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Transformations of Work

Challenges for the Institutions and Social Actors

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CHAPTER 8

Transnational Collective Agreements

Fausta Guarriello

§8.01 INTRODUCTION

The topic of the Transnational Collective Agreements (TCAs) is one of the most challenging issues for labour law because of its transnational dimension, the absence of a legal framework of reference, both at the national and supranational (regional and international) level. Mentioned as ‘unidentified object’,¹ it has fluid contours not yet well defined. Its appearance, exactly thirty years ago (1988 is the first transnational agreement of the French group BSN-Danone), gave rise to a movement of transnational agreements that has strengthened especially in the years 2000, until reaching the significant amount of more than 300 agreements, concerning about 10 million workers worldwide.² This is obviously a marginal figure compared to the pervasive capacity assumed by economic globalization and the occupational dimension of multinational companies, which are its main actors. However, it appears significant of a constantly rising trend, which requires (and deserves) great attention from the labour lawyers, whose studies are still predominantly anchored to the national dimension.

As other topics discussed within this Congress, it is a new and frontier theme, at the crossroads between different disciplinary paths (sociology, industrial relations, managerial sciences, international law), which requires interdisciplinary dialogue and a variety of analysis tools, as well as the support of empirical investigations that, in addition to the formal legal data, reveal both the complexity of the negotiation

1. Moreau M.A. (2017), *La spécificité des accords mondiaux d'entreprise en 2017: originalité, nature, fonctions*, Étude réalisée pour le Bureau de l'OIT pour la France, Text available on the site http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-paris/documents/publication/wcms_614879.pdf.

2. Data ETUC, 2016, according to the database of the European Commission and ILO, updated after 2015 with different sources: see U. Rehfeldt, 2018, who reports the figure of 330 TCAs (in April 2018), over 90% of which are signed by European multinational companies.

experiences realized and being implemented, and the reference context with strategies of the Parties. At the intersection of growing internationalization and deterritorialization of companies, outsourcing processes, organizational changes allowed by trade liberalization and information technologies, costs competition, innovation and quality of products and processes, communication strategies and customer satisfaction, respect for fundamental human rights, including labour rights, transnational collective bargaining tries to tackle issues that arise in the transnational dimension, in a global space that goes beyond the borders of national law, inventing solutions on a voluntary basis.

These are experimental forms of regulation, of a private nature but which for some traits rest on public tools. The growing hybridization between collective private and public regulatory forms, which are source of inspiration, institutional support mechanisms, base content of the agreements, support to effectiveness, is one of the main features of the current development of TCAs. The contamination between tools from different sources, mostly soft law, and their adaptation to the specific regulatory needs of the individual agreements, appears to be the result of settling experiences, learning processes and searching for more reliable mechanisms to ensure effectiveness, as well as of growing attention to the socially responsible behaviour of companies operating on a global scale, through the improvement of the voluntary mechanisms of CSR and provision of dispute settlement mechanisms that tend to raise the rate of compliance. The French law 2017 goes in this direction, providing for the responsibility of companies towards the damages caused by their violation of human rights and environmental protection occurred outside the territory of the home State. The law requires the parent company or the contractor a ‘duty of supervision’ on the activities of the subsidiaries, as well as of the subcontracting and supply companies, by taking care of a supervisory plan on foreseeable risks and ‘due diligence’ behaviour. One can consider these devices as an indirect form of enforceability of transnational framework agreements³ that include negotiating obligations to respect fundamental labour rights both in the subsidiaries of the company, and in global supply chains (in fact about 70% of TCAs include in its scope at least the main suppliers and subcontractors).⁴

§8.02 EVOLUTION AND ACTUAL PRACTICE OF TCAs

The dynamic evolution of Transnational Company Agreements (TCAs), concluded between the management of a multinational company and one or more entities

3. Daugareilh I. (ed.) (2017), *La responsabilité sociale de l'entreprise, vecteur d'un droit de la mondialisation?*, Bruxelles: Bruylant; M.A. Moreau, 2017.

4. Hadwiger F. (2015), *Accordi quadro globali (GFA): Gli strumenti per garantire il Lavoro dignitoso nelle Catene globali di fornitura?*, Department of Social Sciences, University of Hamburg, pp. 1-14; Hadwiger F. (2018), *Contracting International Employee Participation-Global Framework Agreements*, Cham: Springer International Publishing AG; Marassi S. (2018), *Transnational Company Agreements and Management of Global Supply Chain*, Paper presented to the ISLSSL XXII Congress Turin; Murgu M. (2018), *Global Supply Chains and Labour law: What Rule for Union?*, Paper presented to the ISLSSL XXII Congress Turin; Friedrich T.S., Lopes De Oliveira F., De Oliveira Neto A.E. (2018), *Global Supply Chains, Transnational Law and Workers*, Paper presented to the ISLSSL XXII Congress Turin.

representing the workers – primarily sectoral federations, European or international, but also European Works Councils and/or one or more national trade unions – has increased and become more widespread since the year 2000. Most TCAs concern multinational companies headquartered in Europe (mainly in Germany and France), while fewer agreements are signed by companies coming from outside: USA, Canada, Brazil, Russia, South Africa, Malaysia, Indonesia, Australia, New Zealand and Japan.

These are voluntary agreements, entered into without the benefit of a binding legal framework, either European or international, in the absence of clear provisions defining the rules by which they are to be implemented (i.e., which subjects are legitimately entitled to sign them, the mandate, the form, the effectiveness of the agreement itself, as well as the tools by which their implementation is to be monitored and overseen, the provisions for dispute resolution in the absence of a relevant legal framework and also of national regulations governing the domestic effects of agreements negotiated at a transnational level). In other words, agreements like these are operating in a legal void, in which the only binding power lies in the level of obligation that the negotiating Parties decide to give to the commitments they sign up for in the agreement.

In the field of collective labour relations this legal vacuum does not prevent the social partners from creating their own legal system, according to the theory elaborated by Santi Romano of the plurality of legal systems,⁵ adopted by Gino Giugni through the notion of ‘inter-union order’ based on the principle of collective autonomy.⁶ With the collective agreement the social partners create their own rules, tools, procedures, joint institutions, through which they govern the industrial relations, also providing remedial mechanisms for the infringement of the agreement.

In fact the situation of legal uncertainty in which this kind of agreement develops should not be overestimated: these agreements possess the legal effectiveness of a contract which, both in the common law tradition and in civil law legal orders, has the full force of law between the Parties.⁷ Actually, it is the Parties themselves that define the scope of application, the rights and obligations of each Party, duration and renewal terms, procedures for monitoring and supervising implementation. These are procedural rules that are typical of the compulsory part of a collective labour agreement, the purpose of which is to establish jointly the rules and procedures that the Parties agree to abide by during the negotiation and the implementation of the transnational agreement.

5. Romano S. (1918), *L'ordinamento giuridico*, Firenze: Sansoni.

6. Giugni G. (1960), *Introduzione allo studio dell'autonomia collettiva*, Milano: Giuffrè.

7. Van Hoeck A. (2017), *Private International Law and Dispute Resolution*, in SindNova, Fondazione Di Vittorio, Ires France, Fundación 1° de Mayo, *Implementation of Transnational Agreements in Multinational Companies*, Euride Study Report, September, pp. 11–14; Van Hoeck A. (2016), *Finding a legal framework for transnational collective agreements through private international law*, Amsterdam Law School Legal Studies Research Paper, n. 2016-12; Scarponi S. (2018), *Searching for Effectiveness in Transnational Corporate Agreements: Monitoring and Sanctions Procedures*, in Guarriello F., Stanzani C. (eds), *Trade Unions and collective bargaining in multinationals*, Milano: Franco Angeli, pp. 96–111.

At this current stage in the evolution of transnational negotiations (more than 300 Transnational Company Agreements have been concluded), what is especially interesting is the attention devoted to their actual implementation, which until now had always been the Achilles' heel of these procedures.⁸ The rules on transparency and providing information on the content of the agreements to all corporate subsidiaries and local trade unions are being strengthened, especially in terms of: joint implementation monitoring, bottom-up procedures to handle complaints, joint training exercises, mechanisms providing for periodical reporting and inspections in local subsidiaries.

Furthermore, there is a marked tendency to include in the transnational agreement's scope of application the entire supply chain and subcontractors used by the multinational enterprise, as well as laying down sanctioning mechanisms for infringements by third-party companies in fulfilling their contractual obligations: this highlights the procedural and institutional dimension of these agreements, even suggesting that the intention may be to establish a core system of transnational industrial relations.

There is a considerable variety of sources which, albeit indirectly, have contributed to the shaping of this new system. First of all, Directive no. 38/2009 on European Works Councils (EWCs), which updated Directive no. 45/1994 establishing the EWCs and strengthened the rights to information and consultation of workers' representatives in transnational corporations, and acted as the driving force for collective bargaining in agreements with multinationals, as well as promoting the voluntary extension of workers' representation to non-European subsidiaries, through the establishment of Global Works Councils. The existence of the EWCs in the European Union (EU) and the practice of regular periodical exchanges and social dialogue between the corporate management and the EWCs have favoured the development of bargaining practices *praeter legem* – that are not regulated by law – especially in multinationals under European control and management, which account for the vast majority of companies that have concluded Transnational Company Agreements.

The EU legal obligation to negotiate the establishment, composition and attributions of the EWC constituted the first nucleus of a transnational company negotiation, which contributed to the structuring of actors at this level. Nevertheless, this mark of origin has raised the issue of who is entitled to negotiate and sign TCAs on the workers' side. This is still an open question, due to diversified national systems, which attribute the power to negotiate company agreements either to representative bodies within the company, as works councils, or to union representatives. The transnational projection of the characteristics of the different national systems, already highlighted in the different mechanisms of appointment of national representatives within the EWC, is shown by the prevalence of TCAs signed by European (or worldwide) Works Councils in multinational companies of German origin, by unions in French companies.⁹ The

8. I. Daugareilh, 2017.

9. Rehfeldt U. (2018), *A Mapping of the Transnational Company Agreements: Inventory and Dynamic*, in Guarriello F., Stanzani C. (eds), *Trade Unions and collective bargaining in multinationals*, Milano: Franco Angeli, pp. 46–59.

question deals with the different notion of company agreement, as the result of participatory dynamics within the company (e.g., information and consultation) or as a tool for the composition of conflicting interests.

In general, the concentration of a large number of TCAs in European companies is considered the result of a positive climate of social dialogue established in the parent company,¹⁰ as well as the role that the national system of industrial relations and the European institutional framework recognize to the social dialogue at company level.¹¹ The situation is completely different for non-European multinationals where it rests totally on power relations¹²: often in an openly anti-union atmosphere, the agreement is the result of lengthy negotiations aimed at putting an end to mobilization campaigns and judicial strategies to denounce the company's infringements of fundamental principles within national borders or in third countries.

Second, among the international sources underpinning Transnational Company Agreements, we need to mention the following: the OECD Guidelines on Multinational Enterprises (1976), recently revised and strengthened especially in terms of States' obligations to supervise the activities of multinational enterprises; the ILO Tripartite Declaration on Multinationals (1977), revised and updated in 2017 in order to include the concept of due diligence in contractual relations with third companies, the promotion of the Decent Work Agenda, and the respect of human rights throughout global supply chains; the 2000 Global Compact and the 2011 United Nations Guiding Principles on Business and Human Rights. Although these are all instruments of non-binding soft law, these sources have promoted the development of a culture of social dialogue. They have also encouraged multinationals to endorse conventions on fundamental rights, including through the adoption of Corporate Social Responsibility (CSR) programmes entailing tools such as charters and codes of conduct, which these 'new generation' Transnational Company Agreements appear to have developed out of.¹³

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10. Schoemann I. et al. (2012), *Transnational Collective Bargaining at Company Level: A New Component of European Industrial Relations?* Bruxelles: Etui; Telljohann V., Da Costa I., Muller T., Rehfeldt U., Zimmer R. (2009), *European and International Framework Agreements: New Tools of Transnational Industrial Relations*, Transfer, 3–4, p. 505–525; Papadakis K. (ed.) (2008), *Cross-border Social Dialogue and Agreements. An Emerging Global Industrial Relations Framework?* Geneva, ILO; Dehnen V., Pries L. (2014), *International Framework Agreements: A Thread in the Web of Transnational Labour Regulation*, European Journal of Industrial Relations, 20 (4), pp. 335–350. Among the papers presented to the ISLSSL Congress at Turin 2018 on this topic see: Ales E. (2018), *Transnational Collective Bargaining and European Works Councils: from Hurdle to Stepping Stone?*; Guadagno S. (2018), *Transnational Company Agreements: Opportunities in the Face of Technological Change*; Moll Noguera R. (2018), *La legitimidad negociadora de los agentes sociales a escala transnacional europea: una llamada a su completación*; Rojas Rivero G.P. (2018), *Descentralización transnacional y negociación colectiva*.
 11. Treu T. (2018), *Transformation of Work: Challenges to the National Systems of Labour Law and Social Security*, General Report presented to the ISLSSL XXII Congress Turin.
 12. The different institutional environment is highlighted by Smit P. (2018), *International Framework Agreements Taking the Sting out of Transnational Collective Agreements/Bargaining*, Paper presented to the ISLSSL XXII Congress Turin; Rosembaum Rimolo J. (2018), *Negociación colectiva internacional. Algunas reflexiones a cerca del impulso y sus frenos en Latinoamérica*, Paper presented to the ISLSSL XXII Congress Turin.
 13. The link between TCAs and CSR is widely recognized by scholars: see I. Daugareilh, 2017. Among the papers discussed in Turin Congress 2018, see: Rodriguez Gonzalez S. (2018), *El Papel*

The contents of TCAs show a fair amount of continuity with CSR practices: TCAs are based on the ILO core conventions set out in the 1998 Declaration (on freedom of association and the right to collective bargaining, on prohibition of forced labour, child labour and any form of discrimination), but also on other principles, including the protection of health and safety in the workplace, the rights of migrant workers, the right to a decent wage, including for employees of suppliers and subcontractors; on training, gender equality, data protection and even in some cases on linking certain wage items to corporate performance at the global level. In the development from unilateral CSR protocols to framework agreements negotiated with Global Union Federations (GUFs), the substance of the agreements has become the object of more detailed negotiations¹⁴; with auditing procedures supervising the implementation of agreements requiring a more contractual form, including full and compulsory compliance with the clauses and – at least in principle – a more stringent practical implementation. The implementation is to be overseen by the Global Union Federations through their local affiliates, and jointly by the multinational’s central management exercising its influence over the company’s local management.

Due to their very nature of framework agreements, TCAs are incomplete and require additional conditions, achieved through supplementary negotiation at national/local level (in fact, little practiced) or directives handed down by central management which the company’s local management is obliged to comply with, in order for the contents of the agreement to be properly implemented and for the inclusion of procedures to handle complaints and sanction infringements. It is therefore especially in the implementation stage that it is necessary for the trade union involved to have strong local linkages, if it is to ensure that the agreement is managed effectively. It is at this stage that most critical difficulties occur: both because the trade union’s mandate is not recognized at a local level (this is problematic in many developing countries, but also in several parts of the United States) and because of the need to oversee local suppliers and subcontractors are in compliance with the conditions agreed in the framework agreement, especially since the local suppliers or subcontractors are frequently small or very small companies.

One positive element needs to be highlighted: mostly International Framework Agreements clearly establish that observance of ILO conventions on freedom of association, as well as on the right of collective bargaining, is a crucial aspect of any agreement, since these principles are indispensable prerequisites for the correct functioning of monitoring mechanisms overseeing the successful implementation of

de los codigos de conducta en la consecucion de los objetivos de la agenda 2030 para el desarrollo sostenible; Molina Navarrete C. (2018), *Derecho de la U.E. y responsabilidad social empresarial: el ‘futuro del trabajo’ también se juega en la ‘buena gobernanza’ societaria*; Giacconi M., Giasanti L., Varva S. (2018), *The Value of Social Reputation. The Protection of MNES’ Workers Through Consumers’ Eyes*; Erkens Y. (2018), *Dutch Sector Agreements-Innovation in Corporate Social Responsibility (CSR) and CSR Compliance*.

14. Gottardi D. (2018), *Corporate Social Responsibility. From a Unilateral Employer Choice to a Matter of Collective Bargaining: Contractual Social Responsibility*, in Guarriello F., Stanzani C. (eds), *Trade Unions and collective bargaining in multinationals*, Milano: Franco Angeli, pp. 60–77; S. Scarponi, 2018, pp. 96–111.

TCAs.¹⁵ Where these monitoring and supervision procedures are properly implemented, this contributes significantly to the development and growth of unionization in many areas of the world (see the increase in union membership in the building and food sector in Latin America, in textile and garment sector in Asia).

The real challenge of these agreements lies in the relationship between the global and the local dimensions. In recent case studies it comes across clearly that the negotiating Parties are well aware of the importance of disseminating the content of any transnational agreement that is signed, ensuring that all departments in the corporation and all the local representatives of the workers are fully informed, as well as organizing appropriate training opportunities at all levels. A Transnational Company Agreement does not merely play a role by promoting the company's reputation¹⁶; rather, it appears to provide solutions for very practical problems, such as the prevention and management of local conflicts, production quality, improving productivity on a global scale, as well as conveying an idea of business culture.¹⁷ And this is why the local dimension plays a strategic role, in that it is at the local level that complaints are first noted, with conflicts being addressed and solutions proposed, before they are addressed at a national than international level. Which also explains the importance attached to involving the local trade unions, as the main partner for local management in the implementation of the agreement.

The best practices in TCAs implementation clearly point to an evolution towards greater attention to soft law procedures, such as assessment and monitoring processes, conducted according to very precise and detailed voluntary regulations in order to ensure the effectiveness of the agreement. Even in the crucial phase of their implementation into the national systems, no rule requires compliance with the TCAs. National regulations and legal systems, whether they are State promoted or autonomous, tend to be totally indifferent to collective bargaining in multinational or transnational corporations. This indifference is very short-sighted, in a context in which company bargaining practices have been strongly favoured by State incentives.

§8.03 PARTIES, PROCEEDINGS, CONTENTS OF TCAs

Research studies on agreements concluded within transnational corporations have shown that negotiation leading to these agreements is the result of a deliberate strategy enacted by the main Parties: although they do not pursue the same final goals, they do have complementary objectives. On the one hand, the central management of the transnational corporation aims to improve or enhance the reputation the company

15. This aspect is notably emphasized by some scholars in the papers presented at the Turin Congress, in particular by Garcia Landaburu M.K. (2018), *Los mecanismos de participacion de las organizaciones sindicales en la verificacion del cumplimiento del codigo de conducta de Inditex*; and Rojas Rivero.

16. On the importance of this aspect, see the paper presented by M. Giaconi, L. Giasanti, S. Varva, 2018.

17. See lately: OIT (2018), *Entreprises mondiales et dialogue social transnational: quels enjeux pour les accords-cadre internationaux*, Paris, 7 février, pp. 1–55; Guarriello F., Stanzani C. (eds) (2018), *Trade Unions and collective bargaining in multinationals*, Milano: Franco Angeli.

enjoys nationally, extending it to a global level as well. Central management feels the need to harmonize the management style of local subsidiaries to the style of central management; to address conflicts arising in new countries at the earliest possible stage; to implement a strategy promoting the business ethics and industrial relations of the parent company within the subsidiaries and in relations with third companies; to improve production processes throughout the global value chain. Despite the fact that the phenomenon is usually studied from the viewpoint of the trade unions and/or the workers' representatives within the company, the literature that has addressed this issue has highlighted the fact that it is the company's interest in embarking on a bargaining process that triggers the multinational's response to trade union initiatives, or encourages action by management.¹⁸

There is no obligation, either in the regional European dimension, or on the global scale, for a multinational corporation to negotiate an agreement with a partner (often difficult to identify) which envisages implementation on a transnational level. Despite the challenges posed by economic globalization, which have weakened almost everywhere the power to govern labour relations,¹⁹ industrial relations still appear to be firmly anchored to the national dimension. In the current situation of legal uncertainty, multinational corporations clearly feel that it is in their concrete interest to engage in the drafting and then in the compliance with a transnational agreement, though there is no legal obligation for them to do so. Although each agreement is different and no generalization is possible, empirical research confirms the essential interest of the multinational corporations' central management in negotiating transnational agreements and even more so in their implementation.

The interviews with central management (Human Resources or Industrial Relations directors) of multinational corporations confirm certain elements of analysis: first, the positive climate originating from a well-developed social dialogue within the parent company is an important starting point. An established practice of dialogue and exchange, including through the periodical information and consultation meetings with the European Works Councils (EWC), is considered essential for the development of relations based on mutual trust, and this is an indispensable prerequisite for the identification of issues of mutual interest, the backbone for the drafting of transnational agreements.

Second, prior CSR experiences are an important preparatory activity for the multinational corporation: the unilateral commitments of CSR Codes of Conduct are frequently transposed into transnational agreements, thus becoming bilateral commitments that the partners are obliged to comply with. To a large extent, the contents of TCAs reflect the unilateral commitments already undertaken by the corporation within its CSR practices, providing them with more stringent supervision and monitoring mechanisms, to be conducted jointly by the Parties or by ad hoc monitoring bodies. Incidentally, the will of supranational institutions to strengthen CSR practices (*see*

18. Platzer H.W., Rueb S. (2014), *It takes Two to Tango. Management and European Company Agreements*, Transfer, 20(2), pp. 255–270; OIT, 2018.

19. Baccaro L., Howell C. (2017), *Trajectories of Neoliberal Transformation. European Industrial Relations Since the 1970s*, Cambridge: Cambridge University Press.

below) may provide a positive incentive towards the conclusion of TCAs providing for negotiated joint monitoring and control procedures to verify compliance.

Last but not least, corporations have shown that they are fully aware of the challenge achieved with the bargaining of agreements whose clauses must be implemented in the subsidiaries and, in many cases, throughout the global supply chain as well. This is a challenge which has not yet been fully met, for it implies a huge commitment from both corporate management and the trade unions, who risk jeopardizing their credibility on this very difficult undertaking. However, if successfully met, this challenge will yield considerable improvements in labour conditions, increasing unionization rates in the countries where the multinational corporation carries out its business.

Among the workers' representatives, the negotiation of transnational framework agreements was given a considerable boost by the dynamic evolution of EWCs in Europe: the implementation mechanism envisaged in Council Directive 94/45/EC establishing the EWCs – based on bargaining between corporate central management and Special Negotiating Bodies (SNB) made up of representatives of workers employed in all the production sites involved in Europe – entrusted the establishment of the EWC and the definition of its prerogatives to inform and consult employees to an ad hoc transnational negotiation process. The revised Recast Directive 2009/38/EC further enhanced the bargaining role of the trade unions, both in the first establishment of the EWCs and in the renewal of agreements. The Recast Directive makes it compulsory to inform European trade union organizations of the beginning of negotiations, in order to ensure coordination of the process, the promotion of best practices, and full support for the SNB in its role. While trade unions are explicitly mentioned, there is no specific mention of any negotiating role to be played by the EWCs, despite the fact that EWCs had been extremely important in the negotiation of several agreements with multinational companies, not only in addressing threatened job loss crises and restructuring processes, but also on issues such as workers' health, equal opportunities, mobility and so on. This has meant that, since the entry into force of the Recast Directive, there has been a reduction in the number of transnational agreements signed by the EWCs alone, and an increase of agreements signed by sectoral federations, either European or international.

Trade unions are responding with renewed energy and this is due to a variety of different concerns. On the one hand, they fear that EWCs may become too closely involved with corporate management and they feel the need to keep the participatory role (workers' rights to be informed and consulted) distinct from the negotiating role, in compliance with the tradition of dual-channel countries. On the other hand, they need to share a joint strategy with the international trade union organizations involved in dealings with multinational corporations elsewhere, in order to engage the multinationals at a global level, so as to ensure compliance with workers' fundamental rights in every country where the corporation is present, and also throughout the supply chain. The experience of EWCs in dealing with European multinationals – or those multinationals which have instructed their European management to implement the Directive – has shown how the European regional dimension is totally inadequate for a correct analysis of the major changes affecting a multinational corporation active on

a global scale. It was thus decided, on a voluntary basis, to extend membership in the EWC to representatives of workers employed by third-country subsidiaries, either as observers or as full members. In many instances, the EWC was thus transformed into a Global Works Council (GWC), since it includes representatives of workers from all countries in the world where the corporation has production plants or subsidiaries.

The periodical information on economic, financial and employment trends (now enriched with not financial information on social, environmental, human rights and fight against corruption, according to the Directive 2014/95/UE²⁰), provided by corporate central management in compliance with the Directive, increasingly refers to global scenarios rather than European-scale trends. The synergy between this voluntary transformation of the EWCs into GWCs and the sectoral federations' strategy – aimed at building on the positive climate created by the implementation of the Directive on information and consultation of workers' representatives to establish a direct dialogue with corporate management to establish framework agreements on topics of mutual interest – has led to an exponential growth of the number of these agreements, whose scope extends beyond the European dimension.

We should not be surprised at the fact that sectoral federations become negotiating partners of multinational corporations in European and International Framework Agreements, even outside the context of European social dialogue processes. Sectoral production strategies are guided – or at least strongly conditioned – by multinational corporations, and it is with them that European and especially international trade union federations entertain a variety of forms of dialogue and exchange (especially in the context of implementation of the ILO Tripartite Declaration on Multinational Enterprises). In optimal conditions these forms of dialogue and exchange can lead to the conclusion of actual agreements.

The trade union federations, at a European and international level, have produced guidelines and recommendations, aimed at providing a formal framework for the rules to be followed in transnational negotiations. Among these guidelines, we shall mention: the specific mandate assigned to European federations, the requirement that the agreement be in writing, the inclusion of a non-regression clause in relation to national regulations, the approval of the final agreement by the trade unions that conferred the mandate, the indication of the applicable law for any dispute concerning the interpretation and implementation of the transnational agreement, the ways of disseminating information on the agreement itself.²¹ Building on these basic rules, the attempt was made to get a European-wide regulation approved, with the purpose of providing an optional legal framework for the conclusion of transnational agreements,

20. See the paper presented in Turin Congress by C. Molina Navarrete, 2018.

21. Among the first to be issued: EMF, Internal EMF Procedure for Negotiations at Multinational Company Level, EMF 12/2006. For the enhancement of such guidelines through the signing of procedural sector agreements, see the paper presented in the Turin Congress by Cangemi V. (2018), *Un accord sectorial sur la procédure pour la négociation des accords cadres transnationaux*.

including dispute mediation procedures: this proposal was launched by the European trade unions, but has never been implemented.²²

Equally, Global Union Federations (GUFs) have promoted guidelines for the negotiation of International Framework Agreements (IFAs), aimed at defining the minimum content such agreements should have in relation to: ILO's core labour standards and fundamental conventions; defining the scope of application which must extend to the entire global supply chains; control and monitoring mechanisms to oversee implementation of the agreement; the right to inspect production plants; the guarantee of an attitude of strict neutrality on the part of multinational companies' management in matters of unionization of employees in subsidiaries and throughout the global supply chain and subcontractors.²³

In the strategy of Global Union Federations the conclusion of agreements with multinational companies is of fundamental importance: these agreements are tools for the promotion of workers' rights on a global scale. The essential prerequisites for the success of this strategy are the following: choosing multinationals characterized by a good industrial relations climate; the existence of a good dialogue between the parent company and the national trade unions, as well as established networks between the third countries' trade unions and/or the Global Works Councils, including the presence of workers' representatives from all over the world. The existence of an active network of relations between the workers in the different countries where the multinational corporation carries out its business is important because it implies that there is already an established practice of transnational dialogue and exchange with central management; but it is also important because it means that several issues and problems of common interest have been identified, and it is on these issues that negotiations can begin and agreements be concluded. It is especially important in terms of the concrete implementation of agreements, for this will require dissemination of information at all levels within the multinational company itself and within the third companies that have commercial dealings with it. This will create the basis for effective bottom-up monitoring processes, including transparent reporting procedures in cases of non-compliance, and correct handling of complaints.

The signing of a TCA is, therefore, not the conclusion of the partners' activity: on the contrary, it tends to be merely the point of departure. Once the agreement is signed a whole range of activities must be performed in order for it to be correctly implemented; the implementation will be effective to the extent that the agreement establishes the procedures that need to be followed, attributing to each partner precise obligations in terms of information, training, supervision, monitoring, reporting,

22. Sciarra S., Fuchs M., Sobczak A. (2014), *Towards a Legal Framework for Transnational Company Agreements. Report to the European Trade Union Confederation*, Brussels; ETUC (2016), *Building an Enabling Environment for Voluntary and Autonomous Negotiations at Transnational Level Between Trade Unions and Multinational Companies, Final Report*, download from the following link: https://www.etuc.org/sites/default/files/publication/files/160905_tca_final_report_en_proof_final.pdf.

23. IndustriALL, *Global Union's Guidelines for Global Framework Agreements (GFAs)*, 2012, updated in 2014.

complaints procedure, management of infringements.²⁴ It is in this context that Transnational Company Agreements are to be seen mostly as procedural agreements, whose purpose is to define the obligations of the Parties, which are obligations for their entire organization: this means local management in third-country subsidiaries, suppliers and subcontractors, on the company's side; local trade unions and workers' representatives in the workplace, on the workers' side.

It would not, however, be accurate to describe these agreements as merely procedural: they have a substantive content which is not purely symbolic, as some people would have it. Case studies have shown how such agreements, even with their minimal content, have become an important mobilization tool for international trade unions thanks to their inclusion of ILO core principles and fundamental conventions on freedom of association and the right to collective bargaining, on the prohibition of discrimination, of forced labour and child labour. The TCAs underscore the requirement to comply with ILO conventions, defined as fundamental tools for the active implementation of the framework agreement – especially Conventions 87/48 and 98/49 on freedom of association and the right to collective bargaining. By acknowledging the trade union as a dialogue partner for local corporate management, TCAs provide the local trade unions with new legitimacy, enabling them to benefit from authorized leaves of absence and to avail of resources needed in implementing the agreement; to provide training on the content of the agreement, to fight against anti-trade union practices. Freedom of association is a prerequisite for the mobilization of workers in the subsidiaries and throughout a multinational's production chain, especially in some States in the USA, in countries in Latin America and in Turkey, where local management or companies involved in the supply chain often enact anti-trade union practices, in breach of the TCA's clauses. In these cases, the agreement's supervision procedures oblige the multinational's central management to address the problem, remedying the critical situation by exerting pressure on local management and on the companies in the supply chain; they can also threaten sanctions and, where this is envisaged, termination of the contract with any third company which refuses to comply with the TCA's clauses.

On the positive side, ILO conventions are referred to in order to promote unionization processes in subsidiaries and in the companies in the supply chains, thanks to the role given to trade unions by the framework agreements and to the benefits related to their implementation, i.e. promoting decent work, observance of workers' fundamental rights to health and safety in the workplace, to a minimum wage, to social security. In the case of production plants located in countries known for the violation of the most elementary rights and freedoms of workers, the joint action of trade unions, non-governmental organizations (NGOs), mass media, together with the existence of a TCA, have succeeded in improving local practices and legislation; even in countries which had hitherto appeared impenetrable to actions promoting the basic rights of workers, such as in Qatar's construction sector, on the building sites for the infrastructure and sports facilities for the 2022 Football World Cup. The existence of

24. On the role of the parties in the implementation of TCAs, *see* OIT, 2018; Guarriello, F., Stanzani, C. (2018); Garcia Landaburu, M.K. (2018).

TCA in multinational companies in the building sector has been useful in promoting international mobilization and inspections in the building sites, thanks to the alliance between multinational corporations and trade unions, partners in the TCAs.

The content of TCAs goes beyond the reference to the ILO core standards and fundamental conventions. The case studies have listed a wide range of other clauses contained in the TCAs: the promotion and supervision of workers' safety in subsidiaries and throughout the global supply chains, decent living conditions, the right to training, limits to daily and weekly working hours, supplementary pension benefits, minimum wage and wage benefits linked to productivity improvements, working and employment conditions for migrant workers, often provided by temporary employment agencies. They are for the most part minimum standards relating to wages and conditions that are of no great interest to workers in industrialized countries, but which cannot be taken for granted in developing nations, where national legislation does not guarantee adequate workers' protection standards and where salaried employment is carried out in conditions of almost slavery.

The implementation of framework agreements concluded with multinational companies in some contexts is the most important factor allowing for the introduction of decent labour conditions, especially for the workers in the supply chain, who are usually employed by small or very small local companies, relegated to the informal economy. The disaster at Rana Plaza has left their mark: it has raised the levels of global awareness among consumers and the informed general public; it has ensured greater attention to the quality of production processes on the part of corporations; it has set in motion mechanisms of solidarity bringing together both workers and trade unions, increasingly confronted by global challenges.

The urgency of the problems raised by globalization has favoured the emergence of a new generation of agreements, more interested than in the past in establishing effective implementation mechanisms. In the more all-encompassing agreements, the partners stress a whole range of obligations relating to implementation: the agreement itself shall be translated in all the languages used in the company's subsidiaries; the agreement shall be printed and distributed, its essential elements being communicated to all those involved; provisions are made for the information and training of management and workers' representatives in all production sites; periodical meetings between the Parties to the agreement shall be held, in order to examine any problems relating to implementation; inspections to be organized at production sites, including at suppliers' facilities; definition of indicators to be used in monitoring the implementation; production of periodical reports, usually drafted by management and then discussed jointly in monitoring bodies established ad hoc or in existing transnational representative bodies (EWCs, GWCs); rules for submitting complaints and bottom-up procedures for addressing them; duration of the agreement and renegotiation procedure; indication of the official language and applicable national legislation in the case of disputes. Obviously not all agreements contain all the clauses mentioned above and they are not always set out in a sufficiently precise manner. Difficulties arise when the monitoring report is drawn up entirely by management, for it can avail of the human and material resources necessary in collecting the relevant information; equally, there are problems due to the fact that trade unions cannot always be present in a timely

manner at those sites where problems arise. The existence of trade union networks which can be activated when needed, and a synergy with the EWCs or GWCs which receive information and complaints from the different sites, can make up for their lack of material and organizational resources.

Can the existence of a growing number of corporate agreements, global in scope, supported by trade union strategies aimed at extending the influence of ILO core principles, to strengthen compliance with fundamental labour rights through contractual undertakings, especially compliance with freedom of association, workers' representatives in the workplace and the right of collective bargaining, become the core of a nascent system of global industrial relations, developing despite the absence of a transnational regulatory framework? The answer is yes, if we consider that historically industrial relations systems are the result of dialogue and exchange between the main players in the field, especially companies and trade unions. In civil law systems, like in common law, a contract has the binding power of law, between the Parties: through their collective autonomy they will establish the mechanisms and procedures required for their future negotiating activity. In TCAs negotiated in the last decade we can see that there has been a learning curve among the Parties who have developed this special system: if we look at the framework agreements drafted in the early years of the century, we shall see that they were still basically declarations of intent, without any adequate internal control mechanisms or monitoring procedures for implementation. Today, on the other hand, Transnational Company Agreements increasingly contain procedural machinery and control, and supervision mechanisms which are potentially capable of ensuring their effectiveness.

There is no doubt that the challenge for the Parties is still huge and the results achieved, judged positively by the partners, are by their very nature reversible, unless they are supported by continuous commitment on all parts. On the one hand, we have the economic power of the multinational company, characterized by its managerial practices which tend to prioritize financial strategies rather than productive goals. On the other, the composite group of their partners in labour relations, at a local, national, global level. The asymmetry of power between the Parties is evident: economic, financial, information, human resources and so on. The efforts of the GUFs try to exorcize the asymmetry, but there is a marked need for active synergy among the different levels of workers' representatives within the multinational and in the national, European, international sectoral federations, in order to ensure that bottom-up control mechanisms function adequately. The implicit challenge for the trade unions lies in their ability to act as a bridge between agreements reached at the top and their implementation at the local level. All the more so, when the framework agreement involves the supply chain as well, including companies that are technically autonomous from the Parties who signed the agreement: in a sense, compliance with the agreement amounts to a social clause imposed by the multinational corporation on its entire supply chain and all (or the most relevant) its subcontractors.

§8.04 HOW TO SUPPORT IMPLEMENTATION AND ENFORCEMENT OF TCAs

As has already been pointed out, negotiations on agreements within transnational corporations are to a large extent based on the hard law of the European Union's regulations on information and consultation rights through the EWCs, the establishment and functioning of which require a transnational ad hoc negotiating process. The legal obligation to establish European works councils in community-wide corporations or groups has led to the development of social dialogue practices within transnational companies, enriched by periodical exchanges of information and consultation processes enacted when the transnational corporation undergoes organizational changes, especially in restructuring processes. In compliance with the Recast Directive, the composition of the EWC must be renegotiated every time the structure of the transnational company is modified through mergers and acquisitions, according to the adjustment clause.

This particular condition in transnational negotiations – with which corporate central management (or the parent company) and a Special Negotiating Body (SNB) made up of representatives of the workers from the different production sites, assisted and coordinated by the sectoral trade union federations, are obliged to comply – ensures that the EWC is properly formed and modified when needed. In the European experience, this clause has favoured the development of a practice of social dialogue in transnational corporations, which in many cases has created the climate favourable to the conclusion of further agreements, on different issues, some more formal, others less so, negotiated outside a binding legal framework.²⁵ These agreements have the characteristics of voluntary agreements concluded in a situation of 'legal gap', in the absence of binding supranational rules governing the legitimacy of the signatories, the form, the scope of application, the effectiveness, the duration, the procedures for supervision, the sanctioning mechanisms.

In this situation, the will of the Parties makes up for the absence of external rules by establishing autonomously a set of shared mechanisms which the Parties undertake to observe in their joint management of the agreement (following the theory of the

25. The European Commission has defined them 'joint texts' in its Communication *Mapping of Transnational Texts Negotiated at Corporate Level*, Directorate-General, Employment, Social Affairs and Equal Opportunities, EMPL F2 EP/bp 2008 (D) 14511; and European Commission, *Commission Staff Working Document: The role of transnational company agreements in the context of increasing international integration*, Directorate-General, Employment, Social Affairs and Equal Opportunities, SEC (2008) 2155, dated 2 July 2008, referring to the variety of types of agreements concluded between the social partners. See also: Laulom S., Sciarra S. (2018), *Quel cadre juridique pour les accords transnationaux d'entreprise?* in *Mélanges en l'honneur d'Antoine Lyon-Caen*, Paris: Dalloz, pp. 517-532; Leonardi S. (ed.) (2012), *Transnational Company Agreements. A stepping stone towards a real internationalization of Industrial Relations?* Roma: Ediesse; EURACTA 2 (2015), *The transnational company agreements. Experiences and prospects. Final Report*, Text available on the site www.fondazionevittorio.it/sites/default/files/content_attachment/Euracta2_Final%20report_0.pdf.

‘collective autonomy’ elaborated in the ‘60 by Gino Giugni).²⁶ This explains why the procedural and institutional elements of TCAs have evolved and become more elaborate in recent years, in order to meet the needs of the effective implementation of the agreement’s clauses, ensuring that the agreement does not remain a mere declaration of intent, with no effective consequences. The absence of binding rules does not, however, mean a total absence of all rules for Parties operating transnationally, especially not for multinationals.

Ever since the 1970s, a range of international codes of conduct, non-binding in nature, i.e., soft law, have been addressed to multinational corporations with the goal of guiding their conduct in the various countries where they establish production plants. They are: the 1976 OECD Guidelines on Multinational Enterprises, the 1977 ILO Tripartite Declaration, the 2000 United Nations Global Compact, the 2011 United Nations Guiding Principles on Business and Human Rights. All of these instruments have recently been revised and updated, with the addition of mechanisms ensuring technical assistance, expertise and supervisory obligations to ensure compliance with recommended conduct. Alongside these instruments, addressed to multinational companies, another highly significant source of inspiration for IFAs is, of course, the 1948 Universal Declaration of Human Rights, which is frequently recalled amongst the guiding principles of the agreements.

Until recently these soft law tools advanced on a parallel path to the negotiation experiences of agreements within transnational companies. Now they are increasingly being seen as an international reference framework, which will favour the transition from unilateral CSR practices, moving beyond those charters or codes of conduct on fundamental rights whose nature is merely that of declarations of intent, which have no reliable mechanisms for monitoring or control with respect to labour issues; a transition towards procedures of social dialogue and concertation, which can assure more effective control mechanisms, when the multinational company is called upon to implement the commitments taken with the unions. The question of control mechanisms is, in fact, the weak point in unilateral CSR practices, managed entirely by a company’s Departments of Human Resources or Quality Control, entirely separate from the real-life conditions of industrial relations. In recent years these two pathways have tended to meet, to strengthen each other, to benefit mutually from the complementarity of the different instruments.

The most relevant instrument addressed to multinational companies are the OECD Guidelines, revised on 25 May 2011, providing recommendations ‘for responsible business conduct in a global context’, to be followed in the country of corporate headquarters and in all countries where there are subsidiaries and commercial partners, especially in those countries where there are no efficient administrative offices capable of ensuring full compliance with internal and international regulations. The Guidelines recall a list of ethically correct behaviours to be observed. In particular, Chapter IV of the Guidelines addresses the observance of Human Rights based on the

26. Adhere to this setting Sobzack A. (2012), *Ensuring the effective implementation of transnational company agreements*, European Journal of Industrial Relations, 18 (2), p. 139–151; Moreau M. A. (2017); Daugareilh I. (2017).

United Nations (UN) ‘Protect, Respect and Remedy’ Framework, following the principles enunciated by John Ruggie; whereas Chapter V addresses Employment and Industrial Relations. In this field, apart from recalling the core principles and fundamental rights in the 1998 ILO Declaration, the Guidelines recommend that multinational companies comply with laws, regulations and customary practices in the host countries, as applicable to employees and labour relations,²⁷ as well as collaborating with the social partners in order to conclude collective agreements, applying standards in no way less favourable than those offered by comparable employers in that country or, when comparable employers are not present, applying the best salaries and the best working conditions in relation to the local socio-economic context; the adoption of provisions capable of ensuring health and safety in the workplace, even when this may not be a compulsory legal requirement in that country; the hiring of local employees, including managerial staff, and the provision of training aimed at improving employees’ skills; information to be provided in a timely manner to workers’ representatives and public authorities on important organizational changes; and the commitment to mitigate the social and employment consequences of any such changes; refraining from threatening to transfer production plants or workers out of the country in the effort to influence unfairly any negotiations, or in order to prevent trade unions from organizing effectively; provide protection to any worker who may – in good faith – report situations of abuse or violations.

Compared to the contents of TCAs, the OECD Guidelines are especially interesting in the section on the principles of freedom of association and the right to collective bargaining, which a multinational company should try to ensure ‘through appropriate provisions’ even in those countries where freedom of association is not guaranteed. There is a similar correlation and strengthening between the two instruments – the first being unilateral (CSR), the second being bilateral (TCA) – to be found in some general recommendations: that a company should implement due diligence based on risk assessment and integrated in the corporate risk management systems, in order to identify, prevent and mitigate any negative impact, either potential or actual, of its business activities on any of the issues addressed by the Guidelines (especially in relation to the new chapter on human rights, inspired by the United Nations 2011 Guiding Principles on Business and Human Rights), and be accountable as to how this impact is managed (point 10); and further, through this obligation to monitor and supervise, extend the scope of application of these principles to the multinational company’s commercial partners, i.e., suppliers and subcontractors, so as to ensure that they, too, observe the principles of responsible business conduct in compliance with the Guidelines (point 13). The inclusion of these new chapters is due to the realization that there is considerable global competition from non-OECD countries’ companies; to

27. The notion of employee or employed worker is intended to have the same meaning as in the ILO Tripartite Declaration. In case of doubt as to the existence of an employment relationship, one can refer to the indicators given in para. 13 of ILO Recommendation 198/2006. The OECD Guidelines recommend that employers do not support disguised employment practices or resort to the informal economy, whereas in the case of civil and commercial relations (excluding relations with employees), companies shall act according to due diligence based on risk and on the supply chain, in compliance with items 10 and 13 in the General Principles (*see below*).

the concerns raised by such stakeholders as NGOs and trade unions over the risk of serious human rights abuses perpetrated in emerging economies and elsewhere, as a result of cost-cutting competition, a ‘race to the bottom’ fought by stripping workers of their rights, especially in times of economic crisis. The issue of global supply chains, made up predominantly of local SMEs, has for many years been the subject of discussion in the trade union component of ILO.²⁸

The voluntary and non-binding endorsement of the Guidelines by the multinational enterprises of OECD countries, and not only,²⁹ is today supported by the shared commitment of governments to promote their effective application through the establishment of National Contact Points (NCPs).³⁰ The NCPs, as non-judicial grievance mechanism whose establishment is compulsory for governments, are intended to meet the need to disseminate information on the content of the Guidelines, to respond to requests, to guarantee full interpretation and correct application, to solve issues related to implementation and to address ‘specific instances’ raised by trade unions, NGOs and individuals as to the violation of the Guidelines’ clauses by multinational companies or their suppliers.

The NCPs must respond to all requests for action submitted ‘in good faith’ by any one of the subjects legitimately entitled to act, proposing itself as a mediator to favour positive dialogue between all interested parties, if needed with the assistance of the NCPs from other countries involved, treating the matter in an entirely impartial manner, acting fairly, in a timely and foreseeable and transparent manner, with a view to obtaining a formal declaration on the importance of the matter, a report on the issue and on the result of the mediation, accompanied by any recommendations to be made to the company and by a clear indication of deadlines for the monitoring and assessment of the implementation of the agreed solution.

Attention to the procedures through which complaints are managed (‘specific instances’ in the jargon OECD), including the detailed definition of the procedures followed by the NCPs, is one of the issues that was most discussed during the recent review of the Guidelines, with the aim of equipping the CSR mechanism with effective and harmonized Alternative Dispute Resolution (ADR) procedures, to match the voluntary nature of the commitments undertaken.³¹ The solution of reported issues is reached through a procedure of concertation and dialogue amongst all the Parties involved, in order to find an agreement, the implementation of which will be monitored

28. See: Papadakis K. (2018), *Lessons Learnt and On-Going Debates on the Implementation of IFAs in Global Value Chains*, in Guarriello F., Stanzani C. (eds), *Trade Unions and Collective Bargaining in Multinationals*, Milano: Franco Angeli, pp. 112–124.

29. As of 25 May 2011, the governments of all OECD Member States had endorsed the Guidelines, as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

30. The obligation to establish a NCP aims at improving information on the content of the Guidelines and to guarantee access to remedial mechanisms in case of infringement. The NCP is a non-judiciary State body providing a platform for discussion and for the resolution of a broad range of issues linked to the application of the OECD Guidelines within multinational companies and throughout their global supply chains. OECD Member States have considerable freedom as to the configuration of the NCP, but must observe shared criteria of visibility, accessibility, transparency and responsibility.

31. J. Schneider, L. Siegenthaler, *Les principes directeurs de l’OECD: pour une conduite responsable des entreprises multinationales*, in *La vie économique*, 9, 2011, pp. 63 ss.

by the NCPs. As mentioned above, the intention is not to sanction conduct in violation of the Guidelines, but rather to recommend that in the future the company may adopt conduct more consistent with the Guidelines and also remedy any damage caused.

The obligation to perform due diligence vis-a-vis the companies in the supply chain extends the scope of application of responsible conduct beyond the boundaries of the multinational corporation and its subsidiaries, to the entire network of its commercial partners from different countries, including non-OECD members or which have not endorsed the Guidelines; these are companies of all different sizes, including local SMEs. The multinational company is encouraged to use its influence in order to promote conduct compatible with the Guidelines by their suppliers, thereby contributing to the improvement of local standards. In the case of serious violations, a procedure of concertation and dialogue is envisaged, which will bring together the companies and the stakeholders in order to agree on a gradual alignment with the recommendations; should this not be achieved, the commercial relationship will be temporarily suspended, or totally terminated if serious violations persist.

In relation to the multiplication of risk factors in the supply chains, and the different geographical and sectoral contexts, the OECD recommends that multi-stakeholder platforms are established, like the one on mineral extraction in conflict-affected or high-risk areas (2010), or in the supply chains in the garment and footwear sector (2017), which commit multinational companies to involving trade unions and workers' representatives in the due diligence process at every single stage of the platform's implementation, including in the evaluation of suppliers, remedial actions, monitoring of impact and planning of operational mechanisms to handle complaint management and resolution.³²

Global Framework Agreements (GFAs), agreements negotiated between multinational companies and international and local trade unions, are considered by OECD and ILO particularly suitable tools to strengthen the processes of due diligence throughout the supply chain, thus creating a relationship of trust between the various stakeholders: that is what occurred in the garment sector with the Agreement on Fire and Building Safety in Bangladesh in 2013 after the Rana Plaza tragedy, with the Honduras Labour Framework and the Indonesia Freedom of Association Protocol, just as with the IFAs signed between the multinational corporations Inditex and H&M and the Global Union IndustriALL.

The handling of complaints in the supply chains through the establishment of concertation and dialogue processes amongst all the Parties involved (social partners, governments, local government authorities, embassies, NGOs) is of fundamental importance since it promotes the conclusion of agreements³³ and the enactment of monitoring mechanisms and follow-up. The relationship between the different instruments enhances the synergy between them, on the one hand promoting negotiated solutions in the handling of social responsibility procedures, on the other providing new instruments to remedy violations of TCA clauses connected to the Guidelines.

32. See the different contributions in I. Daugareilh (ed.), 2017.

33. Examples of such procedures as they are applied in practice are reported in: Global Deal, ILO, OECD, *The Global Deal for Decent Work and Inclusive Growth Flagship Report*, 2018, pp. 78 ss.

A similar correlation of goals and instruments can be found in the evolution of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the current developments in TCAs. Alongside the 1998 Declaration on Fundamental Principles and Rights at Work, the 2000 Decent Work Agenda and the 2008 Declaration on Social Justice for a Fair Globalization, the ILO has also worked on a review of the Tripartite Declaration on Multinational Enterprises with the goal of harmonizing this instrument – voluntary in nature – with the changes that have occurred on the global economic stage. In particular, the general discussion undertaken at the 2016 International Labour Conference on the topic of Decent Work in global supply chains,³⁴ following a request submitted sometime earlier by the workers' group in the ILO Governing Body: the request was to ensure transparency and to define procedures for corporate responsibility throughout the entire subcontracting, supply, production and distribution chains. After the conference a working group and a select committee were appointed to draft the conclusions of the discussion and in March 2017 the revised Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was released.

The changes concerned essentially the inclusion of the entire supply chain into the multinational company's sphere of CSR; by endorsing the Declaration, the multinational enterprise undertakes to exercise due diligence on the operations of its suppliers and subcontractors, in order to ensure that each of them shall comply with the goals of the Decent Work Agenda and shall observe the core labour standards, including in those countries that have not ratified ILO fundamental conventions or which do not have suitable administrative offices to ensure they are respected.

The revised version of the Declaration assigns to States the task of ensuring that human rights are respected, protected and implemented, through the establishment of Tripartite National Contact Points, whose function is to raise the awareness of trade unions and employers' organizations, to facilitate social dialogue and the establishment of networks with the countries in which the multinationals are operating. In the ILO perspective, due diligence processes are preferably devised and implemented through bilateral agreements, reached between corporate management and trade union federations, involving in this process suppliers and national/local trade unions; such agreements further envisage periodical monitoring and assessment, as well as complaint handling procedures. The pressure exercised by workers' group within the ILO Governing Body, demanding that arbitration procedures be established for breaches of the Declaration by multinational corporations or by companies in the supply chain, has led to the role of the ILO as a trusted dispute settlement mediator, thus extending its role of technical assistance, and providing the resolution to issues relating to the interpretation of the Declaration.

As compared to other soft law instruments, founded on mechanisms related to the unilateral commitment on the part of the company, the ILO Tripartite Declaration presupposes the existence of a structured social dialogue between the social partners,

34. See K. Papadakis, 2018.

both internationally (through the parent company's central management), and locally (with the local management and the global supply chains).

There is widespread disappointment due to the lack of effectiveness of the monitoring and auditing mechanisms envisaged in CSR – for they are considered totally inadequate in monitoring the level of compliance relating to social goals and especially to the respect of human rights. Conversely, the mechanisms based on direct dialogue between the Parties in the industrial relations system (although the system is still not very well structured and lacks supranational regulations) are considered more relevant and more promising in the ILO context, thanks to the tripartite dialogue and structure on which the organization is founded. It should therefore not surprise us that TCAs concluded in recent years have given special attention to monitoring and evaluating implementation of agreements, extending the scope of application to include the supply chains.³⁵

The attention devoted by the ILO to negotiation and implementation of IFAs, the constant and direct dialogue with the companies that have endorsed the Declaration and with Global Union Federations, which have their main offices in Geneva, the technical assistance provided through the ILO dedicated help desk, the confidential resolution of interpretation disputes raised by the stakeholders and, lastly, the activity of consciousness raising, support to social dialogue and facilitation in the establishment of networks provided by the Tripartite National Contact Points (TNCP), all together provide a near-institutional support structure to IFAs, offered by the UN organization specialized in labour issues. Nor should we forget that the ILO, through these actions, is working to extend the scope of application and to strengthen the effectiveness of its core labour standards, since serious and persistent violations of the standards can be ascertained by the usual control mechanisms provided by its Committee on Freedom of Association or its Committee on the Application of Standards, where the conduct of a State – in terms of either commission or omission – can be assessed: in the final analysis, it is the State that is responsible for the application of ILO standards.

Thanks to the dialogue between international organizations, the various soft law instruments addressed to multinational corporations have begun to interact and to implement decentralized supervision procedures; since the multinational corporations endorse them on a voluntary basis, these soft law tools tend to call upon the active surveillance of States, to detect human rights abuses and violations of the ILO fundamental conventions in their own territory, but also in countries where a multinational operates or where the global supply chains are active.

§8.05 CURRENT PROBLEMS AND PROSPECTS

The variety of transnational agreements is such that it is impossible to generalize about the existing experiences, since each one has its own rational approach, which could not

35. Hadwiger, F., 2015; Hadwiger F. (2017), *Looking to the Future: Mediation and Arbitration Procedures for Global Framework Agreements*, Transfer, 23/4, pp. 409–424; Hadwiger, F., 2018; OIT, 2018.

easily be borrowed for a different situation. Even the distinction between European Framework Agreements (EFAs) and International Framework Agreements (IFAs) only really grasps one aspect of the situation, i.e., its scope of application. It actually tells us very little about the nature of the agreements, whether they are prevalently about substance or procedure; or about their content, if they focus on the interests of individual workers, or on prerogatives that can be exercised by trade union or workplace representatives. The only element they have in common is the transnational dimension of the issues involved, projecting beyond the traditional national dimension of industrial relations systems.

The absence of rules at the transnational level leads the partners to build their agreements based on an incremental, do-it-yourself putting together of experiences, of previously unilateral commitments, currently negotiated with the trade union partner, of national regulations adapted to the transnational dimension, or the adoption of guidelines issued by European and Global Union Federations, adapting the follow-up procedures envisaged for CSR to the bilateral nature of collectively negotiated obligations. The toolbox that can be used has grown considerably in recent years, with the addition of new instruments and new opportunities, as well as a greater awareness that States play an essential role in the transnational dimension, too.

As the number of agreements with corporations at the global dimension is increasing, as compared to agreements covering only the European dimension, the time has come to ask ourselves how relevant a European-based Optional Legal Framework is today. The European Trade Union Confederation (ETUC) firmly believes that there is great urgency for such a legal framework, which would provide regulatory support to company agreements including the new dimension of social dialogue envisaged by the Treaty and so far implemented exclusively at the inter-professional and sectoral dimension; and further, it would allow agreements to fight more effectively against social and wage dumping practised in Europe by multinationals in their race towards relocation and cost reductions, in European countries with lower labour costs and reduced social rights. For this reason the trade unions decided to propose an Optional Legal Framework for Transnational Company Agreements, as a tool providing those agreements with a legal status, laying down the necessary formal and procedural prerequisites ensuring their legal effectiveness in the context agreed upon by the signatories. A legal framework, albeit voluntary in nature, supporting company agreements would provide negotiators with a regulatory reference parameter, formalizing the obligation to respect certain essential conditions and acknowledging the legal effectiveness of the commitments undertaken by corporate management, accepting them as binding for all subsidiaries and/or controlled companies listed in the agreement; and, where specifically envisaged, also including suppliers and subcontractors. The legal basis of this initiative could be the acknowledgement of the role of social dialogue, as stated in the Treaty on the Functioning of the EU.³⁶

36. Article 152 of the TFEU states: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.'

Should such a legal tool be introduced, within the context of promoting social dialogue we might wonder whether it could effectively facilitate the conclusion of TCAs, to start with, in the European dimension but, moving forward, on a global scale. There is no easy answer to this question: many scholars raise doubts about the opportunity of this initiative, arguing that it's too early to press this new development in a fixed frame, because it could freeze the spontaneous blooming of agreements³⁷. Others doubt the effectiveness of a purely optional legal framework, which could encourage companies to prefer informal agreements or not to negotiate at all. A positive attitude considers the adoption of an optional legal framework as a useful tool to give transparency and legal certainty to TCAs, overcoming the current phase of agreements that follow different regimes in each country.

Another question we need to examine in depth concerns the enforceability of procedural obligations envisaged in TCAs. It is a matter here of establishing a procedural machinery which could support the self-regulatory capacity, i.e., the ability of the social partners to ensure their interests are upheld. On a global scale, and in relations with multinational corporate management, the position of trade unions is far weaker than in more traditional contexts, where it is regulated by national industrial relations practices. In such a context, the implementation of a collective agreement – especially as concerns the different national systems in the countries covered by the agreement – becomes a question that raises a variety of problems. Implementation can become objectively difficult both for the multinational corporation and for the Global Union Federations (and, to a different extent, for the European federations). Domestic legal mechanisms capable of ensuring that the framework agreement is complied with in the various countries (the mandate being conferred by the national trade unions, negotiations to be held at a local level, directives issued by corporate central management and then applied by local management, the duty to influence affiliate trade unions, etc.) all suffer from absence of regulations and challenges in application. No system envisages the precise legal effects that a TCA can have at a national level, although the problem has occasionally been addressed (e.g., the Italian trade union confederations document on collective bargaining 2016, or French Combrexelle Report 2015) in documents outlining the new horizons of collective bargaining at company level.

In this context, a system supporting the effective implementation of transnational agreements by means of procedures establishing the State's obligation to supervise – where the State's duty to supervise is clearly regulated – with follow-up mechanisms included in CSR undertakings, would be beneficial: it would offer the advantage of putting the State back into the process of overseeing the activity of multinationals. This could add effectiveness to the agreement between the Parties, both in the company's country of origin (through the obligation to make supervision arrangements, to ensure the respect of human rights and reparations for damages caused), and in the countries where they have established plants and subsidiaries. This debate and the initial solutions proposed in recent years by international organizations bear witness to the

37. Meissner D., *Transnational Collective Agreements* (2018), Paper presented to the ISLSSL XXII Congress Turin.

fact that there is a clear determination to establish a correlation between the different legal tools, in order to work towards a fair globalization.

TCA's have provided a significant contribution to these developments: experiments with autonomous methods of monitoring and implementation of agreements on global scale, by means of a whole range of procedural obligations and creating opportunities for dialogue, for sharing results achieved and complaint handling mechanisms. The lesson learned from the experience of implemented TCA's is that there is a need to link the global dimension to the local dimension, meaning subsidiaries, but also all the companies in the subcontracting and supply chains. The effective implementation of TCA's presupposes efficient and transparent communication at all stages (both bottom-up communication, i.e., when the agreement is still being negotiated, and top-down, when agreed contents need to be communicated to the subsidiaries and, if envisaged, throughout the supply chains) and with all subjects involved, within the multinational corporations and throughout the partner organizations.

Different procedures and methods can be envisaged, depending on how the corporate command chain is structured; and, on the trade union side, depending on the internal relations as well as relations between trade unions and workers' representation in the workplace. Implementation is the crucial stage: if successful, it needs to demonstrate the active participation of all subjects involved in the concrete application of the undertakings in the agreement. Agreements reached at the top which are not then concretely applied in the daily life of the company – and its subsidiaries and supply chains – are destined to be merely symbolic statements of intentions. The negotiators of second-generation IFAs, fully aware of this risk, have taken great care in providing agreements with all instruments necessary to ensure their correct implementation, allowing all sections of their organization to take over the agreement and implement it in their concrete daily practice. The range of these instruments varies considerably: presentation and dissemination of the agreement, translation into a variety of languages, training opportunities on the content of the agreement, periodical inspections to production sites, preparatory meetings and follow-up sessions before and after meetings with management, complaint handling procedures, indicators for implementation monitoring, etc. And it is this wide-ranging toolbox that is the most innovative aspect of TCA's, with their multilevel implementation and monitoring, which will lead to the development of a sustainable system of global industrial relations, capable of meeting the needs of present-day challenges.