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# Transnational Company Agreements: Past, present and future. A play in three acts.

Beryl ter Haar (University of Warsaw (Poland)) · Friday, July 19th, 2024

**Introduction**

A good decade ago, Transnational Company Agreements (TCAs) were a hot topic in Europe. In the broader context of globalisation, they were hailed as an interesting step forward in the context of Corporate Social Responsibility (CSR), nowadays called Corporate Sustainability. However, since 2016 discussions about TCAs faded and ever since it seems as if they do not exist anymore. Although the contrary is true, as suggested by the EU's database on TCAs,[1] given the lack of academic interest it is remarkable that in May 2024 in Warsaw a group of national labour experts

from Romania, Hungary, Bulgaria, Poland, Estonia, Czech Republic, and Lithuania virtually came together to discuss experiences with TCAs in their respective countries. Experts from Germany, Italy, Spain, the United Kingdom, the Netherlands, and trade union Solidarno??, joined the national experts for panel discussions about TCAs. For a moment it felt like as if TCAs had never left the academic stage. Whether the latter is truly the case is core to this "play". This "play" is divided into three acts: Act 1 the past, Act 2 the present, and Act 3 the future. Act 1 (the past) contains a (re)introduction of TCAs focussing on their historic background and the efforts to create an optional legal framework for TCAs. Act 2 (the present) examines to what extent TCAs are still used and how they have developed. Act 3 (the future) is a plea to revive (sectoral-level) TCAs as instruments to implement labour rights related due diligence obligations of the EU's Corporate Sustainability Due Diligence Directive (CS3D). (Editors' note: This topic was discussed in separate posts by Maria Giovanonne and Aria Huys.)

**Act 1 TCAs entering the stage and the lack of a legal framework (past)**

TCAs entered the stage of labour law via two routes. The first route is based in Corporate Social Responsibility (CSR). To give shape to their CSR policies, transnational companies in general use two types of instruments: unilateral codes of conduct or international or global framework agreements (IFAs or GFAs) that are adopted by the management of the transnational company on the one hand and the workers representatives, often global union federations (GUFs) on the other hand. The agreements that have a geographical scope that is limited to the European Union are called European Framework Agreements (EFAs). The second route is European and related to the agreements that European Works Councils (EWCs) conclude with the management of a "Community-scale undertaking" as defined in Article 2(1) sub a of Directive 2009/38/EC on European Works Councils (EWCD). These agreements are sometimes referred to as Transnational Company Agreements (TCAs). Over the course of time the name TCAs is also used for EFAs, as will be done in this "play".

In general, TCAs distinguish themselves from IFAs or GFAs, not only because of their geographical scope (limited to the EU), but also by their material scope. Table 2 of the Appendix in the book edited by Papadakis (2011), *Shaping Global Relations. The Impact of International Framework Agreements*, shows that the agreements with an EU-scope cover the four ILO core labour standards of that time (abolition of forced labour; abolition of child labour, equal treatment, and freedom of association and collective bargaining), as well as the since 2022 fifth core labour standard (occupational safety and health), and provisions on employment, wages, working time, and training and restructuring. Especially the latter topic can be related to the EWCD since in the subsidiary requirements (Annex 1 to the directive) it is included as a topic particularly for information and consultation of the EWC.

Being regulated by the EWCD, TCAs concluded with EWCs have a legal basis. However, not all TCAs concluded with or co-signed by a EWC have been negotiated in the context of the EWCD. Furthermore, TCAs are not only concluded by EWCs. On the contrary, those that have been adopted as instrument to shape a company's CSR policy have been concluded with and (co-)signed by one or more trade unions at different organizational levels (international, European, national, company). These TCAs are not covered by the EWCD and therefore lack a legal framework that renders them legally binding, which leads to issues of enforcement of the rights contained therein. Problems that are well illustrated by studies of the ILO, such as the above-mentioned edited book by Papadakis (2011) and his 2008 edited book *Cross-Border Social Dialogue and Agreements: An Emerging Global Industrial Relations Framework?* and studies of the European Trade Union

Institute (ETUI), such as their collective work *Transnational Collective Bargaining at Company Level. A New Concept of European Industrial Relations?* (2012).

To overcome the lack of legal bindingness of TCAs the debate from a decade ago in academia, as well as at EU social policy level, focused on the creation of a legal framework. According to some academics, the EU's policy attention for TCAs dates back to the 1970s (e.g. Da Costa and Rehfeldt, *Transnational Collective Bargaining at Company Level: Historical Developments*, in Papadakis (2011)), however, concrete steps to create a legal framework were made in 2005 when the European Commission announced a plan to adopt a proposal for a legal framework that could be used by social partners if they desired to do so. In 2006 a group of academics, lead by prof. Ales, was tasked with conducting a study to indicate what would be needed for such an "Optional Legal Framework" (OLF). The resulting report *Transnational Collective Bargaining: Past, Present and Future* (2006), was followed-up by more studies, reports, and working papers, including in 2012 a report by an Expert group on TCAs established by the Commission and in 2013 a proposal for a European Parliament resolution on *Cross-border collective bargaining and transnational social dialogue*(2012/2292(INI)).

Issues that are addressed in these studies, reports, and working papers include the determination of which parties may conclude TCAs, the set up of a procedure by which TCAs are to be adopted, the relationship between TCAs and national collective agreements, and the legal status of TCAs. The first issue reflects the differences between industrial relations systems of the Member States, due to which in some countries TCAs are considered the terrain of works councils and in other countries of trade unions. However, since in general TCAs are considered to be the result of collective bargaining, works councils lack the legitimacy that trade unions have to adopt legally binding agreements. Procedural aspects include issues such as the adoption of the TCA, as well as the implementation of and ensuring compliance with TCAs. For example, the set up of a special negotiation body at sectoral level and formal requirements such as that the TCA needs to be in writing and accessible.

Despite the fact that there are three full-fledged proposals for an OLF (by Ales c.s. (2006); the Commission (2012); and Sciarra, Fuchs and Sobczak, supported by the ETUC (2014)) none of the proposals made it into EU law. Instead, … it turned silent. As if TCAs didn't exist anymore and as if all the advantages that were once attributed to TCAs didn't matter any longer. Although it is unclear what the exact reasons are for this silence, fingers are pointed to a fundamental disagreement between social partners about the need of an OLF. In its working paper (SWD(2012)0264), the Commission notes the lack of support from the employers side for the OLF, because such a framework could have the effect of discouraging companies from concluding TCAs for fear of legal complications. Trade unions on the other hand strongly supported the OLF to improve clarity and better implementation of TCAs given the different industrial relation systems within the EU Member States.

**Act 2 Continued use and development of TCAs (present)**

As proved by the EU's database, TCAs have not disappeared They are still in use and new ones are still concluded. However, the pace in which new TCAs are concluded has slowed down significantly. Moreover, each of the national experts participating in the meeting on 16 May 2024 indicated that TCAs are not really used by companies in their countries. Nonetheless, each of the experts did consider them to be an interesting instrument that could help to further develop national industrial relations.

The slowed pace and apparent limited geographical use of TCAs (most companies in the EU database are German, French or Italian), have not hindered the development of the content of TCAs. More particularly, from instruments merely stating which rights are respected by the transnational company, TCAs have developed into instruments that also include measures to implement and to monitor compliance with the TCA. This is an interesting and important development because it "hardens" TCAs from instruments without any tangible commitments into instruments with obligations that can be enforced. Thus, although the conclusion of a TCA remains voluntary and at the discretion of the transnational company, once a TCA is concluded the content of the TCA can be of such a nature that it binds the transnational company as if it was a legally binding instrument. Let there be no misunderstanding here, due to the lack of an OLF, TCAs are still a form of soft law; however, by the nature of the content the TCA can have legal effect: hardening of soft law.

More concretely, in a study I conducted in 2021 for the same research project that the meeting of 16 May 2024 was part of (published in: ? Pisarczyk (ed) *TCA or about David's negotiation with Goliath* National Commission NSZZ "Solidarno??", 71-86), I assessed the "legal quality" of the content of TCAs that are included in the EU's database, which is current to 2018. With "legal quality", I mean especially what kind of language is used for the formulation of the commitments in the TCA. The more legal this language is, for example, by the use of words such as shall, will, and must, rather than endorse, endeavour, and promote, the higher the legal quality of the commitments. Second, "legal quality" is about the clarity and precision by which the commitments are formulated. A commitment that the transnational company must set up a monitoring body in agreement with the signatory partners, is less clear than the inclusion of a monitoring body in the TCA itself, including rules about its composition, terms of members, number of meetings and concrete tasks. To assess this legal quality, I focused on two aspects of the TCAs to which I applied a simple form of coding. First on the clarity of the key objectives and topics addressed by the TCA, with coding 0 when abstract and general and 1 when more concrete and defined. Second on three formal aspects of the TCAs, namely provisions on implementation and dissemination of the TCA; on review and monitoring of the (progress of the) implementation of the TCA; and on dispute settlement and sanctions to enforce compliance with the material content of the TCA. These three aspects have been coded separately with 0 when nothing is included in the TCA, with 1 when something is included, and with 3 when it is elaborately included.

Of course, this approach gives only a first impression, and it should also be stressed that the sample of N=33 is hardly representative for the total number of transnational companies that are engaged with or expected to be engaged with CSR or corporate sustainability. Nonetheless, it gives an impression. Moreover, the results of the coding confirms a trend of hardening of soft law in TCAs. It shows this trend in two ways. Firstly, the content of TCAs that have been adopted roughly since 2014, is of higher legal quality (is "harder") than that of the TCAs adopted before 2014. Secondly, among the 33 transnational companies, 5 of them have renewed their TCAs. For one company no change in terms of legal quality was found .For the other four TCAs the legal quality improved significantly. This is especially the case for TCAs that have been adopted relatively early (2004-2008) compared to TCA adopted after 2008. All renewals have taken place after 2014, therewith also confirming the general trend.

This leads to the question why the legal quality of the content of TCAs has improved over the course of time. I have addressed this question in a study on the EU and TCAs which is published in *EU Collective Labour Law*. In this study I speculated that this change might be the result of a more general change in CSR policy, especially with a stronger focus on procedural aspects with the aim

to make CSR policies more (legally) tangible. Push and pulls for transnational companies to develop their CSR policies and instruments (such as TCAs) into those directions are created by a panoply of international, transnational, supranational and national initiatives. At international level this includes initiatives from international organisations such as the International Labour Organization (ILO) with its *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, the Organisation for Economic Cooperation and Development (OECD) with its *Guidelines for Multinational Enterprises*, and practical support document *Due Diligence Guidelines for Responsible Business Conduct*, and the United Nations (UN) with its *Guiding Principles for Business and Human Rights*, including the Ruggie Framework *Protect, Respect and Remedy*. At transnational level, this includes initiatives, such as certification schemes like SA 8.000 and ISO 26.000, and from NGOs like Responsible Business Alliance, Fair Labor Association, and the Fair Wear Foundation. Supranationally, the EU has been active in the field of CSR since the mid 1990s. Such initially with legally non-binding initiatives such as the establishment of the European Business Network for Social Cohesion, which was renamed "CSR Europe" in 2000 and the Commission's strategies on CSR (COM(2006) 136 final; and COM(2011) 681 final). Yet, since 2014 also with legally binding initiatives, particularly Directive 2014/95/EC on non-financial reporting, the Taxonomy Regulation 2020/852/EU and the Corporate Sustainability Reporting Directive 2022/2464 (CSRD) which are both part of the European Green Deal, and the CS3D (Directive 2024/1760) which was adopted on 13 June 2024. Lastly, several EU member states have also adopted initiatives to promote CSR, Responsible Business Conduct (RBC), Environmental, Social Governance (ESG), or human rights or corporate sustainability due diligence (HRDD or CSDD). France has been a frontrunner on this with its law on due vigilance. Germany adopted in 2021 the supply chain act on corporate due diligence obligations in supply chains. And the Netherlands has been working with legally non-binding initiatives on RBC for various sectors which are supported by the Dutch government.

All together a strong field of multi-level governance is created pushing and pulling transnational companies to adopt a form of CSR, RBC, ESG, HRDD or CSDD policy. In fact, many of these initiatives refer to each other, particularly references are made to the OECD MNE Guidelines, the UN GPs, and the ILO's Tripartite Declaration on MNEs. This was already the case in 2013 when I conducted a study on this ('Love, Flirt or Repel: Hybrid global governance of the ILO core labour standards', *European Journal of Social Law*, 2013(2), 68-102) and confirmed by the ILO in two studies it conducted in 2022 and 2024.

**Act 3 The use of TCAs to implement labour rights CSDD (future)**

With the strong multi-level governance framework with CSR initiatives, including the EU's CS3D, it is very likely that the combination of these initiatives has resulted in the hardening of the content of TCAs. Especially given the fact that the hardening has taken place on the procedural aspects, which can be related to the development of CSR in general moving from declaring adherence and respecting a set of rights to more attention for implementation, monitoring of compliance and enforcement. HRDD and CSDD fit in this line of development. All of these procedural aspects indicate what kind of behaviour is expected from the transnational company in managing the labour right risks affiliated with its business activities throughout its value chain.

With the inclusion of several procedural aspects, which hardened the content of TCAs, TCAs have proven to be adaptable instruments. That makes a good starting point to reconsider the value of the TCA as an instrument for European scale companies to adopt their labour rights related CSDD obligations. Especially, since the CS3D stipulates that "[t]he due diligence policy should be

developed in prior consultation with the company's employees and their representatives" which are to be worked out in "a code of conduct describing the rules and principles to be followed throughout the company and its subsidiaries" (par. 39 preamble and art. 7 CS3D). Moreover, suggestions can be found in the CS3D for sectoral-level TCAs, rather than company-level TCAs. These suggestions include the obligation for companies to take sector-specific (human rights) risks into account with their CSDD policies (par. 41 preamble CS3D), that the monitoring of the implementation of the CSDD obligations can be carried out by other companies or by an industry or multi-stakeholder initiative (par. 52 preamble and art. 14 CS3D), and that to support companies in their due diligence obligations, the Commission, in consultation with, among others, the Member States and stakeholders, can issue sector-specific guidelines (art. 19 CS3D). Something that the Commission has already done in the past with, among others, its Communication on a better functioning food supply chain in Europe (COM(2009) 591 final), the joint Communication on responsible sourcing of minerals originating in conflict-affected and high-risk areas towards an integrated EU approach (JOIN(2014) 8 final), and the Commission's Staff Working Document on sustainable garment value chains through EU development action (SWD(2017) 147 final) followed by a Council Conclusion (9381/17 (DEVGEN 103)).

To ensure an equal playing field for companies in the same sector, faced by the same sector-specific (human rights) risks, companies could even benefit from sectoral-level TCAs which may include correction plans to avoid, mitigate or end the human rights risks that either directly or indirectly caused by the business activities. As is indicated in par. 57 of the preamble of the CS3D, in some instances "collaboration with another company could be the only realistic way of bringing to an end actual adverse impacts". Regarding the remediation of adverse impacts, the CS3D suggests that companies should be able to participate in collaborative complaint procedures and notification mechanisms (par. 59 preamble CS3D), again, when it comes to the labour rights obligations of the CS3D, something that could be foreseen by sectoral-level TCAs. Confining this to labour (or human) rights within a certain sector, will also have the advantage of creating bodies and mechanisms that are more specialised and sensitive to the labour rights risks and issues in that sector. Moreover, it may lead to a more coherent and coordinated CSDD, corrective plans (art. 11 CS3D), and remedies within the sector that will make it easier for the whole sector to have a positive impact on the supply chain. Such, especially in light of the obligations for companies to obtain contractual assurances of compliance with their suppliers and partner companies (art. 10 and 11 CS3D). It would contribute to a next step in the harmonisation of obligations that the companies that are part of the supply chains are faced with.

All in all, the CS3D creates a new momentum for TCAs and makes a strong case for sectoral-level TCAs as promoted by Ales c.s.. Time to revive the discussions about the OLF and to actively promote TCAs as instrument for the implementation of labour rights due diligence obligations. The 2023 article *European Framework Agreements in Multinational Companies. What Role for European Labour Law?* by ?ukasz Pisarczyk and Anna Boguska, which is one of the results of the TCA project that the seminar of 16 May was part of, offers a good point of reference to restart these discussions. As these authors also point out, promoting TCAs would also do justice to the Commission's promotion of social dialogue in general and as part of the implementation of the European Pillar of Social Rights.

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*References*

[1] The database is available at: https://ec.europa.eu/social/main.jsp?catId=978&langId=en (accessed 5 July 2024).

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