

ETUC Resolution Proposal for an Optional Legal Framework for transnational negotiations in multinational companies

Adopted at the ETUC Executive Committee on 11-12 March 2014

Summary

The Executive committee endorses the Report “Towards a Legal Framework for Transnational Company Agreements”¹ as a solid basis to support trade union demands for clearer and more transparent rules for transnational negotiations with multinational companies

The ETUC, together with the ETUFs, advocates for the establishment of an Optional Legal Framework for TCAs to be introduced through a fully binding decision of the Council according the TFEU procedures.

The ETUC encourages the ETUFs to adopt procedures for transnational negotiations with multinational companies and will support ETUFs for converging on a coherent set of internal procedures in all sectors, with particular reference to bilateral disputes settlement mechanisms.

The ETUC will promote social dialogue with European employer associations and multinational companies in order to achieve more and better TCAs.

BACKGROUND

On 18 October 2012, the Executive Committee of the ETUC endorsed the position on European Commission’s consultation on the Transnational Company Agreements (TCAs)

This position was the result of an in depth discussion which involved all affiliates and notably the ETUFs within the ETUC Collective Bargaining Committee and Task Force.

.On the basis of this position, the ETUC Secretariat developed further discussions with the European Commission and the European Parliament that led to the initiative report, Cross-border collective bargaining and transnational social dialogue (2012/2292(INI)) adopted by the Parliament on 15 July 2013, rapporteur Thomas Haendel (GUE), and mainly based on the ETUC Position and the ETUFs procedures for transnational negotiations.

With this Report, the EU Parliament asks the EU Commission to consider the possibility of issuing a European optional legal framework to support transnational negotiations, and to set up mediation mechanisms to settle disputes linked to the enforcement of the agreements.

In the meantime, the ETUC started developing an EU co-financed project, in order to draft a trade union proposal for an optional legal framework, by involving legal experts and the affiliates, particularly the ETUFs. The project consisted of a first phase of research for the compilation of a report (<http://www.etuc.org/a/11793>), aiming at:

¹ Available in English, French, German and Italian at <http://collective.etuc.org/node/80>

- discussing the opportunities of developing an optional legal framework for TCAs
- defining the legal basis and the content of such a framework
- Suggesting the steps that may lead to its adoption.

The report takes into account both academic literature and political documents, in particular by the European Commission. Moreover, interviews have been conducted with several representatives of transnational companies and European Trade Union Federations involved in the negotiation and implementation of Transnational Company Agreements (TCAs).

The report starts from the evidence that the absence of a reference framework of rules represents a significant obstacle to the potential impact of TCAs expected by social partners who negotiate them, as well as to the negotiations themselves.

The report is structured into 5 sections. After an introduction, it builds on recent policy documents, in order to summarize the different legal problems at stake in the field of TCAs. Section III outlines the sources in primary EU law which are relevant for supporting an optional legal framework for TCAs. Section IV contains and explains our proposal, i.e. the adoption of a Council Decision addressed to Member States, defining rules for the conclusion of TCAs and dispute settlement. Finally, in section V suggestions are made for initiatives which need to be taken in order to move forward, towards the adoption of an optional legal framework for TCAs.

In particular the expert report identifies the most complex issues as:

- a) A lack of clear capacity/legitimacy of negotiating and signatory parties
- b) A lack of procedural rules for negotiation
- c) A lack of consistency in the implementation of TCAs between countries and subsidiaries resulting from the absence of rules or practice as to the effects and implementation of such agreements
- d) Risks associated with the uncertainties as to the legal effects of TCAs and to the application of private international law rules to disputes
- e) Resentment among managers' and workers' representatives at lower levels about the top-down imposition of measures agreed at an upper level.

The report proposes a series of solutions for a possible optional legal framework:

- f) Explains how the adhesion to the legal framework does not clash with the autonomy of social partners and the voluntary character of the agreements, as it remains "optional"
- g) Suggests that the best way to implement the optional legal framework is through the adoption at EU level of a Council Decision
- h) Identifies the main, binding elements composing an optional legal framework (para 4.2)
- i) Proposes a mediation procedure as the best dispute resolution method on the basis of experience so far
- j) Suggests a series of further interventions from the European Commission
- k) Recalls the advantages of an optional legal framework for TCAs as has emerged in the experience of workers' and employers' representatives.

As a conclusion of the research project, the European conference “Enhancing European Trade Unions in Negotiations with Transnational Companies and Implementing EFA” was organised on 30th January 2014 in Frankfurt in the IG Metall premises. The conference represented a forum to present the results of the study developed within the project and to discuss it with legal experts, affiliates (ETUFs and national confederations), multinational companies (managers’ and workers’ representatives), employers’ organisations, the European Commission and the European Parliament.

The conference aimed at:

- Disseminating best practices for transnational agreements with multinational companies, especially EFAs (European Framework Agreements)
- Delivering a more focused legal analysis of the procedures established by ETUFs
- Clarifying the legal and sustainability aspects of procedures established by social partners to frame cross-border negotiations within predefined rules and to make their effects binding at national/branch level
- Favours the exchange between social partners and EU institutions with a view to drafting some hypothetical models of the optional legal/procedural framework at European level.

Through the exchange of good practices, the conference clarified and further specified procedures to effectively negotiate and manage transnational agreements, especially EFAs.

The exchange of best practices has disseminated know-how for future negotiations. It has helped social partners to gain a better understanding of the potential benefits of EFAs framed in a specific legal framework.

The final report of the project, integrated with the conference's outcomes, is submitted to the Executive Committee for adoption. It will represent a basis for further negotiations with the EU institutions.

The ETUC Executive committee is asked to take note of the report and to adopt the following resolution:

FOR ADOPTION

The ETUC, together with the ETUFs, urges the European Commission to advance a proposal for a decision introducing an Optional Legal Framework for transnational negotiations with multinational companies. The decision will have a legal basis in the Treaty and be formally adopted with a legal act of the Union (a decision) as argued in Chapter III of the Experts’ Report. It will thus produce obligations for Member states and for the bargaining agents, while still leaving them the choice to ‘opt in’. The obligations will result in granting a legally binding nature to TCAs, namely attributing to them a normative function.

The ETUC, in working closely together with ETUFs, will continue to advocate for the adoption of an optional legal framework for transnational negotiations with multinational companies and TCAs. The ETUC will take a two-pronged approach. On the institutional side, the ETUC will engage in lobbying the EU institutions. At the same time, the ETUC will also strengthen cooperation with ETUFs to support initiatives at the level of sector social dialogue to create consensus around the optional legal framework.

The Optional Legal Framework will include at least the following items:

- l) The **Opt-In Clause**: The social partners must clearly express their willingness to benefit from the optional legal framework set up by EU law.
- m) **Signatory parties of the TCA**: To be coherent with the legal base chosen (see above IV.1), the access to the optional legal framework should be limited to certain actors. On the workers' side, European trade union federations should be entitled to sign transnational agreement with multinational companies. EWC and workers' representatives are involved in the negotiation process and can co-sign the TCA according to ETUFs procedures and if they are part of ETUFs delegations, but in order to access to the optional legal framework, they cannot be the only signatory party on the workers' side.
- n) **Disclosure of the mandate**: Disclosure of the mandate on the workers' side is an essential element to qualify the agreement as 'collective' and to implement all collective interests at stake. However, rules to operate the mandate – majority voting, cross-industry representation, homogeneity of the rules across all sectors; vetoing powers – should entirely be left to unions' self-regulation. TCAs should reflect autonomous choices of the bargaining agents, as for the mutual recognition of bargaining powers and representativeness.
- o) **Scope of application of the TCA and changes in the composition of the Transnational Company**. The TCA should clearly define its scope of application. It should mention the conditions under which a subsidiary will (or will not) be covered by the content of the TCA.
- p) **Non-regression Clause**: TCA occupies a level of its own, distinct from national sectoral collective agreements and company agreements. TCAs cannot impose pejorative changes of labour standards and working conditions agreed upon at national level, be it sector or company.
- q) **Internal dispute settlement**: The TCA should specify the signatory parties' common responsibility in its implementation. It should also indicate the internal complaint mechanisms for workers covered by the text.
- r) **Date and venue of the signature**: The TCA should specify the date and venue of signature
- s) **Expiry date and rules to promote renewal**: The TCA should specify whether it is signed for a definite or indefinite period of time. In the first case, it has to clearly indicate the expiry date and any relevant rules that may enable the signatory parties to conclude a new TCA. In the second case, the TCA should explain the rules regarding the termination of the agreement.
- t) **Duty to notify the TCA and subsequent amendments**: Once the optional legal framework has been entered into and the TCA has been signed accordingly, all subsequent changes, in particular with regard to the disclosure of the mandate on both sides, renegotiation of the TCA after its expiry date and possible expansions in the scope of the TCA should be notified to the European Commission, or to national authorities. The text of the agreement should specify the signatory parties' responsibility to respect this notification.

The ETUC will continue pave the way for conditions for adopting an Optional Legal Framework by lobbying the Commission and other EU institutions, by proposing intermediate steps as well as further analysis on concrete best practices and obstacles,

and by starting a process for setting up a European level mediation mechanism managed by the Commission.

The ETUC will continue to perform its coordination role with the ETUFs with the aim to extend procedures to negotiate with multinational companies in as many sectors as possible.

It is important to have a high degree of convergence on the way such procedures are designed. First of all because formal procedures adopted by some ETUFs proved to be beneficial for good management of negotiations and smoother implementation of the agreements. It should also be considered that many TCAs cover more sectors, often involving more than one ETUF. Coherency in the procedures adopted within different ETUFs ensure a neat and transparent development of negotiations.

More and better TCAs need an enhanced social dialogue on this topic. European employer associations show reluctance in engaging with trade unions on this subject. In contrast, multinational companies themselves appear to be more open to dialogue.

The ETUC puts forward the following solid arguments for insisting on a closer dialogue with employer associations

- u) The extent of the phenomenon of transnational negotiations is not marginal. Multinational companies with a well-rooted presence in more member states, justifying the existence of a TCA, are estimated to number 1.000, of which about 130 already have a TCA. TCAs cover about 10 million workers worldwide and about two million in Europe.
- v) It concerns all Member States. Geographical localisation of TCAs are misleadingly identified with headquarters of multinational company who have signed the agreements. They are mostly placed in France and Germany as they are the two countries (together with the UK) in which multinational companies set their headquarters in greatest number. However, TCAs cover, and are implemented in, all EU Countries.

Past experiences show that an optional legal framework can have a strong promotional role to play. For instance, Directive 94/45 established a framework for negotiations with a view to agreeing on rules for informing and consulting employees at transnational level. Negotiations rules in the EWC directive were quite flexible and optional (including the option of not-establishing a EWC). Before the adoption of the EWC directive, only a handful of pioneers had experienced negotiations to sign agreements for the exercise of information and consultation rights at transnational level. Two years after the adoption, 350 companies had already achieved an agreement and today more than one thousand agreements have been signed to introduce transnational information and consultation rights of employees in multinational companies.

The promotional role of an EU legal framework, with the same characteristics of flexibility and optionality, can multiply the number of agreements, spreading best practices and improving the implementation of existing TCAs.

For these reasons, the ETUC will support ETUFs in the attempt to open a dialogue with their counterparts at sector level.

Furthermore, in order to enhance social dialogue on this topic, the ETUC plans for a project possibly in partnership with the employer associations to be financed under the budget line "Information, consultation and participation of representatives of undertakings".