unions and management have established new mechanisms for transnational framework agreements, inspired by domestic and European collective labour law. However, whether on the part of management or of labour, the solutions developed by the parties give rise, from a legal point of view, to a number of difficulties, if TCAs are to be classified according to existing legal categories of collective instruments.

1. Parties at stake

ILO Convention 87 on freedom of association and the right to collective bargaining confers a domestic right to collective bargaining, but not an international one (Daugareilh 2005: 71). At European level, Art. 152 TFEU, while referring to the social partners, cannot be interpreted as involving trade unions and employers' organisations in European social dialogue other than the ones recognized as being representative by the European Commission¹. The conclusion of the 31 October 1991 Agreement and its incorporation in Articles 138 and 139 of the Social Chapter of the Treaty (now Art. 152 TFEU) was initiated by the European social partners and marked a crucial step in the development of the European social dialogue, enshrining the role of the social partners in the EC Treaty. Though the TFEU provides for the mandatory consultation of the social partners on Commission proposals in the area of social affairs, and an option for negotiation between social partners on framework agreements, this can be interpreted as implicitly excluding MNC

1. The term 'European social partners' specifically refers to those organizations at EU level which are engaged in the European social dialogue, as provided for under Article 154 and 155 of the TFEU. In its 'Communication concerning the application of the Agreement on Social Policy' (COM (93) 600 final, Brussels, 14 December 1993), the Commission set out criteria for the representativeness of employers and trade union organizations and these are still valid today. This does not include multinationals. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeansocialpartners.htm>

participation. This is particularly true as, at that time (the late 1980s and early 1990s), the first international frameworks agreements were negotiated (Thomson Grand Public and Danone). The European level framework therefore provides no explicit support for TFAs.

At national level, certain pieces of legislation related to transnational issues recognize, though in a very limited way, the existence of transnational collective bargaining (e.g. the French 'convention de groupe' 1982²). Furthermore, there is no transnational trade union representation exclusively targeting specific MNCs. This is one of the reasons why at present TCAs are signed by global / European trade union federations representing one or more specific sectors of MNC activity, yet 'external' to it. The involvement of EWCs and national trade unions in TCA negotiations raises, amongst others, legal questions in terms of representativeness of the workforce at stake.

On the management side, while the solutions adopted reflect the hierarchical reality of the corporation (Sobczak 2008), they contravene the legal autonomy of subsidiaries in terms of their legal personality, meaning that corporate headquarters have no legal liability for the social consequences of a subsidiary's activities. Collective agreements concluded at corporate level are not binding for subsidiaries. There are two legal alternatives possible for overcoming this difficulty and forcing subsidiaries to apply TCAs. First, recourse to the legal mechanism of a mandate would allow an MNC to sign a TCA at corporate level which is legally binding for its subsidiaries, and possibly for subcontractors and suppliers. This would clarify the legal status of a TCA and its binding effect on subsidiaries. A second alternative, already used in certain TCAs, is recourse to clauses in commercial contracts concluded between an MNC and its subcontractors. Such clauses oblige subcontractors to respect the agreement signed by the MNC.

On the workers' side, the issue of the representativeness of the signatory party (given that three groups of actors are involved: trade union federations, EWCs and national trade unions) throughout the holding, its subsidiaries and subcontractors is at stake.

2. French code du travail, Art. L2232-30 on Conventions ou accords de groupe.

The choice of sectoral worker representation as a party to a TCA appears to be the most appropriate in legal terms. It solves the issue of representativeness through the fact that trade union federations represent workers in all companies operating in the sector(s) in question, given that the MNC belongs to the relevant economic sector(s). Furthermore, this option allows legal conflicts over the representativeness of workers' representatives or collective bargaining procedures to be overcome. However, TCAs signed by (global or European) trade union federations cannot be classified as sectoral agreements (following traditional divisions of collective bargaining outcomes at national level), as there is no corresponding collective representation on the management side. TCAs are signed by individual employers and not by employer associations. Furthermore, global union federations' bargaining power is not backed up by domestic, European or international labour law provisions (Sobczak 2008: 119). This legal difficulty is usually overcome by the involvement of domestic trade unions, with their co-signature under TCAs currently one of the most pragmatic ways of ensuring TCA compliance with national labour legislation and thus giving them the legal status of national collective agreements insofar as national collective bargaining procedures have been respected.

The involvement of EWCs as signatory party is more problematic. EWCs have been playing a facilitating role in TCA negotiations, clearly due to their 'transnational' legal status as workers' representatives within transnational companies accorded to them by EWC Directive 94/45/EC. They are increasingly being seen by management as legitimate partners in transnational discussions possibly leading to agreements. On the part of trade union federations, some even allow EWCs to be TCA co-signatories (IMF strategy), whereby this is not all too common, as in many Member States trade unions have a monopoly on collective bargaining. The intention of both EWC Directive 94/45/EC and its recast version (2009/38/EC) is to establish European Works Councils and a procedure for informing and consulting employees in Community-scale undertakings and Community-scale groups of undertakings. The Special Negotiating Body provided for in the EWC Directive is the one (albeit temporary) body explicitly mandated to '*negotiate with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.*' (Art. 5.3). While the *recast*

EWC Directive 2009/38/EC does not explicitly rule out an EWC having bargaining competence, it remains a rather contentious point whether the Directive gives extensive negotiating power to EWCs covering aspects other than information and consultation. Whereas EWC involvement as (co-) signatory party could solve the issue of asymmetry between management and workers representatives, the legal issue of its representativeness remains open in respect of workers employed in subsidiaries located outside the European Union.

2. Scope and content of TCAs

Analysing the scope of application of a norm allows us to evaluate its impact. Reviewing CSR initiatives, the European Commission stated (European Commission 2002, 2006) that they went beyond legislation and collective agreements that were already compulsory for companies. The scope of application of such initiatives remained at the discretion of management, making it practically impossible to assess their impact.

In a TCA, the parties usually indicate the scope of its application, though in varying ways. This leads to a host of legal questions arising with regard to the definition of an MNC and its subsidiaries, given that national legislation in EU Members States is generally very vague, leading to different interpretations and consequently to legal insecurity. In addition, the issue of internal restructuring within an MNC is rarely dealt with. However, such changes can have major legal consequences for the workforce and its representation, not least at corporate level, and may impact the implementation or even the existence of a TCA (see the *ArcelorMittal case*³). In the same vein, subsidiaries are usually mentioned as falling within the scope of application of a TCA. Yet, they are rarely defined as such, with the same being true for subcontractors and suppliers. Do TCAs apply to new MNC subsidiaries? In the opposite case, what happen to TCAs when a subsidiary is sold by the MNC? In the case of subcontractors or suppliers, the legal construct gets even more complicated, with a study of TCAs coming up with 3 types of references: (1) a vague mention of subcontractors or suppliers, without

3. <http://www.eurofound.europa.eu/pubdocs/2007/922/en/1/ef07922en.pdf>

further MNC commitment to actively promote the TCA; (2) subcontractors or suppliers are invited to apply TCA provisions, though with no further specific obligations foreseen in respect of monitoring and sanctions in the case of violations of the provisions; (3) compliance with TCA provisions is a criterion for selecting and retaining subcontractors or suppliers. Such vagueness in defining the scope of TCA application leads to greater uncertainty and diverging interpretations when difficulties arise. Interestingly, the most recent TCAs tend where possible to use more precise provisions.

Evaluating the content of norms gives indications of their expected impact. Compared to the vagueness of the scope of application, TCA content is generally much more precise. In addition, the systematic reference to existing legal standards - in most cases tripartite ILO (core) conventions - reinforces TCA legitimacy and can be seen as 'progress insofar as these conventions only impose obligations on the States that have ratified them and not on companies (...)'. Furthermore, the companies agree 'to apply ILO conventions not only to their own workers but also to those of their subsidiaries or even of their subcontractors' (Sobczak 2008: 123-124). Thus, the promotion of compliance with core labour standards by such private actors as MNCs can complement state action and increase the effectiveness of norms. Nevertheless, such private initiatives are no substitute for state intervention and compliance with ratified international norms. References to European (in very rare cases) and national legislation already applying to MNCs operating in the geographic scope of application of the respective laws do not in principle provide any additional help in classifying TCAs within one of the existing labour law categories. However, reference to international law may be of added value in terms of defining the legal order applicable to a TCA, as will be dwelt upon later on. On the other hand, references to international standards and national legislation may lead to legal conflicts where domestic law is not in line with international standards. Finally, reference to additional norms going beyond the ILO labour standards and / or beyond norms enshrined in labour law (e.g. environmental norms), may lead in some cases to a question-mark being put over the legitimacy of trade unions to deal with issues long abandoned to NGOs. Although rare, NGOs may be involved in TCAs. A TCA including an NGO as a signatory party would chart new bargaining paths in a field which remains a trade union monopoly at national and European level.

Furthermore, environmental issues may include health and safety related topics traditionally falling under the remit of trade unions. In this latter case, the legitimacy of NGOs to deal with health and safety issues could be questioned.

3. Implementing TCAs: the 'efficiency test' of private norms

Examining the implementation clauses of a private norm reveals the willingness of the parties to make it effective. Comparing unilateral CSR initiatives (codes of conduct, declaration, etc.) with TCAs, the contrast is striking. Whereas only very few of the former have implementation clauses, the majority of TCAs have precise ones, varying according to the issues covered, the sector(s) involved, but also dependent on the scope of application. Four main phases can be identified. (1) The establishment of a monitoring body is the first step in ensuring TCA implementation. Though various models are available, most of them are modelled on existing workers' representation structures such as (European) works councils and are usually composed of representatives from trade unions and/or management. (2) TCA dissemination includes its publication usually on global / European trade union federation websites (often more difficult to find on the website of the MNC in question), with relevant translations reflecting the scope of the MNC and its worldwide operations, and information sessions including training trade unions and local management. This is of great importance, as the involvement of national and local trade unions in the implementation is essential: the impact of any TCA can be best assessed at local / national levels. (3) TCA monitoring includes regular annual meetings between management and trade union representatives to evaluate TCA dissemination and impact, frequently on the basis of performance indicators defined by management and/or trade unions. Monitoring allows discussions of potential or existing difficulties ranging from TCA implementation to violations of rights enshrined in the TCA. (4) To deal with violations, a step-by-step complaints procedure is installed, allowing workers to first address local management, then to gain trade union support at local and national level, right up to corporate level. The underlying idea is that TCA violations should be solved via 'in-house' solutions based on joint management / trade union decisions, thus preventing social conflicts and the disclosure of violations

to the outside world. This is reminiscent of peace provisions often found in labour legislation. Such internal reviews appear to be the option currently used in most TCAs and help avoid judicial (external) scrutiny.

These characteristics are a great help in bringing TCAs closer to existing implementation procedures found in domestic collective agreements, as well as European framework agreements signed in the context of Lisbon Treaty provisions and building on the existing models of social dialogue and workers participation already in place in many EU-based MNCs. Yet, the lack of any domestic and/or international legal framework including for example the 'transnational' aspects of such collective bargaining, together with the specific TCA features (asymmetry of actors, specific features of the signatory parties, scope of application including commercial partners) prevent any legal classification of TCAs in existing labour law categories, thus leaving TCAs as *sui generis*, hybrid agreements, with their only legal anchoring found in private international law.

II. TCAs: legal grounds in private international law and domestic legislation

The 2009 study commissioned by the European Commission dealt with the key issue of TCA enforcement (Van Hoek and Hendrickx 2009). Its aim was to look into solutions provided for in private international law in terms of (1) applicable legislation and jurisdiction in the case of any dispute arising from TCA interpretation or application; (2) practical and legal obstacles to the way TCA-related disputes can be settled in court; and (3) any measures for overcoming these obstacles and allowing for TCA-related disputes to be resolved.

The wide variety of content, commitments and implementation clauses characterizing TCAs does not permit them to be categorized under a single criterion. However, TCAs are by nature civil and commercial contractual agreements, thereby falling under the broader concept of contract law (including any unilateral commitments). Consequently, private international law regulations are applicable: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (the so-called Brussels I regulation), Regulation (EC) No 593/2008 of the European

Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the so-called Rome I regulation) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the so-called Rome II regulation).

The Rome I Regulation allows parties to define the law applicable to contractual obligations. Rome I is based on the autonomy of the parties, with management and trade union in principle able to select which law applies to the TCA and in its commitments (in an existing system of law), thereby removing any uncertainty. Which law is applicable will depend on whether there is a party performing the obligations. Where this cannot be determined, Rome I refers to the law with the closest connection, thus necessitating the facts of the case to be weighed up. Although in general the law of the country in which the MNC has its headquarter is the most obvious, other criteria may prevail, leading to the choice of a different law and therefore uncertainty.

The normative effects of TCAs, as previously mentioned, are best secured through recourse to national instruments such as domestic collective agreements. However, differences in procedures and requirements for example for ensuring the horizontal effects of collective agreements or determining the division of power between trade unions and works councils to qualify TCAs as collective agreements vary so much between EU Member States that legal uncertainty is unavoidable.

The Brussels I Regulation proposes three solutions: first, that jurisdiction be given to the defendant's country of domicile, thus providing parties with legal certainty and predictability (Art. 2). However, this solution might not offer efficient protection due to the great variability of domestic legal systems, especially where workers' rights and representation are concerned. Second, exclusive jurisdiction over certain matters is granted to the court most closely connected to the issue (Art. 22). This solution however prevents the consolidation of proceedings when several subsidiaries (located in several countries) of the same corporation are involved. A third solution is to introduce a claim against the parent company in the jurisdiction of the court where the obligation on which the claim is based is to be fulfilled (Art. 5 (1)). This last solution could however lead to unpredictable results, as the place of fulfilment of TCA obligations might be difficult to determine,

especially when the parties have not specified such. Finally, recourse to interim measures may be an alternative, when there is a sufficient link between the obligation and the court to which the case is referred (i.e. when the obligation is to be fulfilled within the court's jurisdiction, even though the court might not have competence to decide on the contents). In a case of breach of TCA (for example when management imposes a decision contrary to the agreed TCA procedure), this alternative would give unions the possibility to suspend the management decision until the agreed procedure has been respected. In such a case, the court's decision will be based on local law. Thus, the significant differences between EU Member States and between non-EU legal orders with respect to the legal capacity of unions and workers' representation to go to court hinder legal certainty and predictability of TCA enforcement.

As previously mentioned, recourse to domestic law could at present be an appropriate solution. An alternative way of giving legal force to a private norm is to integrate it in another legally binding norm - in the case of a TCA either in a commercial contract or in a national collective agreement. This has been done with some TCAs, either by involving national unions in the TCA negotiation and signature phase or by (re)negotiating and signing a TCA as a national collective agreement, or by using the legal mechanism of a mandate. Where domestic rules and procedures for collective agreements are fulfilled, a TCA qualifies as a national collective agreement, thus allowing recourse to national enforcement rules and mechanisms. This alternative is currently under scrutiny, with the European Commission looking at solutions provided for by domestic law. The first results of this study (Prof. R. Rodriguez and team) on the characteristics and legal effects of agreements between companies and workers' representatives is extensively dealt with in the next chapter by Prof T. Jaspers. One of his major conclusions is that the European Union should intervene, adopting a Directive allowing for the uniform application of a TCA.

The current lack of a legal framework at national and international level, as well as the solutions provided for under private international law, do not ensure legal certainty and predictability for TCA signatories. A potential solution to TCA enforcement issues would clearly be for the parties to the agreement to specify which commitments are binding or non-binding, the scope of application, and the law applicable to their obligations. Such an option has been developed by certain European

and global trade union federations in the form of model agreements. However, these model agreements are not mandatory and TCA parties can choose to apply them or not, or to conduct a selection of the items proposed in the model agreements. The flexibility as to whether or not to follow a model agreement works against ensuring legal certainty. This issue could be resolved by making such model agreements or a similar procedure mandatory for the parties, possibly based on European experience in creating procedures for the transnational information and consultation of workers.

III. Why do TCAs need a contractual and/or legal framework?

In a nutshell, TCAs cannot be classified in existing labour law categories. They appear to be an autonomous category needing to be clarified. TCAs fall under the category of private norms, i.e. norms set by private actors and not public authorities. Private norms may create rights and obligations for the signatory parties, if they so agree. In the case of TCAs, parties' intentions may range from a pure declaration of intent without any clear commitments to more binding commitments (Schömann *et al.* 2008), yet without being expressly mentioned in the agreement or, where mentioned, subject to variable interpretation. In the case of a dispute, the lack of a specific legal framework obliges the parties to depend on a court decision, whereby a domestic court might potentially not be well acquainted with transnational social dialogue customs, yet forced to apply national law. In doing so, domestic courts may favour customary rules when TCAs have been applied over a certain period of time. In continental legal orders, customary rules usually provide for the maintenance of the rights in question until a defined procedure has been respected.

Alternatively, domestic courts might favour the concept of unilateral commitments used against misleading advertisements in consumer law. As the famous Supreme Court of California case *Kasky v. Nike* (2001) shows, the protection of core labour standards (in this case child labour) might find a (better) solution in recourse to a branch of law other than labour law (here consumer protection legislation), thus performing a rather awkward legal *volte-face*. The legal protection foreseen is for consumers and not for workers, thus changing their

status (Sobczak 2008: 126). Such a shift can lead to additional tension, for example between consumers and workers, as certain labour rights might not be perceived as a priority by consumers, or as sufficiently important to file a case. Clearly, neither recourse to customary rules nor the use of the theory of unilateral employer commitments (via consumer law) match the spirit of TCAs as an instrument providing worldwide protection to MNC workers and guaranteeing the promotion of (core) labour standards independent of their acceptance by the public at large.

The current legal no-man's-land creates insecurity not only in terms of the legal outcomes of potential conflicts between the parties, or in cases of (hierarchy) conflicts of norms. Much more, and despite the efforts invested by certain global and European trade union federations in developing model agreements including basic provisions, TCAs develop erratically, leaving a large number of legal questions open and potentially stopping management and trade unions from reframing their social dialogue to better cope with economic globalisation. A legal framework would for example offer legal answers to such issues as the legitimacy of the parties and their representativeness. It would clarify the scope of application and would identify the addressees of the TCAs. It would particularly help parties to shape TCA implementation provisions for a broader and more efficient impact (Ales *et al.* 2006). Though an international norm embracing the global reach of TCAs would obviously be the best solution, European law appears to be well-equipped and already acquainted with regulating transnational collective labour law aspects of industrial relations, in particular in the field of workers' information, consultation and participation. A European legal act would in particular enhance the transparency of the whole process and support the momentum already created by management and trade unions. In addition, a legal framework would boost protection of labour rights enshrined in international, European and national legislation and reaffirmed in TCAs, providing for additional monitoring procedures aimed at making these labour standards effective.

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