



EUROPEAN COMMISSION

Brussels, 10.9.2012
SWD(2012) 264 final

COMMISSION STAFF WORKING DOCUMENT

Transnational company agreements: realising the potential of social dialogue

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1. INTRODUCTION

Transnational company agreements (TCAs)¹ are new forms of social dialogue in multinational companies. They provide for voluntary, innovative and socially agreed solutions in companies across Europe to issues of, for example, anticipation of change and restructuring, training, mobility, health and safety at work, or equality. At global level, such agreements, often called International Framework Agreements (IFAs), focus on corporate social responsibility and respect of fundamental rights.

Transnational company agreements have gained significance over the last decade since the first initiatives in 2000. By early 2012, 224 such agreements had been recorded in 144 companies, mostly with headquarters in Europe, covering over 10 million employees.

Examples of transnational company agreements²

- A world leader in transport infrastructure, power generation and transmission agreed with the European Metalworkers Federation (EMF) in 2011 on how to anticipate the impact of market and product trends on employment and skills across 25 European countries.
- The management and the European Works Council (EWC) of a global airline agreed in 2010 on how to inform and consult staff at all levels on the reorganisation of sales agencies at European airports.
- A leading company in oil and gas production and the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) concluded a global agreement in 2008 providing for exchange of information to develop good work practice, industrial relations and respect of fundamental rights in worldwide operations.
- An industrial group that manufactures and markets building materials and systems, the EWC of that group and the European Federation of Building and Woodworkers (EFBWW) signed an Environment, Health and Safety Charter in 2011, applicable all over Europe.

In 2008, the Commission published a Staff Working Document on 'The role of transnational company agreements in the context of increasing international integration'³, accompanied by an analysis mapping existing agreements, in which it drew attention to the key role and potential of such agreements in an increasingly globalised business environment.

In that document, the Commission announced its intention to set up an expert group on transnational company agreements whose remit would be to monitor developments and exchange information on how to support the ongoing process. This group, made up of experts

¹ For the purposes of this document, as was the case in SEC(2008) 2155, 'transnational company agreement' means "an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives."

² Details and full texts can be found in the Database <http://ec.europa.eu/social/TCA>.

³ SEC(2008) 2155 of 2.7.2008.

from Member States and the EU social partners, as well as academics and researchers, representatives of European institutions and company actors, held six meetings between 2009 and 2011. The group's report was issued in early 2012⁴. It contains a wealth of information on the phenomenon of transnational company agreements, including concrete examples, and reviews the main issues arising in this field as well as options for addressing them.

The Commission provided the expert group with its initiatives and work on the subject⁵. Two studies were commissioned in 2009 and 2011. The purpose of the study of 2009 was to clarify to what extent transnational company agreements are governed by rules of private international law and how such rules would apply to such agreements. The study of 2011 reviewed the legal effects produced by company agreements. A searchable online database of agreements⁶ was created in 2011 and welcomed by all stakeholders.

The Commission further organised exchanges of experience, in particular through a workshop with company actors as well as a restructuring forum and a larger conference with the French Presidency of the Council on the transnational dimension of social dialogue and restructuring in 2008. Support was also given to social partners' projects between 2008 and 2011.

It is now time to draw conclusions from the work of the expert group and take stock of developments since 2008. In its Communication COM(2012) 173 'Towards a job-rich recovery', the Commission considered that it '*is essential to establish a shared path of reforms that create the conditions for sustainable creation of quality jobs in the future, and where social partners play an active role at all levels in the preparation and implementation of such reforms. In a growing number of companies, this contribution has taken the form of transnational company agreements, through which agreed responses are given at the European level to the challenges generated by the crisis, and mechanisms are set up to manage change. Transnational company agreements already cover more than 10 million employees; their role needs to be better recognised and supported*'. It announced that the Commission will '*develop further action to disseminate good practice and promote debate with respect to Transnational Company Agreements*'.

The purpose of this document is therefore to propose operational conclusions and outline options for further initiatives. Although it draws on discussions and contributions by members of the expert group, it does not represent the position of that group. It places emphasis on the European dimension of transnational company agreements and is meant to encourage debate.

The discussions surrounding the present document have a strong link to the issues that are being debated and developed by the Commission's Green Paper on restructuring⁷. A number of transnational company agreements address issues related to anticipation and management of change and restructuring. Transnational company agreements are therefore one of the tools available to cope, at the level of companies, with social and economic effects of restructuring in a socially responsible way. Building on the experience of social dialogue at the enterprise level, they may contribute to a fair distribution of the cost of adjustment within multinational enterprises and groups in advance or in critical situations and thus help prevent, mitigate and shorten industrial conflict.

As highlighted in the Commission Communication on a renewed EU strategy 2011-14 for Corporate Social Responsibility⁸, transnational company agreements also have a role to play

⁴ Documents and report available at <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>.

⁵ All documents at <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>.

⁶ Database at <http://ec.europa.eu/social/TCA>.

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0007:FIN:EN:PDF>.

⁸ COM(2011)681 of 25.10.2011.

in the discussions on Corporate Social Responsibility (CSR). CSR contributes to and supplements social dialogue, and CSR issues are taken up by agreements concluded between enterprises and European or global workers' organisations. In that regard, the conclusion of transnational company agreements could also be relevant in the framework of discussions on the elements covered by the above-mentioned Communication, such as on CSR performance or as regards non-financial disclosure requirements. Equally, approaches developed under CSR instruments such as mediation procedures (e.g. under the OECD Guidelines for Multinational Enterprises) could enrich the discussion related to challenges faced by the parties of transnational company agreements.

2. RECOGNISING THE ROLE OF TRANSNATIONAL COMPANY AGREEMENTS AND CONTRIBUTING TO THEIR DEVELOPMENT

Resulting from voluntary initiatives, transnational company agreements play a positive role in identifying and implementing agreed solutions at company level to the challenges posed by a constantly changing business environment. They represent an interesting and promising development of social dialogue at transnational level and for that reason they are increasingly a subject of analytical, legal and policy attention at EU level. However, companies and workers may face difficulties in concluding and implementing particular transnational company agreements and a series of open questions are thus raised.

2.1. The emergence of transnational company agreements ...

Transnational negotiation processes in companies began to emerge from the early 2000s, after the frontrunner *Danone* had experimented with them in the previous decade. The joint texts resulting from these processes cover situations found in the different countries where the European/multinational companies operate. These transnational company agreements stem from purely voluntary initiatives and there are no rules at national, European or international level to govern their negotiation or conclusion.

By mid 2007, there were already 150 texts known through public sources in companies employing 7.5 million people, showing significant development of these texts. By the end of 2009, about 9.8 million employees worldwide were working in companies involved in TCAs, and 6.5 million of them were in companies that had texts with a European or mixed scope. By mid 2011, the database on TCAs listed 215 agreements (some of them having already been renewed several times) in 138 companies. By early 2012, 224 such agreements were known in 144 companies employing over 10 million people.

Companies involved in concluding transnational company agreements are mostly big multinationals in the metal, construction, chemicals, food and financial sectors, headquartered in Europe and having well established European Works Councils.

Of the TCAs listed in the database by mid 2011, 102 have a European scope, of which 15 include non-EEA Member States, and 113 have a global scope. While global texts typically focus on fundamental rights or address the different aspects of corporate social responsibility, transnational texts for the European area tend to have as their core aim the establishment of partnerships to deal with restructuring, reorganisation and anticipative measures. In addition to the organisation of social dialogue itself, the agreements address specific subjects such as health and safety at work, equality in employment, training and mobility, planning of employment and skills needs, measures to avoid dismissals and accompanying measures in case of restructuring.

Transnational company agreements differ greatly from each other, as parties adapt the text to their needs. They are issued under various titles, including declarations, joint opinions,

guidelines, charters, framework agreements or European agreements and may or not be meant as legally binding documents.

Drivers for engaging in transnational negotiations include the company context, for example the need to favour corporate European integration after a merger, strategic Human Resources (HR) policy, for example in regard to anticipation or Health and Safety, active European Works Council (EWC) and trade union objectives.

Actual results depend on the agreements' substantive content, for example where training measures, job security or the maintenance of terms and conditions of employment in case of transfers are provided. In this respect, agreements with a European scope have shown greater capacity to attain their initial objectives than global agreements, since they may refer to a more homogeneous set of rules and traditions.

For those companies that have entered into transnational agreements, these are meant to:

- have a positive impact on understanding and facing challenges, for example as regards the need for and design of measures to anticipate and manage change;
- promote new ways of thinking on both management and employee sides, notably a forward-looking approach to change or safeguarding of equal opportunities;
- bring in a European dimension, contribute to a stronger sense of group-wide corporate common identity across borders;
- constitute a driving force for further action on social issues and introduce managerial principles throughout the group;
- give substance to the role of European representative bodies and link them more strongly to developments at national and/or local levels;
- improve mutual understanding and confidence between management and workers' representatives at both transnational and lower levels.

2.2. ... presents opportunities ...

The steady growth of TCAs confirms their relevance as instruments of social dialogue particularly when, in times of crisis, it appears more difficult for social partners at national or sectoral level to conclude successful negotiations.

Despite being concentrated in a small number of companies, TCAs have already acquired a significant dimension as they involve:

- at least 10 million employees and 100 multinationals headquartered in Europe;
- a significant proportion of the most important companies in the metal and financial sectors headquartered in the EU;
- most of the European and international trade union federations and at least 10 % of the European Works Councils.

Transnational company agreements are seen as having contributed to promoting:

- sustainable economic development and competitiveness, notably by developing best practices as to anticipation and management of change and skills needs in a coordinated way across Member States;
- socially agreed responses at European level to the challenges generated by the economic crisis;
- a stronger European dimension in companies, notably by enabling the development of cross-border solidarity and facilitating cross-border mediation of interests;
- innovation in the social sphere at European level, for example in the areas of Corporate Social Responsibility, equal opportunities and Health and Safety at Work;

- new forms of social dialogue adapted to an increased international integration of multinational companies;
- a social dimension in international relations through the promotion of social dialogue, fundamental social rights and socially responsible HR policies alongside economic, financial and trade relations.

2.3. ...but also challenges

Many companies have been successful in negotiating, in concluding and often in implementing transnational company agreements. This does not mean however that the emergence of these purely voluntary initiatives is free of problems and questions.

At company level, management and employee representatives face difficulties in negotiating, concluding and implementing transnational company agreements, in particular owing to:

- complexity of, delays in or even failure to start content-related negotiation due to the need to negotiate on the procedure before being able to negotiate on the content without any guidance or recognised reference;
- disagreements between parties or problems in implementing the agreements resulting from a lack of clear capacity and/or legitimacy of the signatories;
- 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;
- risks associated with uncertainties as to the legal effects of TCAs and to the application of private international law rules to disputes relating to TCAs;
- resentment among managers and workers' representatives at lower levels about the top-down imposition of measures agreed at an upper level, or even perceived interference with national systems of industrial relations and norms, resulting from the absence of mandating procedures and mechanisms to link the levels of dialogue and norms.

The lack of specific regulations on TCAs at EU level can partly explain some of these difficulties. As a result, a series of open questions regarding actors, transparency, implementation, legal effects, links with other norms and dispute settlement have been raised. However, it has been recognised by stakeholders that the higher level of integration in a European legal and economic environment can help to mitigate the uncertainties which companies and trade unions have to face when they are engaged in worldwide negotiations.

The difficulties will be described in more detail in the following chapters, together with the open questions and possible ways to address them.

2.4. How to recognise the role of transnational company agreements and provide for support tailored to their development?

The recent development of TCAs has given them an increasingly relevant position in social dialogue at EU level. Their role has been recognised by the social partners, academics and the ILO⁹. They are starting to catch the attention of national authorities at least in those countries where transnational companies have their headquarters or are most strongly established.

Two issues may be raised at this stage. The first issue is whether the difficulties mentioned above are sufficiently important to hamper development of the potential of TCAs. The second issue is whether it is justified for the EU to take a policy-related, rather than just an analytical,

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See

<http://www.ilo.org/ifpdial/information-resources/cross-border-social-dialogue-and-agreements/lang--en/index.htm> and in particular Papadakis, K. (ed.), *Shaping global industrial relations: the impact of International Framework Agreements*, Palgrave Macmillan, International Labour Organisation, 2011.

interest in this matter. It is undisputed that the phenomenon of TCAs is of EU-wide importance since the agreements are established between actors that have a representative status in a multinational context — management of transnational companies and EU-wide federations or European Works Councils.

Is it justified to provide support at EU level for the development of TCAs by addressing at that level the difficulties and challenges we have just identified? The work of the expert group did not lead to a consensus of views around these central issues. On the one hand, experts from employers' organisations took the view that no legislative action needs to be taken since such difficulties are not sufficiently serious and have not so far hampered the steady growth of TCAs. In their view, any legal instrument could have the opposite effect by discouraging transnational companies from entering into negotiations with workers' representatives, for fear of legal complications¹⁰. On the other hand, trade union experts argued that more clarity and better implementation of TCAs are needed and that there is still considerable uncertainty as to the effects of TCAs when they are applied in Member States with different internal regulations and industrial relations' systems. In their view, the further development of transnational company agreements would need adequate EU support, including by means of a legal framework that would address the challenges identified.

As an emerging factor in EU social dialogue, TCAs deserve to be promoted in line with the provisions of the Treaty (Articles 152 and 153). This would also have a positive impact on rights enshrined in the Charter of Fundamental Rights of the EU (Articles 27 and 28). It is also clear that they serve a useful purpose — to identify and implement feasible negotiated solutions tailored to the structure and circumstances of each company, particularly in the case of large restructuring processes. This is consistent with the principles and objectives underpinning the Europe 2020 Strategy.

It is recognised that support given at EU level could contribute to alleviating some of the difficulties faced by companies and workers when negotiating, concluding and implementing TCAs with a European scope. However, such support would need to be:

- flexible, adapted to the needs of the companies and workers concerned;
- designed in close cooperation with the European social partners, or better still initiated by them;
- optional, as companies and workers should be able to innovate and operate outside any instrument intended to support transnational company agreements; parties should be free to negotiate and conclude agreements that are custom-built to their needs and to a specific situation.

A series of open questions which are raised by TCAs are detailed in the following chapters. They relate to:

- the actors that should be involved in transnational company agreements, their capacity, their legitimacy, their role;
- the form and transparency of transnational company agreements;
- the implementation of transnational company agreements and the links between them and other levels of social dialogue and norms;
- the legal effects of transnational company agreements;
- settling disputes over the interpretation and application of transnational company agreements.

¹⁰ This opinion was not shared by some individual employers having taken part in TCA negotiations, who recognise the need for further legal clarity.

3. SUPPORTING THE ACTORS INVOLVED IN TRANSNATIONAL COMPANY AGREEMENTS AND CLARIFYING THEIR ROLE

The issue of who these actors are is crucial in a transnational negotiation at company level, as in any negotiation.

3.1. Different categories of actors are involved in transnational company agreements ...

The following categories of actors today play a part in representing workers in the context of transnational company agreements:

- European Works Councils (EWCs) generally play a key role. The initiative to start a transnational negotiation often originates from the EWCs. They have also signed a large number of the texts, particularly the European ones, even though they have no negotiating powers under Directive 2009/38/EC.
- European and/or international workers' federations sign the majority of texts, notably global ones. Their role has increased, as a result of some union federations' strategies in triggering and organising transnational negotiation mechanisms in the European sphere.
- National workers' organisations, generally the ones active in the country of the company's headquarters, often sign global texts along with international workers' federations.

On the management side, involvement of national and local management, together with corporate management, varies from one company to another.

As to the negotiating process, it may be very centralised, being limited to the European HR Director and the coordinator of the European Works Council, or may actively involve local actors at various stages.

3.2. ... but actors face problems of legitimacy and capacity which hamper the conclusion and implementation of transnational company agreements

Before any real negotiation can start, it is necessary to determine who the negotiating parties will be, which in turn requires negotiation. In concrete terms, the question is who will sit at the table on the employee side. As no rules or reference procedures exist, several worker representatives may feel entitled to a seat and the company management may feel free to choose its counterpart. The choice made risks being perceived as arbitrary, leaving non-chosen parties dissatisfied or entailing compensatory measures for the company or the actual negotiator on the employee side. In some cases, the negotiation between management and employee representatives cannot even start, as the negotiation on the process could not be successfully concluded.

In several Member States, none of the categories of actors on the employee side has the full legitimacy or the legal capacity needed to conclude transnational agreements with an effect equivalent to that of company agreements under national rules and/or practice:

- The sphere of competence of European Works Councils under Directive 2009/38/EC covers information and consultation, not negotiation. Their membership is tailored to that end and determining their representativeness is problematic given the frequent lack of proportionality when set against the worker head count. Furthermore, their involvement in negotiations is at odds with national systems that make a clear distinction between the consultative role of elected bodies (works councils) and the negotiating mandates entrusted to trade unions (in France for example) or which utilise a single trade-union channel for worker representation (in Italy or in the Nordic countries for example);
- The representativeness of European and international workers' organisations and their mandates to negotiate and sign are not always clear. With the European Metalworkers'

Federation having paved the way in this respect, several other European industry federations (EMCEF, EPSU, FSE-THC, UNI-finance, UNI graphical) have adopted internal rules of procedure to that end, but not all have done so. The involvement of trade-union organisations in negotiations on matters such as restructuring also comes up against national systems under which the works council is responsible for such matters (in Germany for example);

- When it comes to concluding transnational texts, the crucial limitation affecting national workers' organisations lies in their national field of competence.

Where the process for concluding transnational agreements is unclear, conflicts of competence may occur between European-level and national-level bodies as well as between elected and trade union bodies representing the employees. In particular:

- In countries where works councils are competent to sign company agreements, the involvement of European or transnational trade unions in company-related issues is not well understood;
- In countries where trade unions are competent to sign company agreements, the signature of a transnational agreement by the European Works Council conflicts with the national system;
- The signature of a transnational agreement by European bodies which does not in some way involve all actors entitled to negotiate the issue at national level is seen as illegitimate or a threat to national prerogatives.

The further implementation of a transnational agreement is burdened with uncertainties. Negotiators need to innovate to ensure the text agreed is accepted as widely as possible and has the desired impact. Where the signatories' capacity to represent and enter into commitments is not recognised by the workforce or local management, the actual application of a transnational agreement is at risk. 'Opt-outs' have also occurred in some cases, following disagreements between national actors and the negotiators. In further cases, the text has simply remained ignored locally.

3.3. How to support the actors in transnational company agreements and clarify their role?

The issue of the actors is crucial for the development of transnational company agreements. How to build on the positive results that may be attained through transnational company agreements, by ensuring the actors have the legitimacy and capacity to negotiate, conclude and implement transnational company agreements while fully respecting each party's responsibility and autonomy, is the aim of the following options that ought to be considered.

An optional reference (or framework) relating to the actors involved in the conclusion of transnational company agreements could be provided:

- Parties could use this reference/framework to avoid difficult pre-negotiations where they so wish;
- This should not prevent the negotiation and conclusion of transnational texts outside this reference/framework where companies wish to innovate or to conclude texts which are not intended to produce the effects of company agreements;
- This reference/framework could be provided for example through guidelines; European social partners, at cross-industry or sectoral level, should be given a primary role in defining or contributing to this reference/framework.

The legitimacy of the negotiating and signatory parties would need to be ensured by the parties themselves, where appropriate with the support of procedures and arrangements worked out by the social partners at sectoral or cross-industry levels:

- Information, consultation and mandating mechanisms could be established to enable employee-side representatives to negotiate and sign an agreement on behalf of all employees of the multinational, its subsidiaries and, where relevant, its suppliers/contractors;
- It should be ensured that management representatives are able to deliver the commitment of the multinational company itself, its subsidiaries and, where relevant, its suppliers or contractors;
- On the employee side the respective roles of trade-union industry federations with established procedures as to the negotiation and conclusion of transnational company agreements and European Works Councils could be clarified ;
- The parties negotiating on the issue at stake at national level should take part from an early stage in the negotiation and conclusion of a transnational agreement.

The capacity of the negotiating and signatory parties would need to be ensured where the agreement is intended to produce legal effects:

- The negotiators and the signatories could be given a clear mandate to do so on behalf of the employees and companies concerned;
- The mandating process could involve all actors entitled, under national rules and/or practice, to negotiate the issues covered by the negotiation;
- The legal capacity of the signatory parties to undertake commitments could be checked.

4. PROMOTING TRANSPARENCY OF TRANSNATIONAL COMPANY AGREEMENTS

Clarity about the aim and the consequences, as well as identification and information of the persons affected, are important for allowing transnational company agreements to fulfil their purpose, as for any agreement.

4.1. There is noticeable variety in the form of transnational texts and in their dissemination ...

At present, particularly for the oldest transnational company agreements, there is wide diversity in the titles given to the texts, with no clear correspondence between the main issue addressed in the texts and their binding or declarative nature.

Similarly, there is wide variety in the form and drafting of transnational company agreements even though standards have been established by European and international trade union organisations over time. Date, signatories, scope, addressees and duration are still not always clear and the texts are often drafted as a mix of political declarations and agreements.

In most cases, signatories to a transnational company agreement make provision for its internal dissemination upon its conclusion. Some companies go to great lengths to disseminate and implement the agreement. European and international trade union organisations have also started to establish procedures in this regard. The employees and management coming within the scope of a transnational company agreement are however not always informed about its existence and do not always have access to its content. This holds true even more for subcontractors and suppliers falling under the scope of the agreement, although over one third of the agreements contain provisions covering them. Long-term provision of information to the addressees is also not always ensured.

Some transnational company agreements form a specific category, being drafted and treated as group or company agreements under national law and in some cases sent to national authorities and/or the Commission for ‘registration’ in the same way as national collective agreements.

Many texts of transnational company agreements are available to the public through a series of websites, set up mainly by trade unions, research institutes or consultancy firms. As announced by the Commission in its 2008 documents and discussed in the expert group, a searchable database on transnational company agreements was created and has been available since 2011 to stakeholders and the general public on the Europa website¹¹. In 2011, it fully displayed 199 of the 215 identified transnational company agreements with additional information on the company concerned and search criteria related to company, country of headquarters, sector, type of text, employee signature parties, geographical scope, functional scope, main and other topics addressed as well as keywords.

4.2. ... but issues are raised about clarity and respect of the rights of the affected persons

There is a lack of clarity in the way many transnational company agreements are drafted, particularly the oldest ones, which may be a source of confusion:

- The title of the text does not necessarily reflect its content and the type of commitments it involves, which may create uncertainty in particular as to its declarative or binding nature;
- Basic and necessary information is not always clearly displayed, such as the date, name and function of the signatories, scope, addressees and duration, which makes it difficult to assess the consequences or ensure appropriate implementation and follow-up.

Transnational company agreements usually cannot produce the effects associated with collective agreements, in particular company agreements in any of the covered countries, even if the parties would wish so, because their form, content or process do not follow the relevant rules or requirements.

For transnational company agreements that entail reciprocal commitments, especially where they are stated in the form of concrete and detailed provisions or where failure to comply with them may have consequences, the fact that employees, management or subcontractors coming within the scope of a transnational text are not always informed about its existence and do not always have access to its content directly affects their rights.

Non-disclosure of the content of transnational company agreements runs counter to national systems under which collective/company agreements are necessarily public documents and need to be brought to the knowledge of all stakeholders (in France or Spain for example). The systematic disclosure of such content can on the contrary be perceived negatively by signatories from Member States in which company agreements – and even collective agreements at sectoral level – are generally considered as private documents (in Nordic countries or the Netherlands for example).

4.3. How to support best practices, ensure information of the affected persons and promote transparency?

The question is how to give transnational company agreements the appropriate form and transparency to enable them to fulfil the objective assigned to them by the parties and respect the rights of any person they affect with due regard to each party’s responsibility and autonomy. The following options could be considered to that end.

¹¹

At <http://ec.europa.eu/social/TCA>.

Signatories to a transnational text could give it a title clearly indicating the type of text it is, distinguishing in particular between agreements entailing reciprocal commitments, process-oriented, declarative and procedural texts.

Where the parties wish them to produce effects other than declaratory, transnational company agreements could take account of certain principles, which could be developed in the form of a standard contract or good practice body of rules, in particular:

- be dated and signed,
- show clearly the name and capacity of the person signing,
- indicate the persons to whom the text is addressed,
- provide for a date by which its provisions are to be implemented and the way this is to be done as well as rules for monitoring the agreement and settling disputes.

Management and employees falling within the scope of a transnational company agreement could be guaranteed information on its existence and access to its content.

As to the public disclosure of transnational company agreements in the interests of transparency, knowledge and best practices in this area:

- Signatories could always be in a position to refuse public disclosure of the text they have signed or to correct inaccurate information related to this text;
- The database on transnational company agreements could be maintained and the parties invited to transmit new agreements or amendments for its update;
- Notification of new or renewed texts to a public authority or a joint body promoted by the social partners could be encouraged.

European social partners, at cross-industry or sectoral level, could be invited to issue guidance or rules as to the form and transparency of transnational company agreements.

Coordination could be further organised between the EU and the ILO with a view to improving information on transnational company agreements.

5. ENHANCING THE IMPLEMENTATION OF TRANSNATIONAL COMPANY AGREEMENTS AND THE LINKS WITH OTHER LEVELS OF SOCIAL DIALOGUE

The quality of implementation of a transnational company agreement depends on its provisions, on measures adopted to ensure ownership of the agreement in the company and also on the way it is integrated into the landscape of social dialogue.

5.1. Implementing practices and links with other levels of social dialogue are diverse ...

At present, particularly for the oldest transnational company agreements, there is a broad spectrum of implementing practices ranging from the absence of any follow-up measure to extensive efforts to ensure an agreement is being ‘deployed’ across all sites of the company.

European and international trade union organisations have started to establish procedures to ensure the involvement of national trade union organisations and the European Works Councils or ad hoc committees/bodies in the conclusion of transnational company agreements and their proper implementation.

As to the links between transnational company agreements and other levels of social dialogue, initiatives exist but they are neither systematic nor integrated:

- European social dialogue: some transnational agreements aim at implementing outcomes of European social dialogue at cross-industry level (e.g. on equal opportunities or on

stress) or at sectoral level (e.g. on lifelong learning in the financial sector) or use the definitions and provisions of European texts as references. As explored by the group of experts on transnational company agreements, transnational agreements are also of interest for European sectoral social dialogue through the negotiating and implementation procedures established by European trade union federations, the role of TCAs in certain sectors such as energy or civil aviation and the discussion about TCAs in certain sectoral social dialogue committees such as chemicals or electricity.¹²

- National social dialogue in the company: noteworthy points include the involvement of national trade unions in some TCAs, the transnational scope of some national company agreements (e.g.. on financial participation), the negotiation of a TCA after a national agreement has been concluded (e.g. skills planning in France/Europe), the implementation of some TCAs through national agreements and the effects of transnational agreements on establishment, improvement or reinforcement of local social dialogue.
- National social dialogue beyond the company: this may refer to the objectives of international coordination of national trade unions, the decent work agenda of national social partners, the implementation of national sectoral or cross-industry collective agreements through some TCAs (e.g. equal opportunities), the effects of transnational agreements on establishment, improvement or reinforcement of national social dialogue (e.g. for some new Member States or non-European countries).
- Global social dialogue: it should be noted that transnational agreements promote global social dialogue in companies, promote ILO Conventions, support international cooperation of trade unions and other international instruments relating to social dialogue. As to content, topics such as training, restructuring, mobility, health and safety or equal opportunities are addressed at different levels of social dialogue.
- Transnational social dialogue in different companies: informal consultations are held between employers in what can be considered as a process of innovation. On the employee side, the same actors are found in different negotiations and standard agreements are developed.

5.2. ... but issues are raised over implementation of transnational company agreements and conflicts between levels of social dialogue arise

The following problems have been identified in the implementation of transnational company agreements, in addition to the ones related to the actors involved in such agreements.

Some transnational company agreements do not produce the effects intended by the signatories because of a lack of follow-up measures or conflicts with national norms or views of the actors at national level.

The present approach as to the ‘implementation’ of transnational company agreements by local company agreements is not satisfactory because it is too complex and leads to multiple national negotiations in a burdensome and often incoherent manner.

Inconsistency and conflicts between different outcomes of social dialogue stem from the lack of organised links between transnational company agreements and other levels of social dialogue. TCAs may thus interfere with the application of collective agreements at national level and the absence of a non-regression clause becomes a reason for concern amongst social actors and raises issues of labour law.

¹²

See the summary of the related discussions and presentations in the Expert Group's report, pages 63-66.

5.3. How to support procedures to implement transnational company agreements and promote consistency between levels of social dialogue?

The question is therefore how to support improved practice in the implementation of TCAs and coherence between transnational agreements and national, European and global social dialogue at cross-industry, sectoral and company levels while fully respecting each party's responsibility and autonomy. The following section contains options to that end.

Where the parties wish transnational company agreements to produce effects other than declaratory, they could provide for procedures to implement them.

An optional reference or framework for the implementation of transnational company agreements could be provided:

- Parties could use this reference/framework to avoid difficulties in implementation where they so wish;
- This should not prevent the implementation of transnational texts outside this reference/framework, in particular where companies wish to innovate or to conclude declaratory texts;
- This reference/framework could be provided for example through guidelines; European social partners, at cross-industry or sectoral level, should be given a primary role in defining or contributing to this reference/framework.

The links and coherence between transnational company agreements and other levels of social dialogue, in particular European social dialogue, could be reinforced, notably through the promotion of best practices.

The interaction between the different levels of social dialogue could be subject to further work involving the European Commission together with social partners at different levels and other stakeholders.

6. IMPROVING LEGAL CERTAINTY IN THE EFFECTS OF TRANSNATIONAL COMPANY AGREEMENTS

To facilitate the development of transnational company agreements, parties should be able to determine and control the legal effects produced by the text they conclude, in accordance with national norms in place. What legal and practical obstacles have to be faced and what could be done in this regard?

6.1. The legal status of transnational company agreements is unclear and varies from one Member State to another

The parties' intentions as to the effects of transnational company agreements may vary widely from declaratory texts to binding agreements producing direct legal effects.

The actual legal status of the text is thus unclear and may differ from the parties' intentions. The lack of norms and of case-law means that an agreement might be considered as an employer's unilateral commitment or a contract under certain laws and that its legal status may vary from one country to another. In fact, the legal effects of an agreement are conditioned by the applicable national framework, under which various elements could enter into consideration such as the content, the signatories and their representativeness or the procedure followed.

There are differing national rules as to what constitutes a collective agreement at company level, in particular regarding the capacity to negotiate, the link between company agreements and other norms and levels of social dialogue, and the effects on individual working contracts.

Two main types of personal enforceability exist: the provisions are applied to all employees who fall within the scope of the agreement regardless of their membership of the signatory party or it can be limited to the workers affiliated to the trade union signing the agreement.

A study on the characteristics and legal effects of agreements between companies and workers' representatives has been commissioned by the Commission with the aim of providing a comprehensive review of those aspects under national rules; identifying practical and legal obstacles faced in the context of TCAs; and exploring options to overcome them. Results were issued in 2011¹³.

6.2. Intended and actual legal effects of agreements do not match and there are legal risks associated with transnational company agreements

Legal risks attach to the conclusion of transnational company agreements, particularly for company management.

The parties face difficulties in controlling the legal effects of transnational company agreements as their intentions and the actual legal effects produced can diverge considerably.

There is no coherence across Member States as to the present legal effects of a given transnational company agreement.

Interferences may be created in the legal effects of national, local or company-based collective agreements by the absence of links between TCAs and other levels of agreements.

6.3. How to improve legal certainty in the effects of transnational company agreements?

The following options could be considered to improve legal certainty in the effects of TCAs.

The parties could clearly state in the agreement their intentions as to the legal effects of the TCA they conclude.

Where a transnational company agreement is intended to produce legal effects, certain rules could be observed, also addressing other issues (actors, implementation, etc.) at the same time:

- The legal capacity of the negotiating and signatory parties and their legitimacy should be ensured – this implies appropriate information and consultation procedures and coherence with other levels of social dialogue;
- The drafting of the agreement could observe the principles described under 4.3;
- Procedures to implement the agreement could be provided;
- Possible contradictions with other levels of norms and agreements could be subject to prior scrutiny and avoided, and derogations in peius should not be possible;

A mechanism aiming at clarifying legal effects of transnational company agreements could be worked out:

- Parties could use this mechanism where they so wish;
- This should not prevent transnational texts from being concluded outside this mechanism;
- The design of this mechanism could be worked out by or in close cooperation with European social partners;
- Provided the signature of the agreement follows the rules described above, in particular as to the capacity of the parties, the mechanism could:

¹³ See the documents discussed by the Sixth Meeting of the Expert Group under <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>.

- either provide for automatic legal effects similar to the ones produced by company agreements under national law and/or practice;
- or provide for an invitation to or obligation on the appropriate /mandating bodies at national level to take the necessary measures to enable the agreement to produce the legal effects of a company agreement concluded under national rules and/or practice.

7. PREVENTION AND SETTLEMENT OF DISPUTES

Whereas trust between the parties remains a fundamental condition for the conclusion and the implementation of any agreement, social actors must be able to implement and protect transnational company agreements concluded, to follow their development and to resolve any differences of interpretation and disputes that may arise in their application

7.1. Few mechanisms in place to handle disputes

Some transnational agreements contain provisions addressing dispute settlement. This is usually done in vague terms but some agreements do provide for more detailed provisions in this regard, notably through the involvement of joint monitoring committees established specifically for the agreement in question. The type of text is not a crucial criterion in this respect: dispute settlement provisions are not more frequent in texts addressing restructuring and/or anticipation of change at European level than in global agreements.

Some transnational agreements do specify the linguistic version to be referred to, as well as the applicable legislation and competent jurisdiction, preference being given in this case to that of the country where the company's headquarters are. Most agreements however do not contain any such indication and some of the earlier agreements explicitly rule out the competence of any external body to settle disputes over interpretation or implementation of the agreement.

Some transnational company agreements provide for penalties or compensatory payments for the employees or management, in the event of failure to observe the provisions of the agreement.

As a result of a transnational company agreement, transnational transfer of personal data may be necessary. As regards data protection issues raised by transnational agreements, most actors are not aware of them and the obligation to provide for compliance enforcement rights when data are transferred outside the EU seems to go unheeded. Any processing of personal data has to comply with the Data Protection Directive 95/46/EC¹⁴. As far as data processing involves the transfer of personal data from an EU Member State to a company in a non-EU country, Article 25 and 26 of the Directive apply.

So far, no party to a transnational company agreement or person affected by a transnational company agreement seems to have brought a dispute before the courts or before an out-of-court dispute resolution body.

¹⁴

Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

7.2. Lack of awareness, complexity and difficulties arise for settling disputes in or out of court

Signatories of transnational company agreements and affected parties are rarely well equipped to prevent and resolve internally disputes over interpretation or implementation that may arise.

The risks for management and employees concerned of someone ‘going it alone’, of action being taken by associations external to the company or of non-compliance with previous commitments following a merger or restructuring, are not well addressed in the present situation.

For court settlement of disputes, the 2010 study on private international law aspects of dispute settlement related to transnational company agreements shows in detail the particular difficulties raised by the application of private international law rules to transnational texts in order to determine the applicable legislation and the competent jurisdiction. Main instruments are the Rome Convention, replaced by the ‘Rome I’ Regulation since 17 December 2009¹⁵, and the ‘Brussels I’ Regulation¹⁶ that has largely replaced the Brussels Convention of 1968.

For out-of-court settlement of disputes, such as conciliation, mediation or arbitration, it is considered that parties would face major difficulties in using existing mechanisms. Although national industrial relations systems provide for developed mechanisms to that end, they are not suited to transnational company agreements. A study commissioned by the Commission will further explore this aspect in the course of 2012.

7.3. How to favour prevention and settle disputes?

Potential ways of preventing and properly settling disputes while fully respecting each party’s responsibility and autonomy are described below.

To prevent disputes, where parties wish a transnational company agreement to produce effects other than declaratory, they could provide for:

- monitoring mechanisms and indicators to enable them to assess results and control risks;
- adaptation mechanisms to help improve provisions of the text that prove difficult to apply over time, adapting to changing needs, developing actions, or addressing change in the structure of the company;
- first-level dispute resolution mechanisms to enable fast resolution of problems or disagreements in interpretation or implementation of the agreement.

To limit the risks associated with court settlement of disputes over the interpretation or implementation of a transnational company agreement, the parties could consider stating the applicable law and the competent jurisdiction in the agreement.

The content of EU rules on data protection as well as the findings of the 2010 study on private international law and its recommendations and the forthcoming study on out-of-court dispute settlement mechanisms could be further brought to the knowledge of the actors involved in transnational company agreements.

The European social partners, at cross-industry or sectoral levels, could be invited to work on guidance or negotiate agreements on first-level or other dispute resolution mechanisms,

¹⁵ Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6); 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 (Rome II) (OJ L 199, 31.7.2007, p. 40).

¹⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

conciliation or mediation so as to facilitate the prevention and out-of-court settlement of disputes over transnational company agreements.

8. CONCLUSION

Transnational company agreements require policy attention at European level. They play a positive role in identifying and implementing agreed solutions at company level to the challenges posed by a constantly changing business environment, in particular in the context of corporate restructuring. Today, over 10 million employees are affected.

The work of the group of experts made it possible to examine issues relating to transnational company agreements, identify difficulties encountered when negotiating, concluding and implementing TCAs and explore possible ways to address them.

To address the challenges identified, EU action would aim at recognising the role of TCAs and contributing to their further development, notably to:

- support the actors in TCAs and clarify their role;
- promote transparency in TCAs;
- enhance the implementation of TCAs and the links with other levels of social dialogue;
- improve legal certainty in the effects of TCAs;
- enable better prevention and settlement of disputes.

A series of options for action have been identified with the above objectives in mind. Addressed to the actors directly involved in TCAs, institutional stakeholders as well as the European social partners, at cross-industry or sectoral level, these options mainly involve:

- issuing guidance and promoting good practice;
- maintaining the database and improving information on TCAs;
- establishing references/frameworks for use by parties involved or planning to be involved in the negotiation of TCAs;
- working out a mechanism aiming at clarifying legal effects of TCAs where parties so wish.

The area of transnational company agreements pertains to social dialogue and therefore requires as far as possible convergence, consensus and joint initiatives of the social partners. These conclusions stemming from the work of the group of experts are now meant to encourage debate, in particular between social partners, on support to be provided at EU level that could contribute to the development of TCAs in the European area.

The Commission has worked since 2008 with stakeholders to monitor developments, analyse issues and exchange information on how to best support transnational company agreements. With the present document, the Commission invites all interested parties to share their views on the main elements set out above and in particular regarding the following issues:

- Is the analysis as to challenges and opportunities related to transnational company agreements shared by stakeholders? Are there important other aspects that have not been taken up so far?
- Which options should be chosen to support actors involved in transnational company agreements and with a view to clarifying their role?
- What are possible ways to raise awareness as to the data protection obligations to be respected, in particular with regard to transfers of personal data to non-EU countries?
- How can more transparency of transnational company agreements be achieved?

- How can the implementation of transnational company agreements be improved and their interrelation with other levels of social dialogue be better addressed?
- How can more legal certainty in the application of transnational company agreements be achieved? Should the development of a mechanism aiming at clarifying legal effects of such agreements be envisaged?
- Should action be taken to support the prevention of disputes and out-of-court settlement? If yes, which action(s)?
- Should an optional framework be developed that addresses the above-mentioned issues, for example in the form of guidelines? What should be the main elements of such a framework?
- Who should be the main actors and which role should be given in particular to social partners, and at what level?

Reactions can be sent by email to empl-tca@ec.europa.eu or by surface mail to European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Unit B2 (Labour Law), Rue Joseph II, 54, Office J-54/01-58, 1049 Brussels by 31/12/2012.