



## European Commission's consultation on the Transnational Company Agreements (TCAs)

Position of the ETUC adopted by the ETUC Executive Committee at their meeting on 17–18 October 2012

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### Background

In recent years Transnational Company Agreements (TCAs) have become an increasing practice in transnational companies. About 220 texts of different kinds (agreements, protocols, declarations, etc.) have been signed in 138 multinational companies covering more than 10 million workers worldwide. Almost 85% of such TCAs should be defined as European Framework Agreements (EFAs) according to their geographical scope.

The ETUC Discussion Note “More and Better European Company Framework Agreements: Enhancing Trade Unions in Transnational Negotiations with Transnational Companies” (Discussion Note) was submitted to the ETUC Executive Committee on 5-6 June 2012 with the aim of informing the ETUC affiliates about the most recent developments in this field and of clarifying the role of European trade unions in triggering and leading transnational negotiations with multinational companies.

The Discussion Note also draws attention to the opportunities and difficulties concerning the implementation of transnational agreements. In the Annex to the Discussion Note, the ETUC illustrates the recurrent characteristics of the procedures for negotiating and managing EFAs established by European Trade Union Federations.

The Discussion Note also underlined the idea that EFAs and transnational negotiation should support and enhance national collective bargaining practices and possibly help in disseminating positive collective bargaining results from the countries where industrial relations are stronger to the other European countries. Any kind of misuse of EFAs by the companies aimed at undermining national practices and collective bargaining systems should be countered.

On the 10th of September the European Commission issued the Staff Working Document “Transnational company agreements: realising the potential of social dialogue” (Staff Document). The Staff Document provides some conclusions - largely based on the outcomes of the Group of Experts that was in place from 2009 to 2011 - in order to follow up the invitation contained in the Communication COM(2012)173final “Towards a Job-Rich Recovery” in which it is stated that the role of TCAs “needs to be better recognised and supported” and invites the European Commission to “develop further action to disseminate good practice and promote debate with respect to Transnational Company Agreements”.

The Staff Document considers transnational negotiations with multinational companies to be

part of the social dialogue at European level and therefore any initiative to enhance it “requires as far as possible convergence, consensus and joint initiatives of the social partners”.

The Staff Document also launches a public consultation aimed at collecting the opinions of relevant stakeholders on the main issues raised in the document and summarised in 9 key questions concerning the general scope and amplitude of a European policy – more precisely, they refer to the actors, legitimacy, transparency, implementation, legal effects and dispute resolution concerning TCAs.

This Resolution is aimed at defining the ETUC position, in order to provide a joint response to the European Commission’s consultation on transnational negotiations with multinational companies. This Resolution is also meant to be a reference for those affiliates who wish to submit their responses to the public consultation.

### The ETUC’s position

The ETUC welcomes the Staff Document of the European Commission as it shows that the exercise carried out with experts and social partners in recent years has achieved the objective of creating a common understanding of the phenomenon and can establish common recommendations for European social partners that wish to negotiate at transnational level.

In particular, the ETUC looks positively on the establishing of an enabling environment for EFAs as they have shown to ‘have greater capacity to attain their initial objectives’ and they ‘may refer to a more homogenous set of rules and traditions’ (see also Staff Document, page 5).

EFAs can have positive effects on social dialogue from different perspectives:

- They can promote upwards harmonisation of working conditions throughout the operations of the same transnational company (TNC) in different countries so that higher standards prevail everywhere, with full respect of national collective bargaining traditions;
- They can provide innovative routes for anticipating change in transnational companies;
- In cross-border restructuring processes, they are an instrument for building a larger cross-border solidarity, facilitating the cross-border mediation of interests;
- They can support and enhance social dialogue in countries where industrial relations are underdeveloped.

If, on the one hand, EFAs can play a relevant role in enriching industrial relations in TNCs, it is necessary on the other hand to get rid of the uncertainties and obstacles that are currently hampering transnational negotiations. The existing shortfalls in defining the entitled actors and their mandate, in the form and transparency of the agreements, in the link between the implementation of transnational agreements’ results and full respect of national collective bargaining traditions and in the provisions aimed at preventing legal disputes can undermine the concrete application and effects of EFAs at national and branch level.

Therefore, the ETUC agrees that EFAs should be supported and further developed, in social dialogue at cross-industry and sectoral level. The engagement of the European Commission is welcome as long as it respects the autonomy of the national and European social partners in developing transnational negotiations and in setting the rules of the game themselves.

Many ETUFs, together with their national affiliates, have already established (or are on the way to establishing) the procedures in which transnational negotiations should take place (see examples attached). Such procedures have been demonstrated to work and present relevant elements of convergence in envisaging a procedural framework for negotiations at European level.

ETUFs' procedures for transnational negotiations with TNCs have already provided concrete answers to the questions addressed by the Commission in the Staff Document and in particular in clarifying issues concerning:

- The actors entitled to carry on negotiations and sign the agreements;
- How to get the mandate to negotiate and set up the delegations, with strict cooperation between ETUFs and national trade unions;
- The best form of the agreements, in order to ensure the implementation of their legal effects in and in full respect of different national contexts;
- Provisions aimed at preventing legal disputes, also through monitoring systems, first level dispute resolution mechanisms, penalties etc. (without prejudice to the national dispute resolution systems);
- Non regression clauses to be included in all EFAs;
- Proper paths for promoting the transparency and dissemination of information regarding EFAs.

After having studied the current practices and analysed the solutions that parties have worked out for their negotiations, the ETUC is convinced that the ETUFs should lead the negotiations and be the actor entitled to sign an EFA, in strict cooperation with relevant national trade unions through appropriate mandate and negotiation procedures. The ETUFs are already recognised as the actors by the European Commission and their representativeness is established beyond doubt. The Staff Document recognises this implicitly by referring to the link to the European sectoral social dialogue. On the employees' side, the ETUFs are responsible for properly involving the entitled national and company level trade unions in the European negotiations according to the different national practices, and (when required by such practices) the works councils.

European Works Councils and other actors (like IRTUCs – Interregional Trade Union Councils) are able to detect the need/opportunity for a transnational agreement, initiate the process and/or pave the way for negotiations, help in ensuring the transparency and dissemination of information concerning the agreements towards the workers involved. It has to be stressed that the EWCs do not have a negotiation mandate. It will be up to the ETUFs, in strict cooperation with their national affiliates, to design the procedural rules in which EWCs and other relevant actors can play a role as long as they can enrich the final content of the agreements and improve their implementation.

Such procedures have not been adopted by all ETUFs or not applied in all sectors covered by ETUFs. The ETUC will cooperate with ETUFs in order to encourage the adoption and spread of suitable procedures for transnational negotiations with transnational companies to ensure a coherent setting of rules in different sectors and across sectors (in case of multi-sectoral companies), in line with the principles adopted by ETUFs.

Too often, the nature and degree of binding capacity of an EFA remains uncertain because of the deficiencies of the mandate enjoyed by the employer and/or by the management at national/branch level. Starting and concluding negotiations always depends on free and joint decisions by the parties, but in the absence of shared procedures and rules it can be very difficult to distinguish between proper agreements and mere non-binding declarations, and to ensure the full implementation and legal effects of EFAs.

It cannot be excluded that third parties (national courts or extrajudicial bodies) may be called upon to resolve conflicts or disputes in the interest of either one of the signatory parties or the beneficiaries of the agreements (e.g. an individual employee).

Certain legal implications of an EFA cannot be effectively handled by social partners and predefined optional and viable legal solutions may be of help for faster and more effective negotiations. A procedure leading to a clear mandate for negotiations, as well as the strong involvement of national trade unions could contribute to solve these problems, since it is at national level that TCAs have to be transposed.

Therefore, while preserving the autonomy of the social partners in establishing the rules of the game, we should be aware that certain legally-related aspects of transnational negotiations may need further support in terms of an optional framework of rules and recommendations.

An optional framework of rules for transnational negotiation with multinational companies may still be needed to provide references for those who wish to be engaged in transnational agreements. It is mainly due to some ambiguities that trade unions alone cannot resolve, especially when the negotiating parties desire to achieve binding commitments whose terms are supposed to be applicable in different countries with the same extent and effectiveness.

Collective bargaining is a trade union prerogative whether at enterprise, national or European level. For that reason the legitimacy of actors is a key issue in any European initiative and implementation of agreements has to be done in accordance with existing national practices.

Furthermore, the optional framework should state how conflicts and disputes over EFAs shall be solved and also how to solve disputes regarding the interpretation of the optional framework.

The ETUC looks favourably on the adoption of an optional frame of rules and recommendations for EFAs and largely agrees with the possible contents of such a framework, as described in Staff Working Document. It's up to the European Commission to propose to the European social partners the proper European legal tool for supporting this process, in order to open further consultation and possible negotiation.

We are aware that the most representative employers' associations at European level currently have a negative attitude towards getting engaged in such an exercise, but the ETUC is confident that a different opinion may emerge from many of the multinational companies

operating in Europe and from the sectoral employers' organizations, notably in the context of the sectoral social dialogue. The sectoral social dialogue would be the more appropriate level for developing and implementing such a framework of rules and recommendations.

An optional framework will also help the European Commission and social partners to improve the database on TCAs through better definitions of the agreements according to their scopes, forms, commitments, procedures and effects, as well as to set up a European procedure for the registration of the agreements.

## **Annex:**

### **ETUFs procedures for transnational negotiations with TNCs**

The debate around transnational negotiations has been of overwhelming intensity. It is a commonly-held opinion that the absence of rules has made negotiations with TNCs more complex. Autonomy and flexibility work as an incentive in a start-up phase. However, as time passes, the absence of general rules becomes an obstacle to effectively implementing agreements.

The ways in which transnational negotiations are triggered and managed vary greatly. A large number of texts have been signed by EWCs, national unions and European Federations. Sometimes they have negotiated alone, in other cases in cooperation amongst themselves but with different structures and procedures.

Many ETUFs have already developed their internal rules for transnational negotiations with TNCs in order to establish their legitimacy as the negotiating and signatory party from the workers' side.

According to the **IndustriAll** procedures<sup>1</sup>, the European federation must be informed of the opportunity for triggering a transnational negotiation in a transnational company. The initiative mostly comes from an EWC but sometimes it comes from a national union or the works council of the company concerned or by the European Federation itself. Current EFAs have been negotiated in companies in which an EWC exists. It shows the relevance of the EWC in creating an enabling environment for transnational negotiations. According to IndustriAll policy, EWCs should be involved from the beginning in order to take advantage of their privileged position in the company.

If negotiations take place, the IndustriAll takes the lead. A delegation of the European federation will be set up and will include a representative from most countries (major players) in which the agreement is supposed to take effect. The IndustriAll delegation will be composed of national trade union officials and unionised members of the EWC, duly mandated by their national organisations. The negotiation team must include at least one representative from IndustriAll European Trade Union and/or the EWC coordinator, and/or a representative of the trade unions involved, one of whom will lead the negotiations. The IndustriAll Secretary will act as the leader of the delegation and will be the spokesperson. If an agreement is reached, it will be signed by the IndustriAll General or Deputy general Secretary.

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<sup>1</sup> Please note that similar procedures had been adopted by EMF, EMCEF and ETUF-TLC. The recently established Federation IndustriAll will continue to use the procedure as hereby illustrated.

The IndustriAll procedure is designed to make the EFA as binding as possible. The procedure is designed to give voice to both the national organisations and the EWCs concerned but also to prevent these small minority groups from definitely vetoing the eventual start-up of European negotiations/agreements. It is for that reason that countries representing less than 5% of the workforce cannot veto the decision to start negotiations. The results of negotiations are endorsed in each country with a qualified two-third majority according to national practices and rules.

Agreements signed by the IndustriAll according to its procedure derive their validity from the IndustriAll statutes and thus bind and commit all the concerned parties. The IndustriAll does not recognise as equally valid agreements signed outside this procedure.

EFFAT has established its own procedure even if its political agenda does not prioritise the establishment of EFA in transnational companies. According to EFFAT procedure, the EWC or the national unions must immediately inform the European federation of the opportunity of negotiating an EFA. In this case, EFFAT receives its mandate from the Executive Committee and a trade union delegation led by EFFAT will be set up. EFFAT's executive committee is to be kept informed about the ongoing negotiations and their outcomes. The agreement has to be approved by national unions and the organisations involved in the executive committee according to the 2/3-majority rule.

According to EPSU rules, when a company indicates its intention to start negotiations, or the EWC or the trade unions involved in the company express such a wish, then EPSU procedure should be respected.

The decision to trigger negotiations will be taken in a meeting with the national unions and the EWC. A decision will be taken according to the rule of 2/3-majority in each country. EPSU asks its national organisations to disclose the procedure through which they have voted or decided. However, countries representing less than 5% of the workforce cannot veto the decision to start negotiations.

Mandates can be discussed case by case but, as general rule, a mandate should be endorsed unanimously. If not, the 2/3-majority rule and the 5% threshold will apply. The mandate will specify the scope of negotiations, the composition of the delegation and a non-regression clause.

The EPSU delegation will be made up of a negotiating/monitoring group and a negotiating team. The latter is tasked with achieving an agreement with the company's management. The team can be led either by an EPSU Secretariat representative or by a national trade union official. The negotiating team may include EWC representatives.

The text is submitted to the negotiating/monitoring group. Once approved by the negotiating/monitoring group, the agreement needs to be adopted at national level according to the 2/3-majority rule. Should the agreement be rejected in a given country, none of the unions of that country should sign the agreement.

The agreement will be signed formally by the General Secretary or Vice-General Secretary (or other person duly mandated by them). It will include all the organisations concerned. The latter will have the task (commitment) of implementing the agreement in their own countries according to their own practices and traditions.

**UNI-Graphical** has also decided on a mandate and negotiation procedure identical to the one in force at the IndustriAll Federation.

Recurrent elements in ETUF procedures:

- Recognition of the EWC role in creating an enabling environment for transnational negotiations. Trade union members of EWCs should be entitled to be part of the European delegation, which negotiates an EFA, as part of the Trade Union mandated negotiators.
- European Federations must be informed of the possibility of starting a negotiation for an EFA. European federations take a leading role and sign agreements.
- National unions must be part of the negotiations but they have to mediate their specific national interests within the procedures adopted at European level.
- The search for consensus is the leading principle. In order to introduce democratic elements into a situation of divergent interests the 2/3-majority rule applies within each country. Blocking minorities are subject to the threshold of 5% of the workforce.
- Procedures and mandate formation will make the agreements legally stronger and ensure their enforceability at national level.
- Information on the ongoing negotiations and their results are normally communicated to the executive committee of the ETUFs and other coordination bodies. Communication at national level and implementation into national level of collective agreements falls under the competence of the national organisations.