

Roadmap on Transnational Company agreements: Progressing towards an Optional Legal Framework

Adopted at the Meeting of the executive committee on the 8-9 June 2016

Background

Transnational Company Agreements (TCAs) are increasingly part of the collective bargaining landscape. In many sectors ETUFs are stepping up their work to negotiate and conclude TCAs.

The ETUC has been actively supporting the work of the ETUFs including, since 2009, aiming to ensure that the necessary legal and procedural framework is in place to support those ETUFs and to address any problems emerging in the implementation process.

ETUFs have highlighted problems with enforcement associated with the lack of a European legal framework to recognise the existence of TCAs along with their legal value. Respect for the agreement and its enforcement still mostly depends on the willingness of the employers' side to implement it. Although many TCAs foresee 'internal' procedures to settle disputes in circumstances where the conflict persists, no European mediation structures exist to support signature parties to settle the dispute and there is legal ambiguity about the nature of the "Agreement".

In 2014, the ETUC implemented an EU co-funded project ("Building an enabling environment for voluntary and autonomous negotiations at transnational level between Trade unions and multinational companies"), in partnership with the ETUFs

This project built on previous ETUC Resolutions, and combined the legal analyses under this and previous ETUC projects with current practices identified by the ETUFs. The final report of the project is composed as follows:

- a) Part I frames the possible proposal for an Optional Legal Framework for TCAs in the mainstream EU policies (EU 2020 Strategy, Single Market, social market economy) and identifies policy options for an OLF.
- b) Part II includes the contribution from academic experts and addresses the main problems regarding the negotiations and enforcement of TCAs. It further defines possible **solutions and** features of such an OLF for TCAs.
- c) Part III, identifies options and advances concepts and solutions for TCAs management and enforcement that can be set at European level.
- d) Part IV is an example of what shape a possible OLF for TCAs could take.

This report deals in particular with the following issues:

- a) Legitimation of the bargaining agents
- b) Validity and legal effects of a TCA
- c) Enforcement of the agreement in MNCs' subsidiaries and controlled undertakings
- d) Non-interference with national collective bargaining systems and non-regression clauses
- e) Management of disputes arising from implementation and interpretation
- f) Registration of the agreements

The final report aims to clearly establish the leading role of the ETUFs in the negotiations, as recognised also by the resolution of the European Parliament on "Cross-border collective bargaining and transnational social dialogue (2012/2292(INI))" adopted on 15 July 2013 (rapporteur Thomas Händel). Such a leading role should be carried-out

according to the internal procedures and rules established by each ETUF, in full respect of and in coordination with the bargaining power of national trade unions and the specific functioning of the national industrial systems.

For these reasons the final report recommends that the proposal for an Optional Legal Framework for TCAs at EU level should present the following features:

- a) Optional: Access to the legal framework is optional and only applies to those agreements where the parties have declared in writing that the agreement is subject to its provisions
- b) Leading role of ETUFs in the process. On the workers side, the access to the OLF should be limited to the ETUFs. This would secure that collective bargaining is a prerogative of trade unions only and, by doing so, prevent the risk of other agents (i.e. EWCs, workers' councils or associations established under the pressure of companies, etc.) becoming negotiating actors, against the provisions of the European and national law.
- c) Involvement of EWCs. The EWC – where established – should be informed and involved as much as possible in the negotiations, managing and monitoring of TCAs **according** to the internal rules autonomously established by each ETUF
- d) Disclosure of the mandate. At the beginning of the negotiating round both parties should disclose the mandate they have been given and so clarify whom they represent and will then be bound by the agreement. The mandate is key to strengthen the binding nature of the resulting agreements, by defining clear methods for involvement of national trade unions and works councils, which are part of the trade union representation in the multinational companies involved.
- e) Scope of the TCA. The parties shall clearly define the scope of application of the TCA and how to update it in case of changes in the MNC's structure.
- f) Formal contents of the agreement. In order to enhance the enforceability of the agreement, each TCAs shall include:
 - official name (designation) and signature of the signatory parties;
 - location where the agreement was signed;
 - date on which the agreement was signed;
 - date on which the agreement enters into force;
 - expiration date or contract duration or, alternatively, a procedure by which one of the parties can terminate the agreement if its duration is indefinite;
 - procedure for termination, renegotiation, renewal of the agreement.
- g) Non-regression clause. This provision is meant to prevent the OLF from interfering with the autonomy of social partners at national level and to protect workers' rights by not allowing *in pejus* changes.
- h) More favourable clause. In case of conflict between the provisions of a TCA and any other applicable agreement, the more favourable provision for the employee shall apply, including the right to take collective action.
- i) A clause granting the protection of workers and trade unionists involved in TCAs negotiations and enforcement. This protection shall apply in particular to attendance at meetings of negotiating bodies or any other activity related to the implementation of the agreement, as well as to the payment of wages for the period of absence necessary for the performance of their duties.

Moreover, in order to further strengthen the autonomous character of negotiations and TCAs and, at the same time, overcoming problems of national applicable law, the OLF should provide with the following tools:

- a) An Alternative Dispute Resolution (ADR) mediation mechanism at European level, accessible only to signatory parties, to be used when the internal procedure set up by the TCA itself doesn't success in solving the dispute. The ADR has to be a mediation mechanism. The mediators have the task to help the parties to find a solution and to provide a recommendation and a report if requested by the parties.
- b) A register of TCAs subject to the OLF. This tool will ensure the access to official texts.

The ETUC, together with its affiliates, namely the ETUFs, will advance our demands for an Optional Legal Framework for Transnational Company Agreements at EU level aimed at:

- a) Clearly stating the leading role of ETUFs in negotiating, signing and managing TCAs, on the basis of their autonomously established procedures
- b) Setting-up a European ADR Mediation Mechanism
- c) Setting up a register for TCAs subject to the OLF
- d) Clarifying the interaction and legal validity of TCAs including their relationship to collective agreements, law, rules and practices at national level.

The ETUC and the ETUFs shall ensure that, in any case, the establishment of such an OLF will fully respect the autonomy of national social partners and the national collective agreements and collective bargaining systems.

In order to achieve such goals, the ETUC will work closely with its affiliates, especially the ETUFs, on several fields at the same time in order to capitalise on the constructive approach which has characterised its action during the last years:

- a) The ETUC, together with the ETUFs and its affiliates, will further discuss and define existing problems linked to TCAs and their enforcement, and the features of the OLF.
- b) The ETUC will strengthen the consensus on such a proposal, by discussing and working with the employers' side. The ETUC, in partnership with the ETUFs, will submit an application for a joint project - under the 01 budget line (Social Dialogue) – to be carried out with BusinessEurope, CEEP and/or with the employers/employers' organisations who wish to engage in such an exercise.
- c) The future joint project will analyse the concepts that have emerged during the current project with the aim of developing future recommendations to advance the effectiveness of TCAs.
- d) In the meantime, the ETUC will continue discussing and lobbying the European Commission. In particular, the ETUC will push the Commission to support our work on the proposals for the mediation and registration mechanisms, as a starting point for the development of an OLF. In this context we recall the interest expressed by the Commission itself during the European conference held in Amsterdam on 5th April 2016.