TCA

or about David's negotiation

with Goliath

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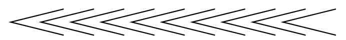
Bogdan Kubiak
Deputy President of National Commission of the NSZZ "Solidarność"

Trade Union Introduction



One of the main goals of NSZZ Solidarność is to promote and develop collective labour agreements as the main instrument to increase labour standards and wages. On the other hand, one of the main features of transnational corporations present in Poland is the avoidance of negotiating collective agreements. In many cases, this leads to inevitable tensions in mutual relations. It is not uncommon for a Western European corporation to apply different (worse) standards of social dialogue in Poland and other Central and Eastern European countries compared to their home country. It is the result of disregarding trade unions and avoiding wage negotiations which are often initiated only under the threat of industrial action.

This has nothing to do with the vision of Social Europe that was promised when our part of Europe was joining the EU. Therefore, it is necessary to civilize the behaviour of transnational corporations so that they do not divide and play out employees in different locations. The corporations, however, are too strong for trade unions to tackle their strategies within a single country. The recipe is the cross-border solidarity of workers, which can be put into practice through the European Framework Agreements (EFA). My trade union believes that EFAs may be perceived as a potential tool for influencing working conditions and the principles of supporting professional development and qualifications of employees, and ultimately – wage developments within a corporation. EFAs should be a tool for positive convergence of labour standards.

Additionally, EFAs are particularly important to us due to the non-existence of a sectoral collective bargaining in Poland.

Of course, for the EFAs to live up to the hopes placed in them, certain conditions need to be met. The current functioning of these systems in the legal "vacuum" causes that problems with their implementation and enforcement of obligations assumed by corporations are notoriously appearing. That is why we are in favour of adopting an optional legal framework at the EU level for its conclusion. We present this position clearly within the European Trade Union Confederation. We believe that, firstly, the parties authorized to conclude EFAs should be more clearly specified and that the leading role should be played by European trade union federations. This imposes on them the duty

and obligation of an active policy in the selection of corporations and issues that should be the subject of EFA. The process of negotiating these agreements should be the subject of regular activities within the industry federations. On the other hand, the role of the EWC operating in a corporation is to inspire EFA negotiations and monitor the correctness of their implementation. The optional legal framework should also specify the rules for the sharing and publication of EFAs and the procedures for resolving disputes arising from their implementation. That's it for the start.

Summing up, I need to point out that EFAs have to play an important role in the architecture of the EU industrial relations system, the building of which we consider an important and necessary component of the European integration process. This means, of course, that the European trade union family organized within the ETUC faces specific challenges related to the mutual recognition of membership and, above all, increasing the scope of cooperation within one corporation or industry.

With regard to the optional legal framework for EFA, we expect a change in the ETUC approach - the provisions contained in the Action Program for 2019-23 from the Congress in Vienna are deeply unsatisfactory We also expect a change of the actions of the European Commission - because building common standards within the corporation is also supported in the provisions of the European Pillar of Social Rights. Of course, we must not forget that our trade union organisations are responsible for actions aimed at the implementation and use of the EFAs that already exist and include plants in Poland.

In short - a lot of work ahead of us.

Source: KK NSZZ „Solidarność"

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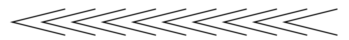
National Commission of the NSZZ "Solidarność"

Introduction to the brochure



Collective bargaining is an inherent feature of the trade union activity. They are conducted at various levels and in various configurations. Always considering the context of a country's industrial relations. At the beginning of the 21st century, however, the development of a unique phenomenon began to be noticed: cross-border negotiations between the cross-border representation of employees and the central management of transnational corporations finalized by drawing up joint agreements. In the longer term, this may shift the relationship: labour-capital to a completely different dimension, the one in which the real game for the future of the capitalist economy takes place. Will this ever happen? It all depends on whether the transnational framework agreements (TCAs) will become a permanent part of the new architecture of industrial relations in the world of developed capitalism.

The Polish researchers rarely touch on this topic and if they do, they relate to selected aspects of this institution[1]. NSZZ Solidarność experts try to do so by publishing articles in scientific periodicals[2] and by participating in international research projects on this subject (EUROATCA1 and EUROATCA 2[3]).

For the trade union, the issue of TCA is important as one of the parts of organizing labour relations in Polish subsidiaries of multinationals. For this reason, NSZZ Solidarność initiated and conducted in 2015-2017 a research and training project with the participation of trade unionists from 5 EU Member States (Croatia, Italy, Poland, Romania and United Kingdom): European Works Councils as a Support Platform for Transnational Framework Agreements. The objective of the project was to collect expertise and experience related to the monitoring and implementation of the existing TCAs[4].

A continuation of this project was a seminar organized in cooperation with the European Centre for Workers Questions (EZA) entitled Can Transnational Framework Agreements Allow for Negotiating Approximation of Work Standards in Transnational Corporations in the EU? The seminar was held in the hybrid formula on February 25-26, 2021 in the BHP Hall in Gdańsk. During the seminar, several researchers, including the leading European TCA researchers presented their speeches:

Volker Telljohann, TCA as a Restructuring Instrument;
Udo Rehfeldt, The Dynamics of TCA Development;
Beryl ter Haar, TCA and Soft Law „Hardening";
Jan Czarzasty, EWC as a Support Platform for TCA - Report Presentation;
Łukasz Pisarczyk, Legal Aspects of the Conclusion and Operation of TCA;
Auriane Lamine: Alternative Pathways to Effective TCA;
Katarzyna Wieczorek, TCA Enforcement in the Context of Collective Disputes;
Anna Boguska, Pursuing Claims against TCA under National Law;
Reingard Zimmer, TCA Implementation and Monitoring;
Marcin Wujczyk, New Areas of Collective Bargaining and the Right to Privacy.

The aftermath of the seminar is this brochure which aims at promoting knowledge on TCA. Its objective is to describe conditions and specific nature of TCA (including EFA) as well as various challenges related to the process of their development and implementation.

Source: KK NSZZ „Solidarność"

An attentive reader will notice that the focus is on the EFA, a European version of framework agreements. It results, inter alia, from the ongoing discussion in the EU whether EFAs may become a potentially fully-fledged element of EU industrial relations

by creating an optional legal framework for them. Differences of views are present not only traditionally along the axis: employers – trade unions, but also within the European trade union family itself. Undoubtedly, the way in which this issue will be resolved may affect the perception of the idea of TCA also on a global scale. And this perspective is also important because the so-called international framework agreements (IFA) are key to civilize labour relations in the Global South, especially when they regulate the terms and conditions of work not only in the corporation itself but also in the chain of its subcontractors. But this is a topic for the next seminar ...

Enjoy reading!

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[1] For example: J. Unterschütz, Transnational collective agreements in the light of the principle of social peace, PiZS, 2015 No. 8.

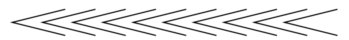
[2] Examples include the following studies:
S. Adamczyk, B. Surdykowska, Ponadnarodowe układy ramowe jako próba odpowiedzi związków zawodowych na wyzwania globalizacji, PiZS 2012, nr 1; S. Adamczyk, B. Surdykowska, *Europejskie układy ramowe jako możliwy element stosunków przemysłowych Unii Europejskiej*, Gdańskie Studia Prawnicze 2013 r., Tom XXX; S. Adamczyk, B. Surdykowska, *Międzynarodowe układy ramowe jako przykład dobrowolnie podejmowanych negocjacji między pracą a kapitałem*, [w:] Z. Góral (red.) *Układy zbiorowe pracy. W stulecie urodzin profesora Wacława Szuberta*, Warszawa 2013; S. Adamczyk, B. Surdykowska, *Europejskie układy ramowe: niedoceniana przez związki zawodowe szansa na wymknięcie się z pułapki globalizacji*, Monitor Prawa Pracy 2015, nr 11.

[3] Materials from these projects can be found here: https://www.solidarnosc.org.pl/dokumenty-i-opracowania

[4] The materials resulting from this project can be found here:
https://www.solidarnosc.org.pl/szkolenia/wspolpraca-zagraniczna/programy-europejskie/realizowane/item/12630-5-europejskie-rady-zakladowe-jako-platforma-wsparcia-dla-ponadnarodowych-ukladow-ramowych-tca. As part of this project, a training module was also developed which can be found at the address indicated.

Łukasz Pisarczyk
University of Warsaw

Introductory remarks



Recent decades have brought economic, social and technological changes that require us to redefine the labour law and its role (Blanpain 2013 p. 35 et seq.). Until not long ago, developed economies were known of their high stability and we saw a unification process in the employment conditions which was leading to uniformization and more even distribution of income. This purpose was served by both statutory mechanisms (e.g. minimum wages), as well as the system of collective bargaining. In a large part of Western European countries, collective bargaining covered a significant proportion of employees - in some countries, practically all employees. It was possible due to the extensive use of multi-establishment negotiations. Their results could have an impact on the employment conditions of the majority of employees due to the strength of social partners (Nordic countries), representation of employers by entities in which membership is obligatory (e.g. Austrian and Slovenian chambers of commerce[1]) or, finally, the generalization of collective agreements - by law or (more often) based on a decision of a specific entity, e.g. a public administration body: Belgium, France, Germany (Czarnecki, Grzebyk, Reda- Ciszewska 2019, p. 143; Müller, Vandaele, Waddington (ed.) 2019). These mechanisms have been complemented by the enhanced effectiveness of collective agreements on the labour side[2]. Historically stable collective bargaining systems have been under massive pressure in the recent times.

In 1970s we experienced economic downturn that made people realize the need for social protection even in the strongest economies. The integration processes and the globalization of the economy changed the position of employers, accelerated economic processes and caused uncertainty. New forms of work organization are also used (Blanpain 1999). The society functions are changing and they become more open and flexible, but in some respects also more demanding. Perhaps the greatest challenges are the technological and organizational changes (economy 4.0) which has dramatically altered the society and the labour market (Borowicz 2018; Świątkowski 2019). Flexibility, liquidity and digitization are the reality of the third decade of the 21st century. A phenomenon that can be considered as an effect (or even a synthesis) of various processes is the development and growth of the importance of transnational corpora-

tions, which are becoming the main market players, having a significant impact on the course of economic processes concerning the way of doing business, and finally also the philosophy of employment (Blanpain 2013). The attitude of corporations not only has a direct impact on the employment conditions of their employees, but also it sends a clear signal to the other market actors.

Labour law, sometimes too slowly, sometimes imperfectly, but it adjusts to the changes in the socio-economic environment. It is not so much a matter of choice as of necessity. An alternative is the spontaneous formation of new forms of cooperation, which could be located outside the framework of the official system, making it difficult to implement a coherent economic and social policy. All the crises accelerate the changes. The 2007/2008 economic crisis forced austerity measures (including in the area of social spending) and the decentralization of collective bargaining. Traditional systems based on stable multi-employer bargaining were to prove too rigid to meet the needs of an increasingly dynamic economy. Enterprises were granted more freedom to be able to respond more easily to changes and build their competitiveness. International institutions, including the so-called Troika put pressure on individual states (especially those in the most difficult situation) to restructure (decentralize) their collective bargaining system. The measures implemented by the European Union which look for ways to overcome economic difficulties, also refer to these trends. In many systems, the focus has shifted from the industry level to the enterprise level. Deviations from multi-establishment standards (the so-called opening clauses) were allowed and the use of generalization mechanisms was limited. The scope and impact of reforms vary (reflecting the capacity of respective economy and its resilience to the crisis). Undoubtedly, however, the crisis contributed to the strengthening of company negotiations and the reduction of the scope of coverage by collective standards. In some cases, the multi-establishment bargaining system has collapsed (Laulom 2018; Liukkunen 2019, p. 5). Another blow is the Covid-19 pandemic which forced individual countries to intervene quickly and deeply to rescue economies affected by the reduction in activity. It is true that it is still difficult to predict what the effects of the crisis will be, but it should be expected that it will hinder the return to stable industry negotiations.

There is no doubt that in 2021 there is no vision on how the labour law and collective relations should look like in the future. However, there may be no return to the old forms. There is a clear need for solutions that may be adapted to the new, changing reality. We still hope that we will be able to save (or develop, like in Poland) some traditional forms of social dialogue, but it is not certain that this goal will be achieved, at least to some extent. At the same time, the basic values on which the international

system of human rights, the European Union and the constitutional systems of individual states are based remain a point of reference. Human dignity as well as freedom and equality (understood as real freedom and equality, not only formal ones), finally having their source in the dignity of the individual - freedoms and fundamental rights. In the area of employment, these values justify the creation of mechanisms that will result in decent work. These conditions may be imposed by statute, but this means limiting the autonomy of individuals and the entities they create, and as a result it may lead to a kind of statism. To the extent that it is possible, the state should still leave the space for freedom of action to the interested parties, as long as the balance of power between them allows for the development of fair solutions (Sanetra 2010, pp. 24-25). The idea of social dialogue can be developed not only within the national framework. In adapting to the market situation, social dialogue must become cross-border. Social dialogue is also used in the European dimension - in the creation and implementation of EU standards.

Transnational (including European) framework agreements play an important role in changing the world of labour. It is no coincidence that their development coincide with a turning point in the European collective bargaining systems and the beginning of profound economic and technological changes. Social dialogue is a mechanism that responds to changes faster than law created by the state. Thus, social dialogue may enter areas where there is a need for action. It is no different in the case of transnational framework systems. They fill in a certain regulatory gap that has arisen due to the new levels of economic activity (cross-border enterprises) and the increasingly clear crisis of negotiations conducted in individual countries. The agreements resulted from the activities aimed at securing employee interests (strategy of employee representation), on the other hand they are part in the strategy of cross-border enterprises (stable operation, image building). The scope of application of the systems varies. Some of them are limited to the European area (European framework agreements), some are also applicable to entities operating on other continents (international, cross-border framework agreements). Distinguishing European agreements is justified not only geographically. They fall within certain economic, social and, finally, legal frameworks (acqui communitaire) which provide a certain point of reference, de lege ferenda, allowing for making demands for a more extensive regulation.

The current situation of the European framework agreements can be considered a success. Almost 300 agreements concluded with important international corporations represent a significant social and legal capacity, even if the number of employees covered is relatively small. This is the evidence of the possibility of conducting effective

social dialogue despite the lack of support and an extensive legal framework, as well as a signal that there is a need to secure basic employee rights. This need becomes more and more evident in the face of the deteriorating economic situation and problems in the labour market (ILO 2021, pp. 1-12). However, it is hard not to notice that the dynamics of concluding European framework agreements has significantly weakened. It is certainly an effect of changes in the social and economic environment that are not conducive to such initiatives. However, the underlying reason may be also the lack of legal mechanisms that would facilitate their conclusion and application. The history of the European agreements so far shows that their development may be independent of external support. At the same time, some shortcomings of the lack of a legal framework are revealed. Two values clash: collective autonomy and the need for more effective protection. So far, the attempts to create a voluntary legal framework at European level have not been successful. The problem is the very choice of the legal instrument to be applied (Sciarra, Fuchs, Sobczak, 2014; ETUC 2016). It is also not obvious what matters should (can) be regulated and which should remain in the hands of the social partners.

Due to the lack of transnational regulation, it is not possible to formulate unequivocal conclusions regarding the legal nature of agreements. In most cases, they should be treated as voluntary collective agreements, the functioning and effectiveness of which remain within the sphere of collective autonomy. In some jurisdictions, they are recognized as collective agreements recognized (regulated) by national law (eg France). Agreements are concluded by various entities. While on the employers› side it is usually the central management (or other entity deciding on the functioning of the corporation), on the employee side it is both trade unions and European works councils. The way the negotiations are conducted and the scope of application of the agreement depend on the social partners themselves. In practice, the problem may be the mandate to act for the benefit of entities covered by the scope of application, including subsidiaries, suppliers and contractors, but also employees not associated in trade unions concluding the agreement (here the argument for the inclusion may be the operation of the agreement in favour of employees). Agreements are made for the employees or all the workforce. Depending on the subject of the regulation, we may distinguish general agreements (formulating guarantees of basic employee rights) and restructuring agreements that create protective mechanisms for the planned structural or technological changes. In the absence of an explicit reference to the national statutory regulation, the agreements themselves determine the rules of their publication (disclosure to interested persons) or settlement of disputes arising from them. The lack of uniform regulation result in significant differentiation and in some way it makes the entire system weaker

(Ales et al. 2006; Adamczyk, Surdykowska 2012; Sciarra, Fuchs, Sobczak, 2014; Gładoch 2014, p. 260, ETUC 2016).

The European framework agreements play a special role in the countries of Central and Eastern Europe. Polish employers do not conclude agreements but are usually subject to their standards (e.g. as subsidiaries). Despite its general nature, the European framework agreements carry some capacity that shouldn't be ignored in the face of the specific problems experienced by most of the former communist bloc countries, including Poland. The countries of the region, treated at the beginning of the systemic changes as the low-labour-cost markets did not develop any system of multi-employer bargaining, including sectoral bargaining. One exception is Slovenia, which had a system of workers› chambers (Stanojević, Pojević 2019, pp. 548, 552 et seq.). In turn, in Romania, the system of multi-establishment bargaining was weakened in response to the economic crisis (Rosioru, 2018).

In Poland, the law makers have developed a general framework for concluding multi-enterprise agreements (without prejudging their scope) and in-company agreements (Section 11 of the Labour Code). Starting from the system of former industry agreements which were not the result of actual collective bargaining, the legislator did not provide for any mechanism that would ensure the effectiveness of multi-establishment bargaining. Unfortunately, it has been confirmed by the recent years when negotiating multi-company agreements has practically died out, and the scope of covering employees has decreased dramatically (to 200,000)[3]. Multi-enterprise agreements are scattered and, with some exceptions, do not create industry-specific employment standards. The state of trade union collective agreements that are negotiated and concluded looks better. However, they also have a limited scope of application. Firstly, company agreements are concluded by specific groups of entities (entities related to the state, e.g. companies of the State Treasury or local governments, large employers) and in specific sectors (eg. financial sector while many other sectors, including of major social importance, are excluded from negotiations). In total, the company agreements cover approximately 1,600,000 employees (very rarely, agreements were concluded also for other employees)[4]. Depending on the criteria (such as, which group of people constitutes a point of reference), the scope of coverage by company agreements (and due to the lack of multi-establishment agreements - by collective agreements in general), may be estimated at 10-15%. As a result, one can speak of a deep crisis of the systemic idea[5]. This means a fundamental difference compared to the countries of Western Europe. Above all, however, it is an expression of the breakdown of the principle of shaping the terms of employment with the participation of social partners, as expressed in the

Constitution. Poland has adopted a specific - decentralized model of determining working conditions and pay, in which the foreground is not even agreements negotiated at the enterprise level, but documents made by the employers (wage regulations) and employment contracts. The resulting gap must be filled by other legal structures, e.g. unnamed collective agreements or corporate acts: e.g. codes of good practice (Wratny 2016, p. 2 and following), which, however, due to their legal nature and the way they are created, are not an effective mechanism for securing the interests of the employees. Therefore, especially in Central and Eastern Europe, it is worth paying attention to the possible role of the European framework agreements which may not only fill in a regulatory vacuum, but also provide an impulse for the revival and development of social dialogue.

Undoubtedly, there is a need for a theoretical reflection on the European framework agreements in general and their specific functioning in our region. Therefore, I am very happy with the publication initiative from NSZZ Solidarność which consists of texts presenting various aspects of the functioning of cross-border social dialogue. It may be an important voice in a discussion on its role and capacity but also an attempt to assess the current state and to make conclusions for the future. With this hope may we present this brochure to the readers.

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[1] In 2006, Slovenia departed from this approach. The level of coverage by collective agreements remained higher than in other countries of the region.

M. Stanojević, A. Poje, Slovenia: organised decentralisation in the private sector and centralisation in the public sector, in: Collecive bargaining in Europe, eds. T. Müller, K. Vandaele and J. Waddington, Brussels 2019, p. 548 and 552.

[2] Used (though with some exceptions, including Germany, Portugal, Switzerland) in most European countries. see Collective Bargaining in OECD and accession countries. Use of erga omnes effect clauses, Paris 2017, https://www.oecd.org/employment/emp/ Use%20 of%20erga%20omnes%20clauses.pdf.

[3] Data based on http://www.dialog.gov.pl/dialog-krajowy/uklady-zbiorowe-pracy/. More on the current situation of multi-establishment agreements; Ł. Pisarczyk, J. Rumian, Ponadzakładowe układy zbiorowe – zmierzch instytucji?, PiZS 2019, nr 11.

[4] Based on data provided by the Chief Labour Inspectorate and research carried out in the registers of collective agreements by J. Rumiana oraz K. Wieczorek.

[5] On the subject of this phenomenon and its causes, among others J. Stelina, Refleksje na temat kondycji układów zbiorowych w Polsce, in: Z zagadnień współczesnego prawa pracy. Księga jubileuszowa Profesora Henryka Lewandowskiego, red. Z. Góral, Warszawa 2009; G. Goździewicz,

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Transnational framework agreements and their environment - basic information

This introduction to the transnational framework agreements (hereinafter – TCA, which is an abbreviation of the name: "transnational company agreements" most often used for these documents) is intended to present the legal and factual conditions of the process of negotiations between the employee representatives and the management of a transnational corporation.

In particular, the European Framework Agreements (EFAs) - a European 'variation' of the TCAs - are of our interest. EFAs are an expression of certain hopes related to an attempt to unify employment standards in transnational corporations which have their headquarters in the old Member States and locations in Central and Eastern Europe. At the same time, the process of concluding the EFA may be an interesting starting point for the discussion whether we are dealing with a European level of industrial relations.

Before taking a closer look at the European level, it seems worthwhile to take a global perspective.

What is a global labour law?

Polish labour law doctrine uses the term: international labour law. The term: global labour law is very rare in a legal discourse (Boruta 2005). It seems, however, that all areas of social life are under impact of a strong globalisation process in the last quarter of a century so the concept of global labour law is most justified.

Firstly, this is due to the diminishing role of "classical" methods of setting international labour standards. We see a clear redefinition of the goals and methods to achieve them in the activities of the International Labour

Organisation (ILO) itself: moving away from the making new conventions and focusing on the broad implementation of fundamental rights in relation to people on the labour market, not only those with formal employment status. The 2012 and 2013 ILO sessions were symptomatic in this regard. They did not produce any new conventions or recommendations. The 2014 General Session brought only a Protocol amending the 1930 Fundamental Convention on Forced Labour No. 29 and Recommendation No. 203 on Supplementary Measures for the Effective Suppression of Forced Labour. The ILO's approach is changing. It is increasingly process-oriented and involving stakeholders other than States.

Secondly, sources of transnational labour law are becoming increasingly polycentric. An important source of these are activities arising from the idea of corporate social responsibility – i.e. codes of good practices adopted by corporations. Another source are IFAs. A very important and dynamically changing area is the process of including various social clauses in free trade agreements. Some FTAs contain explicit references to the ILO fundamental conventions.

Rana Plaza Collapse

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In this box we want to recall an event probably familiar to most readers. A construction disaster that occurred on 24 April 2013 in the Savar Upazila of Dhaka District, Bangladesh. The collapsing building killed 1,134 people (mostly women seamstresses) and injured about 2,500. It is considered the deadliest structural failure accident in modern human history and the deadliest garment-factory disaster in history. It resulted from the building's inadequacy to accommodate heavy machinery and power generators. Under pressure from consumers and trade unions, 31 global apparel brands pledged to sign and implement an agreement to protect against fire and make factory buildings in Bangladesh safer, including a commitment to independent inspections and published reports, repairs and renovations, worker training, and to terminate contracts with factories that fail to follow necessary health and safety procedures. The signatories also pledged to fund these activities. The signatories include H&M, Zara, C&A, Marks and Spencer, Primark, Mango and Benetton. A consequence of the signed agreement is the establishment of an entity that carries out independent safety checks. The agreement also includes a complaint mechanism and worker training. The agreement currently has around 200 signatories and covers over 1,600 factories and two million workers.

Collapsed Rana Plaza Building, Savar District in Dhaka, Bangladesh. April 2013, www.amnesty.org; photo by Jamal Al Nahian, source: www.flic.krpeiAGWr

Is There a European Level of Industrial Relations?

Very often, the mechanism of the European Social Dialogue (ESD) and the activities of the European Works Councils (EWCs) are referred to as proof of the European level of industrial relations. This approach is far too optimistic. In my opinion the ESD is not a collective bargaining mechanism in its own right, but it is primarily an instrument for implementing EU social policy. This is confirmed by the fact that mainly issues considered necessary by the European Commission to be regulated at the EU level are negotiated within this mechanism. It seems that, contrary to the hopes of Euro-enthusiasts such as Marco Biagi (Biagi 1999), the European Social Dialogue mechanism has not only failed to give impetus to the development of a European collective bargaining system but it is currently unable to meet any of the major challenges facing trade unions. This is shown by the ETUC's difficulties in getting European employers' organisations to negotiate agreements based on Article 155 TFEU with a joint request for transforming into a Directive.

Despite the progressive process of the European integration, there are no examples of sectoral cross-border bargaining or advanced trade union action in this direction. An example illustrating the problems with practical coordination of bargaining is the history of the so-called Doorn Group. It was a joint initiative of trade unions from Germany and the Benelux countries which was later joined by French organisations. In 1998, they adopted a declaration that could be described as the first cross-border set of guidelines defining the formula for wage expectations that individual unions would attempt to negotiate at national level. After initial successes in 2000, it became apparent that a united position was unsustainable. This was probably related to the fact that German trade unions, subjected to extreme internal pressure, embarked on a path of violent moderation and later freezing of real wages.

Also, it is difficult to consider the attempts that have taken place to organise cross-border strikes as a success (Dribbusch 2015). It should be clearly emphasised that the exclusion of the trade union's competence to regulate strikes (Article 153(5) TFEU) and the actual organisation of strikes in several locations of the same corporation or in several countries and the coordination of demands made during them is a separate issue.

We need to strat with a reference to a rather fundamental issue before getting to more specific considerations on TCAs: a brief review of how collective bargaining regulations in the European and EU law look like.

Right to Collective Bargaining under law made by the Council of Europe

The right to organise is guaranteed both by the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11) and by the European Social Charter (Article 12). In *Demir and Baykara v. Turkey,* the European Court of Human Rights (ECtHR) points out (para. 154) that, taking into account the development of international labour law and the labour laws of the state parties to the Convention, the right to collective bargaining has become a constituent part of the right to form and join trade unions in order to protect one's interests. However, we can't be overoptimistic as the *Demir and Baykara* rulling has been criticised by some authors, and the ECtHR is undoubtedly subject to certain political pressure from the Member States of the Council of Europe. The ECtHR itself, in its rulling in *RMT v. United Kingdom* (para. 86), indicates that the line of jurisprudence presented in *Demir and Baykara* may be subject to reinterpretation. However, this is not the only threat - European trade unions must not forget that for the first time in the history of the ILO, in 2012, the General Session saw an

unequivocal negation by employers of the reliance of the right to strike on ILO Conventions 87, 98 (Ewing 2013). It can hardly be said that the ILO has managed to overcome the internal crisis that has continued since then.

Right to Collective Bargaining under the European Union Law

At first, to justify the thesis that the right to collective bargaining is rooted in EU law, reference is usually made to Article 155 TFEU. This regulation allowing the European social partners to create hard law subsequently implemented by individual Member States is undoubtedly specific in global terms. It can be noted that the functioning of European Social Dialogue implicitly presupposes the existence of strong social dialogue structures at the level of individual Member States. This is pointed out, for example, by Alan Bogg and Ruth Dukes writing – that the European Social Dialogue will not succeed unless it is the culmination of strong collective bargaining supported by strong trade unions in Member States (Bogg, Dukes 2013). The problem is that TFEU guarantees this unique (compared to other regions of the world) role of social partners at EU level, but does not affect the national level legislation. It is important to remember that the right of association and the right to strike (as well as to lockout and wage fixing) are excluded from the EU competence (Article 153(5) TFEU). There is of course Article 28 of the EU Charter of Fundamental Rights of high relevance. It indicates that workers and employers or their respective organisations, have, under the EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action, including strike action, to defend their interests. Article 28 is often cited in the literature also in the context of the right to conclude TCAs. Among other things, it is interesting to note that it directly refers to bargaining at the "appropriate level".

Some protection of the right to bargain in the EU law exists, but only through the Convention and only indirectly. It should be remembered that according to the Charter of Fundamental Rights of the EU - (According to Article 52(3) of the Charter) - to the

extent that the Charter contains rights which correspond to rights guaranteed by the Convention, their meaning and scope are the same as that of the rights granted by the Convention for the Protection of Human Rights and Fundamental Freedoms.

Transnational corporations

Before getting to the TCAs and EFAs we should begin with some remarks on transnational corporations.

There are currently around 60,000 transnational corporations worldwide which control over 500,000 subsidiaries. They account for half of the international trade because of the scale of the intra-group trade (between subsidiaries of the same company).

The topic that always generates the most interest and which has no answer is which corporation is the largest.

Given the enormous volatility of the current situation (due to the crisis and the changes brought about by the Covid-19 pandemic), the lack of complete and verifiable data on Chinese entities, the impossibility of rationally comparing manufacturing or service companies with financial ones, the question can be answered by saying that there is no answer or trying various approximations.

Although it is fairly easy - based on economic, technical and organisational criteria - to distinguish a large company from a small one, things get more complicated when trying to choose among the “global monsters” which are the largest companies. Is it Microsoft with its gigantic market capitalisation or Walmart with over 11,000 shops in 27 countries or ICBC with 150 million customers and assets worth over $4,300 billion or Facebook with 2.7 billion users? Like beauty, greatness depends on the beholder. But let us try to answer.

10 largest entities by market capitalisation

No	Name	Country	Sector	$ billion
1	Apple	U.S.	Technology	1,971
2	Saudi Aramco	Saudi Arabia	Energy	1,956
3	Amazon	U.S.	Services/customer service	1,592
4	Microsoft	U.S.	Technology	1,546
5	Alphabet	U.S	Technology	1,116
6	Alibaba	China	Services/customer service	836
7	Facebook	U.S.	Services/technology	795

8	Tencent	China	Technology	724
9	Berkshire Hathaway	U.S.	Finance	496
10	Taiwan Semiconductor	Taiwan	Semiconductors	405

10 largest entities according to Fortune Global 500 ranking

No	Name	Country	Revenue ($ million)	Revenue growth (% change)	Profits ($ million)	Profit dynamics (% change)
1	Walmart	U.S.	523, 960	1,9	14, 880	123,1
2	Sinopea Group	China	407,010	- 1,8	6,793	16,2
3	State Grid	China	383, 910	- 0,8	7,970	-2,5
4	China National Petroleum	China	379,130	-3,5	4,443	95,7
5	Royal Dutch Shell	Netherlands	352,110	-11,2	15,840	-32,2
6	Saudi Aramco	Saudi Arabia	329, 780	-7,3	88,211	-20,5
7	Volkswagen	Germany	287, 760	1,6	15, 540	8,5
8	BP	United Kingdom	282, 60	-7,0	4,030	-57,1
9	Amazon	U.S.	280, 520	20,5	11, 590	15,0
10	Toyota Motors	Japan	275, 290	1,0	19,096	12,4

10 largest entities according to Forbes Global 2000 ranking

No	Nameentity	Country	Turnover (billion $)	Profit (in billion $)	Assets (in billion $)	Market value (bilion $)
1	ICBC	China	177	45	4,323	242
2	China Construction Bank	China	162	39	3,822	203
3	JPMorgan Chase	U.S.	143	30	3,139	292
4	Berkshire Hathaway	U.S.	255	81	818	455
5	Agricultural Bank of China	China	149	31	3,698	147
6	Saudi Aramco	Saudi Arabia	330	88	398	1,685

7	Ping An Insurance Group	China	155	19	1,219	187
8	Bank of America	U.S.	112	24	2,620	209
9	Apple	U.S.	268	57	320	1,286
10	Bank of China	China	135	27	3, 387	113

Source: https://www.gfmag.com/global-data/economic-data/largest-companies

For further consideration, a **definition** of a transnational corporation would be useful. Let us adopt the following definition: **A transnational corporation is a company in any legal form that owns, controls or manages activities, alone or together with other companies, in two or more countries.**

What is a Transnational Corporation?

The researchers have no consensus regarding the definition. In 1960, David E. Liliethal defined transnational corporations as corporations that have their home in one country but operate and live under the laws and customs of other countries (Karski, 2009, p. 330). According to UNCTAD, a corporation is considered transnational when it includes entities from more than one country, operating under one decision-making system that allows for the formulation of coherent policies and a common strategy. These entities are linked by ownership or other relationships such that one or more of them can exert a significant influence on the others, in particular to share power, resources and responsibilities between them. UNCTAD assumes that these are enterprises, whether incorporated or unincorporated, consisting of a parent enterprise and its foreign subsidiaries. A parent (dominant) enterprise is defined as an enterprise that controls the assets of other entities in countries other than its home country usually by owning some share in the equity of those entities. The ILO Tripartite Declaration emphasises that transnational corporations own or control production, distribution, services or other facilities - outside their country of domicile. The OECD Guidelines for Multinational Enterprises emphasise that - "they may be private, public or in mixed ownership".

This could be summed up by recalling a statement that was meant to apply to an entirely different entity - the famous phrase "I know what it is when I see it", which applied to pornography and was formulated by the US Supreme Court Justice Potter Stewart in *Jacobellis v Ohio* in 1964. For the purposes of this booklet, a wide definition

will be adopted: a transnational corporation is a company in any legal form that owns, controls or manages activities, alone or in concert with other companies, in two or more countries.

U.S. Corporation Skyscraper Steel in Pittsburgh, Pennsylvania, United States.
Photo Derek Jensen (Tysto). Source: www.wikipedia.org

Transnational Framework Agreements

What Are the TCAs?

TCAs (transnational company agreements) are transnational framework agreements. Sometimes the abbreviation TFA (transnational framework agreement) is also found in the literature and we can equate these two "acronyms" TCA and TFA.

TCAs - concluded by boards of transnational corporations and trade unions/ European Works Councils/other forms of employee representation.

These documents have one thing in common - they are the result of negotiations, unlike the different types of unilateral declarations or codes of conduct adopted by corporations.

The first transnational framework agreement was signed in 1988 at the Danone corporation and was an offshoot of the ideas of the corporation's founder, Antoine Riboud, an ardent advocate of the practical application of the principles of Catholic social teaching in business, rather than organised pressure from transnational employee representation.

Types of the TCAs

TCAs are divided into:

GFA (Global Framework Agreement), literature also refers to IFA (international framework agreement)

and

EFA - (European Framework Agreement)

Where to Find Information on TCA

The main source of the TCA texts is the database maintained by the European Commission

It can be found at the following address

https://ec.europa.eu/social/main.jsp?catId=978&langId=en

However, let us remember that there is no legal framework for concluding TCAs and therefore no obligation for the signatories to report them to the database. In other words, there is no official registration process for TCAs and therefore the database may not include all TCAs.

In the database, agreements can be searched by indicating the specific transnational corporation, the year of signing, or the topic covered (for example: training, occupational health and safety).

Examples of TCAs on changes resulting from the digitalisation of the labour market

Solvay/ EWC

Global agreement on digital transformation for training, skills development and other activities - 17 March 2020.

ENGIE/ EWC

Joint declaration on anticipating and supporting economic, social and organisational change resulting from digital developments through skills development and other activities - 28 November 2019.

TCA in Response to the Covid-19 Crisis

- 28 April 2020. The central management of French energy group ENGI stated that in the context of the Covid-19 outbreak, negotiations were underway with trade unions on a comprehensive global framework agreement on corporate social responsibility
- 3 August 2020. Danone has agreed to enter into negotiations with a global industry federation on measures to support workers and mitigate potentially negative employment consequences arising during and after the Covid-19 pandemic
- 4 August 2020. Inditex and IndustriAll have signed a joint declaration and confirmed their commitment to work together to support the economic and social recovery of the global apparel industry

European Framework Agreements (EFAs)

From the EU perspective and especially from the perspective of the CEE trade unions, the European TCAs are interesting. These documents are often more specific than their non-European counterparts and they might have an importaant role to play during restructuring processes.

EFAs are currently being created spontaneously. There is no specific legal framework for them. It is not clear who on the workers' side can or should sign them.

Who Includes EFAs in Practice?

- European Works Councils (EWCs)
- EWC plus European Industry Federation
- The European Industry Federation only
- European Industry Federation plus trade unions from corporate headquarters
- Trade unions from country of the headquarter plus trade unions from the locations countries
- Works councils (especially from the headquarters of the corporation)

Global Industry Federations

Global Industry Federations are autonomous and self-governing industry organisations, albeit working closely with the IUCN. There are currently eight of them:

Name	Number of affiliated organisations	Approximate number of employees represented
IndustriAll	670	50 million
Education International	401	30 million
Public Service International	650	20 million
Union Network International (UNI)	900	20 million
Building and Wood Workers' International (BWI)	382	12 million
International Transport Workers' Federation (ITF)	700	4.5 million
International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tabaco and Allied Worker's Associations (IUF)	388	12 million
International Federation of Journalists	152	0.6 million

What Do the EFAs Contain?

EFAs are far more specific compared to the global agreements. Thus, their provisions can have a significant impact on the situation of workers in national locations with regard to their working conditions, access to training, work organisation, etc. There are cases where EFAs do not just touch on 'soft issues' but cover the traditional areas of collective bargaining. It should be noted, however, that these are ad hoc actions relating mostly to cross-border restructuring plans and not any regular negotiation process with company managements typical for trade union activities.

What is the Issue with EFAs Signed by EWCs Only?

EWCs are bodies set up for information and consultation, and not for negotiation. One cannot escape the question of the representativeness of EWCs – it should be remembered that EWC members do not have to be trade unionists. At the same time, it is important to be aware that statistically the number of EFAs signed exclusively by EWCs is significant.

Before 2000 - – 62%

In 2006 – 2011- 42%

In 2012 – 2015 - 46%

Trade Unions and EFA

Trade unions must become the *owners* of the EFAs. Unless they are able to use them as part of a comprehensive collective bargaining system with all the consequences thereof like specific content, the possibility to legally enforce the agreements and organise transnational actions in the EFA negotiation process, they will be subject to ongoing marginalisation and rivalry. As Fernando Rocha and Pere J. Beneyto point out, the most appropriate stance for trade unions is to strengthen their internal cooperation and transnational activity (Rocha, Beneyto 2012). Sticking exclusively to national frameworks in collective bargaining, combined with the devastating effects of the development of defensive agreements in Western Europe will result in a '*race to the bottom*' in relation to employment standards. Only the adoption by the European and national trade unions of an active role in promoting and negotiating EFAs can contribute to reverse the current trends.

ILO, OECD and UN Actions against Transnational Corporations

Transnational Private Regulation of Labour

It is worth referring to the concept of the ‘transnational private labour regulations’ (*TPLR*) discussed extensively by Kevin Kolben (Kelben 2011). The author points out that the development of TPLR concerning in particular subcontracting chains is a political and market response to a certain collapse of national and international regulation of labour rules. Many authors point to this decline as resulting in a *governance* deficit. For example, Gary Gereffi and Frederic Mayer point to three areas in which the governance deficit manifests itself (Gereffi, Mayer 2005).

The first area is the “home country governance deficit” - in this case, the home country authorities do not have adequate regulatory tools to address a corporation that admittedly has its central management in one country but performs most of its economic activity elsewhere.

The second area of deficit stems from the weakness of international rules and regulations resulting from agreements between states. The simplest example is a very ineffective and weak system of sanctions at the disposal of the ILO in case of a country which has violated a ratified ILO convention. It is not enough to recall that Article 33 of the ILO Constitution has been used only once in the history of the ILO with regard to Burma. It should also be stressed that while a system of ILO sanctions against member states exists, the relations between the ILO and transnational corporations are completely different.

The third area is the limited capacity of developing countries to effectively regulate their social and economic affairs.

The UN building in New York. Source: www.wikipedia.org

What is a *Due Diligence*?

Due diligence **- a comprehensive, proactive process aiming to identify actual and potential negative social, environmental and economic impacts resulting from the decisions and actions, or resulting from the omissions of an entity (for example, a transnational corporation) throughout the project cycle or cycle of operations. The purpose of the *due diligence* process is to avoid and mitigate negative impacts.**

OECD and ILO and UN action Against Transnational Corporations

Global concern about the growing power of transnational corporations has led to a decision to develop a set of social standards to guide them. The Guidelines for Multinational Enterprises (OECD Guidelines), developed in 1976 by the Organisation for Economic Co-operation and Development (OECD) (subsequently revised in 2000 and 2006) and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted a year later by the International Labour Organisation (ILO) (revised in 2000 and 2006 , and again in 2017), were to serve this purpose.

OECD building in Paris. Source: www.wikipedia.org

In 2000, the UN adopted a programme of incentives for socially responsible behaviour, known as the *Global Compact,* aimed at transnational corporations. The initiative was strongly associated with the then UN Secretary General, Kofi Annan.

The main drawback of these undoubtedly important text has been an entirely voluntary application of their provisions.

In 2011, the UN adopted human rights guidelines. The UN Guidelines do not formulate any new human rights or new obligations under international law. They are the so-called John Ruggie Guidelines (Special Representative of the UN Secretary-General on Business and Human Rights.

The UN Guiding Principles on Business and Human Rights are formulated in 31 principles divided into three groups referred to as the three pillars:

I. State duties to safeguard human rights (10 principles).

II. The responsibility of business to respect human rights (14 principles).

III. Increasing access to effective remedies for affected persons (7 principles).

The UN Guiding Principles on Business and Human Rights apply to all countries and all businesses, regardless of size, industry, location, ownership or structure.

Pillar II of the Guiding Principles identifies 14 principles addressed to enterprises: enterprises should respect human rights in their operations, which means that they should avoid human rights violations and counteract negative impacts on human rights to which they have contributed.

Each UN member state is required to develop a National Action Plan for the implementation of the *UN Guiding Principles on Business and Human Rights*. In Poland, the Council of Ministers adopted the National Action Plan for the implementation of the UN Guiding Principles on *Business and Human Rights for 2017-2020* on 29 May 2017.

Declaration for the ILO 100th Anniversary

The ILO Centenary Declaration for the Future of Work was adopted at the 108th ILO General Conference on 21 June 2019.

The authors of the Declaration point out that the world's governments, employers and workers are capable to revitalize the organization and work towards its founding vision. The authors then call all constituents of the ILO to reaffirm their unwavering commitment and to reinvigorate their efforts to achieve social justice and universal and lasting peace to which they agreed in 1919 and 1944. The ILO marks its Centenary at a time of transformative change in the world of work, driven by technological innovations demographic shifts environmental and climate change, and globalization as well as at a time of persistent inequalities, which have profound impacts on the nature and future of work, and on the place and dignity of people in it.

It is then indicated that the ILO must direct its efforts to:

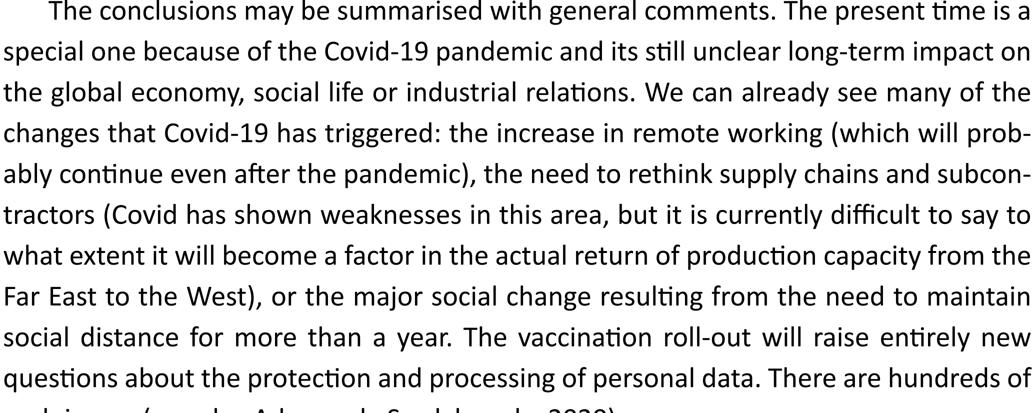
ensuring a just transition to a future of work that contributes to sustainable development in its economic, social and environmental dimensions;

and

harnessing the fullest potential of technological progress and productivity growth, including through social dialogue, to achieve decent work and sustainable development, which ensure dignity, self-fulfilment and a just sharing of the benefits for all;.

Source: www.mop.pl

Conclusions



The conclusions may be summarised with general comments. The present time is a special one because of the Covid-19 pandemic and its still unclear long-term impact on the global economy, social life or industrial relations. We can already see many of the changes that Covid-19 has triggered: the increase in remote working (which will probably continue even after the pandemic), the need to rethink supply chains and subcontractors (Covid has shown weaknesses in this area, but it is currently difficult to say to what extent it will become a factor in the actual return of production capacity from the Far East to the West), or the major social change resulting from the need to maintain social distance for more than a year. The vaccination roll-out will raise entirely new questions about the protection and processing of personal data. There are hundreds of such issues (see also Adamczyk, Surdykowska 2020).

At this point, I wish to emphasise two scenarios for Covid-19 possible impact on industrial relations. These are two very different scenarios (Delautre, Manrique, Fenwick; 2021). According to the first scenario, the pandemic and the economic crisis that fol-

lows it will reduce social dialogue processes and collective bargaining at both national and transnational levels. In particular, in the fight against the pandemic will move from financial stimulation (currently applied worldwide) to fiscal and budgetary restrictions. As Ghellab and Papadakis point out (Ghellab and Papadakis 2011), such a process of freezing the broader bilateral and trilateral dialogue could be observed after the 2008 financial crisis. Such a thesis can also be made with reference to the experience of earlier crises - for example the Asian financial crisis in 1998. (Papadakis, Ghellab 2014).

The second scenario assumes that we don't have *business as usual* any more but instead a real breakthrough. In other words, it is assumed that the Covid-19 crisis has so clearly demonstrated the weaknesses of the current model of capitalist economy that it will be necessary for the national governments, corporations or the international trade union movement to take new action which may be expressed in an increase in various forms of transnational debate which may also translate into increased joint actions by social partners, such as joint declarations, codes of good practice, but also TCA or EFA.

Of course, this scenario can be applied not only on a global scale but also on a European or EU scale in an attempt to answer what impact Covid-19 will have on the process of the European integration or industrial relations and the possible formation of an EU level of industrial relations. Of course, we do not have answers to these questions at the moment.

Before and after the 2008 economic crisis, Meardi pointed out that the lack of visible inclusion of Central and Eastern European countries in the European social model was evidence not so much of the inability of post-communist countries to adapt EU regulations in the area of social standards, but of the weakness of these regulations. In his view, this showed the unpleasant truth that they were intended to serve not so much to raise social standards as to market purposes only (Meardi 2012). This was not evident in the EU-15 countries which had developed national industrial relations systems, but came out forcefully in the new Member States. Thus, the EU-enlargement not only negates the objective existence of the social dimension of the 'European project' but is also supposed to be an evidence of the ongoing neoliberal attack on the institutions of 'organised capitalism'.

At the time of writing this paper, it has not been possible to know the impact of Covid-19 on the process of European integration or the European social model. We can only hint at a few processes that are ongoing and are in some way related to the pandemic:

– 28 November 2020. The European Commission has presented a Draft Directive on adequate minimum wages (COM (2020) 682 final;

– The implementation plan for the European Pillar of Social Rights has been adopted at the Social Summit in Porto in May 2021;

– 4 March 2021. The European Commission has presented a Draft Directive on strengthening the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (COM (2021) 93 final;

– 24 February 2021. The European Commission launches consultation of the European social partners on employment through online platforms.

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Some Reflections on TCA, Trade Unions and European Works Councils… not excluding Corporations

In order to understand the meaning of negotiations leading to the signing of Transnational Framework Agreements (hereinafter – TCA, which is an abbreviation of the name: transnational company agreements most often used for these documents), it is necessary to consider them in the context of the relationship between labour and capital, taking into account the huge imbalance of power between the transnational company with professional legal background and a full stock of necessary information and resources, and employee representation - dispersed, internally diversified, often devoid of strong expert support. Hence the title of this brochure referring to David and Goliath seems accurate, with one reservation however – in this case, it is not about fighting, but about trying to reach an agreement. Charles Levinson, a visionary activist of international trade unions of Canadian origin, who coordinated in 1969 the first ever successful international strike against the Saint Gobain corporation, but later called for trade unions to work out and to implement a model for cross-border negotiations with the managements, was convinced that such a path was possible. (Levinson 1972). TCAs in their current form are certainly not what Levinson meant, but you need to expect a bumpy road when you want to achieve a good goal. And the goal in this case is to try to civilize the conduct of international business.

The Unbearable Lightness of the Extra-Legal Being of Transnational Corporations

It is hard not to notice the role that transnational corporations play in the global economy. Almost a quarter of a million international economic entities (of course non-financial) create one third of the global GDP (OECD 2018) It is indisputable that corporations have a significant impact on labour relations and employment conditions in the countries in which they operate, unlimited by geography or national borders. They used

to do it in a more open way to recall the activity of the North American company United Fruit in Latin America in the first half of the 20th century. The Banana Massacre in Colombia became an infamous symbol of its relationship with foreign workers when in 1928 an army was called by the corporation and at least several hundred workers were shot dead. Today, corporations behave in a more subtle way. When the COVID-19 pandemic began in 2020, Western fashion companies simply refused to pay for their orders to their Asian subcontractors which has led to thousands of layoffs (Donaldson 2020).

Obviously, it does not mean that corporations always and everywhere have a negative impact on local labour relations. More and more often the opposite is happening. This is because the primary objective of a capitalist enterprise is profit maximization. If compliance with CSR (corporate social responsibility) will help to deliver it, such strategies are also implemented by corporations, and the side effect is the improvement of the situation of employees. This also applies to tech corporations such as those of the famous GAFAM group. In the case of sectors producing or supplying consumer goods, the growing pro-social and pro-ecological awareness of Western societies has an increasing impact. Of course, it has a different intensity. The use of child labour is extremely disgusting for public opinion, but the persecution of union activists is less likely to raise protests.

Regardless of the production or service profile, transnational corporations are, above all, big employers. It is estimated that their share in global employment is approx. 23% (OECD 2018). Over two-thirds of this number are employees outside the corporation's home countries, so deprived of even a symbolic opportunity to stand up for their rights where the factual decisions about their workplace are made. Therefore, we are dealing with a huge imbalance: on the one hand, there is usually one global strategy of actions implemented consistently at the local levels, and on the other hand - a variety of employment and work standards, which is a derivative of the level of economic development of a country, but also the ability to defend collective interests.

Despite many examples which confirm that the decisions of the transnational corporation managements made in one country may have direct effects in another country, these entities still operate in an international legal vacuum. This applies to the regulation of labour relations, where we are dealing with a complicated process, mainly due to fuzzy decision-making responsibility and dispersed ownership structure with the simultaneous territorial binding of workers' representation, anchored in specific national systems and traditions of industrial relations. When in the 1970s, the post-war economic order of the world, symbolized by the Bretton Woods agreement, was disintegrating, the international organizations only managed to adopt non-binding docu-

ments relating to the activities of corporations (described in the chapter: Transnational Framework Agreements and their Environment - Basic Information). Even though they were successively amended, they did not eliminate the existing "governance gap." Failure to comply with them may at most result in the loss of a positive image by the corporation, however with no legal repercussions. Only an argument of force against the transnational corporation will work succesfully which has recently been proved by the Australian Prime Minister, who, contrary to Facebook's threats to disconnect the continent from news delivered via this app, introduced regulations obliging this technology giant to pay to local publishers for their content. However, the workers and even the trade unions representing them do not have such strength.

European Works Councils - Unwieldy but Needed

Bearing in mind the previous comments, it is worth appreciating the EU acquis communautaire in this area. It is here that the only legally binding instruments have been adopted, imposing on the boards of transnational corporations any cross-border obligations in relation to the employee matters. I mean mainly the Directive 94/45/EC on the European Works Council, as well as the later directives on: employee involvement in a European company (2001/86/EC) and in a European cooperative (2003/72/EC) and on cross-border mergers of limited liability companies (2005/56/EC).

The idea of a European works council was born as an attempt to find a remedy for the growing power imbalance between the boards of transnational corporations in Europe and national employee representations. After the establishment of the European Communities, its Member States operated for a long time in the blissful conviction of the stability of their social and economic systems, which was to ensure effective protection of the worker in the process of progressing economic integration. The immediate impulse for changing this attitude was the shock caused on our continent by the employment restructuring caused by the oil crisis of 1973. Then, it turned out that the national employee representations did not have any legal means allowing them to influence the decisions proposed by the management boards of transnational corporations. It was when the concept of a legal guarantee for the possibility of a permanent mechanism for informing and consulting employees in companies with an European coverage emerged. It was not easy, however. International business fought to the end. The lobbying capacity of corporations is evidenced by the fact that almost 20 years had to pass, and the treaties had to be changed for this concept to take the shape of the institution of the European Works Council (EWC).

Currently, almost 1,200 such bodies operate in the European Economic Area. However, the potential role of EWC is still an open question. At the beginning, the circles of European employers scornfully pointed out that companies would have to finance “social tourism”. This is how they looked at the meetings of transnational employee representation. For the European Commission however, it was meant to be an instrument aimed at developing such a model of corporate management of employee issues (especially during restructuring) that would be socially acceptable. For trade unions, the councils were supposed to be a step towards democracy in the workplace, and thus involving workers in decision-making processes. An equally important goal was to use EWCs to build platforms for cross-border trade union cooperation. We need to remember that the councils are not union bodies, although their members may be appointed by trade unions which depend on the national legislation. In many cases this is the case, and the Polish Act on European Works Councils of 2002 also grants such a right to the representative trade unions.

Time has shown that EWCs do not fully meet the expectations of the European Commission, let alone trade unionists (Adamczyk 2019). With some exceptions, the consultations of cross-border strategic intentions of the management boards with the employees’ representatives are pretended and take place after the decision has been made. Corporations avoid the actual consultation of planned plans by referring to stock market regulations that prevent the advance disclosure of information about their plans to entities other than shareholders (Pugliano, Waddington 2020). This is anchored in the hierarchy of preferences in EU law, where market rules prevail over industrial democracy. It is therefore not surprising that corporations stopped complaining openly about EWCs and started to build them into their own cross-border personnel management structures.

It should also be worrying for trade unions that the establishment of the EWC has not led to a significant improvement in the quality of trade union cooperation within the corporation. The 2008-09 financial crisis test showed that councils in many cases only played the role of information hubs and were not used by national unions to bring about effective dialogue with cross-border employers. Everything indicates that the 2009 recast of the EWC Directive achieved in spite of massive opposition from business did not change this situation. And the calls for further “improvement” of the directive have been met by the Commission’s by a guide on how to understand the current provisions. We should also remember that over ¼ of the existing EWCs are in fact not covered by the EU law, because the agreements on their establishment were signed in a two-year transition period before the Directive 94/45/EC entered into force, when it

was not necessary to comply with its provisions. This temporal incentive towards corporations was by most of them turned into a permanent state that would be difficult to challenge without the risk of destabilizing the existing council. Although the overall functioning of the EWC institution is not optimistic, one thing seems certain: without the existence of these bodies, the TCA negotiation would not have taken place.

European Works Councils are the Catalyst for TCAs Negotiations

The document signed on 23 August, 1988 by the International Union of Food Industry Workers Associations IUF with the BSN company, now commonly known as Danone, entitled The Common Point of View is recognized as the very first TCA. It contained specific arrangements in four areas: worker training, union rights to economic information, ensuring real equality between women and men, and compliance with the ILO conventions. However, it was the employer, not an employee representation who took this initiative – Antoine Ribaud, the CEO, an ardent supporter of the principles of Catholic social teaching and at the same time a supporter of French socialists. It is worth remembering because later developments indicate clearly that it has been the corporations and not the trade unions that manage the TCA negotiation process.

Everything indicates that the emergence of EWC has become a real catalyst for negotiating transnational framework agreements in the European and global dimensions (Telljohann et al. 2009). Until 2017, 336 TCAs were signed, including 153 European-based (Rehfeldt 2018). It is worth noting that this concerned largely corporations originating in Europe, also in the case of global agreements.

If you look at the TCA negotiation and their content, you can immediately see that this has nothing to do with the Levinson's vision of orderly negotiation. These agreements are far from traditional collective agreements in any country. Some of these texts take just one page, others are very elaborate and describe in detail the procedures for dealing with employee issues. As a rule, the implementation liability is treated very vaguely or transferred to the level of local management. Let us note - management boards and not local employee representatives. These texts have one thing in common - they are signed jointly by corporations and employee representations.

Let's look at the European TCAs. As practice so far shows, they are documents much more suited to the specifics of a given corporation and its current activity which results from the fact that they do not have to refer to international standards, as these are guaranteed by the EU law. European TCA provisions can have a significant impact on

workers in national locations with regard to their working conditions, access to training, work organization, etc. There are often cases where these agreements not only cover "soft issues" but also the traditional areas of collective bargaining, although these are usually ad hoc measures relating to the principles of employee protection during cross-border restructuring (Adamczyk, Surdykowska 2015).

It is hard not to notice that a large part of the European TCAs concern issues that are not very pleasant for employees, i.e. temporary mitigation of the effects of restructuring or anticipating future changes in company management - implicitly also affecting employment relationships. They are the so-called Anticipatory TCA. Therefore, it is important who represents the employees' party in such agreements. We see that in over 2/3 of the cases so far, these agreements have been signed by EWCs, so non-union representation, including almost half of the European TCAs, are signed independently by the EWC without any direct participation of trade unions as signatories. This means more nor less that the EWCs have become negotiating agents which was by no means the intention of the trade unions.

We touch the heart of the problem here. When the TCAs began to develop in the EU, the European Commission considered it a symptom of the European level of collective bargaining: it ordered expert opinions, started consultations with social partners. As a result, the concept of an optional legal framework for the TCA emerged. It resulted from the willingness to organize the situation in which mutual cross-border obligations regarding employment relations appeared, and at the same time it was not clear who was responsible for their enforcement. It turned out, however, that this is not the direction anyone would want to go. The transnational corporations that had just mastered the art of "taming" the EWC were not about to submit to another external scrutiny of the implementation of agreements designed to serve their internal purposes. For Western European trade unions, the legitimacy of the TCA would mean the need to limit their exclusive negotiating autonomy at the national level. On the other hand, they did not like the fact that most of the TCAs are negotiated by the EWC. In such a situation, the best solution was to maintain the existing status quo with full awareness that EWCs would not be able to monitor even those TCAs that they negotiated alone, and therefore that these agreements would have a marginal impact at local level. Admittedly, European trade union federations have developed guidelines for their national organizations on the negotiation and implementation of TCAs. However, it should be remembered that in most cases they are not the signatories of these agreements. The European Trade Union Confederation (ETUC) tried for a long time to maintain a progressive approach to the idea of developing TCA under the "union umbrella", which resulted

from the willingness to meet the expectations of organizations from Central and Eastern Europe. However, the action program adopted at the organisation's congress in Vienna in May 2019, which indicates that the organization will seek some vague tripartite framework agreement on TCA's status, is a clear step backwards.

The Problem of "Taking Care" of TCA

In fact, the Western European trade unions became interested in TCAs when they realized that they the TCA agreements have been effectively and extensively negotiated by EWCs, which meant that the non-union representative bodies entered the area previously reserved for trade unions. The trade unions are incapable to solve the dilemma: should they consider TCA a marginal phenomenon, or important enough to be regulated at the EU level. The latter, however, would mean the emergence of a European level of collective bargaining, and this is met with deep discouragement by many (especially Nordic) trade union organizations.

Inability to resolve this dilemma makes it impossible to implement effective trade union control over TCA negotiation and monitoring, which is a pity, as in such circumstances these agreements often serve solely as a cover for corporate management restructuring efforts. An interesting case is the TCA for the anticipation of changes signed with Schneider Electric in 2007 and then modified 10 years later. It was widely presented as very innovative. However, although the agreement was signed by the European trade union federation, it was left to the EWC to monitor its implementation. And it was not a success story, as at the local level it is primarily perceived as an employer's initiative (Adamczyk, Surdykowska 2015a). The truth is that most of the European TCAs are inspired by corporate management boards. EWCs serve as a convenient platform for such negotiations and trade unions play a marginal role.

Given the above, it is difficult to determine the future of TCAs. Undoubtedly, it is easier to forecast the role of global agreements. Their main task will be, above all, the monitoring of compliance with international labour standards in subsidiaries of corporations located outside countries of developed capitalism and in the chain of subsuppliers/subcontractors. The importance of this is evidenced by recent accusations against leading corporations in the Western world of indirectly taking advantage of Uighur slave labour (European Parliament 2020).

But what about the European TCAs? Until recently, it seemed that they would become part of building the EU dimension of industrial relations. This was indicated by

the involvement of the European Commission in exploring the possibility of developing an optional legal framework for the TCA. After the 2008-09 financial crisis, these visions began to vanish. The TCA facility was rarely used in restructuring operations, which caused the Commission to lose interest in it. In addition, on the side of the seemingly main protagonists of the TCA, i.e. the trade unions, there are deep discrepancies regarding the future strategy towards the cross-border negotiations. Support to the TCA concept is broken by the fundamental, systemic resistance of the Nordic unions towards any activities in the area of Europeanization of industrial relations. This may mean that the TCAs, like many European works councils, will be "be taken care of" by the boards of transnational corporations. However, this would mean a defeat for the European trade union movement. It is worth recalling that back in 2012, the ETUC associated the development of TCA with preventing social dumping and wage competition and achieving a gradual approximation of working conditions within the same transnational company (ETUC 2012). It seems a paradox that the trade union movement struggled to establish a workers representation that could stand up to transnational corporations, but then backed out of action when existence of this representation started to lead to TCA development. This is because trade unions are unable to overcome the limitations of anchoring their actions to the national realities. Consequently, they do not want to take responsibility for TCAs. As a result, negotiations in transnational corporations, if undertaken, become primarily a complement to cross-border personnel management strategies.

However, let us not end these considerations on a pessimistic note. First, the EWCs somehow influenced the civilizing of the behaviour of many corporations. Second, following the councils, the idea of TCA appeared. The vision of corporations descending to the level of employees and negotiating "something" with them, rather than simply announcing the solutions adopted, is a step forward in the labour-capital relationship. In fact, it is the trade unions that now have their lessons to learn - whether to retreat further into their own hustle and bustle of national industrial relations, or to start building cross-border workers' solidarity. Then the TCA has a chance to become a test before starting real negotiations with transnational corporations. As Levinson saw it: mutual support in protest actions, then agreeing on negotiating goals, and as a result, joint transnational negotiations on demands developed by trade unions at the level of individual national subsidiaries. Isn't that an alluring vision?

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Participants of the conference on strengthening national and European social dialogue structures.
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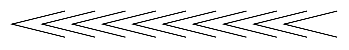
Assertion of TCA claims under national law



Introduction

Transnational company agreements (TCAs) are agreements concluded for transnational companies or groups of transnational companies by their parent company with employee representation (e.g. European works councils, European/international trade union federations). The literature on TCAs often indicates that they operate in a legal vacuum. It results from the fact that TCAs have not been institutionalised, although the first agreement was concluded over 30 years ago[1]. This situation is problematic especially in terms of the possibility to enforce TCAs in court. It requires that the agreement be placed in some normative context which is not obvious in the absence of a legal framework for the TCA. The choice of which state's law applies is resolved by the conflict-of-laws rules of private international law. These norms delimit the spheres of action of legal systems and determine the law of which state should be applied when assessing a case with a foreign (alien) element. This article is an attempt to analyse the TCA in the context of the Rome I Regulation[2] which is decisive in questions concerning the law applicable to cross-border relationships arising from contractual relations in the European Union[3]. The comments will therefore focus on the European variant of the TCA, i.e. the *European framework agreements (*EFAs) which cover workers from the European Union/European Economic Area.

Determining the law governing TCAs

According to the prevailing view, TCAs belong to contractual obligations on the basis of the first sentence of Article 1(1) of the Rome I Regulation (Zimmer 2020, pp. 181-182). Indeed, the term 'contractual obligations' is given an autonomous meaning, encompassing any obligation voluntarily undertaken by one party towards another (Zimmer 2020, p. 182; van Hoek, Hendrickx 2009, pp. 9-10)··. According to Article 3(1) Rome I, the primary means of determining the applicable law is the choice of law made

by the parties. The choice of the applicable law should be made expressly (choice of law clause) or must be sufficiently assured in the contractual provisions or the circumstances of the case (e.g. reference to a specific provision of some legal order or to the entire legal order (Bělohlăvek 2010, pp. 612-614), the choice of the court to which the parties have conferred jurisdiction to resolve a dispute which has arisen or may arise between them in connection with the contract concluded (Bělohlăvek 2010, pp. 619-627, Czepelak 2012, pp. 139-142). An explicit choice of law in TCAs is rare. Sometimes it can be interpreted from the provisions of an agreement which refers to the rules of a specific legal order or the parties have chosen the competent court to resolve a dispute arising under the agreement. If the applicable law cannot be determined on the basis of the aforementioned criteria, Article 4 of the Rome I Regulation, and in particular paragraph 4 thereof, shall apply. Under this regulation, the agreement is governed by the law of the country with which it has the closest connection. This requires the identification of the factual circumstances that most closely link the legal relationship created by the conclusion of the agreement to a legal area. With regard to the TCA, weight is given to the criteria of the domicile of the parties to the agreement, the language of the agreement chosen by the parties, the place where the agreement is concluded and the country where the largest number of employees covered by the agreement are employed (van Hoek, Hendrickx 2009, p. 26; Rudiger 2012, p. 767; Zimmer 2020, p. 182). When the European Works Council is a party to the agreement, the agreement may show the closest connection with the law of the country of the head office of the company where the council has been established (Rudiger 2012 p. 767; van Hoek , Hendrickx 2009, p. 27).

The legal nature of the TCA considering the applicable law

The law governing the TCA governs aspects of the contractual relationship, ranging from the interpretation of the agreement, its performance, the consequences of non-performance, to the issue of the termination of the contractual relationship and the consequences of nullity of the obligations undertaken (Article 12 Rome I). The law applicable to the agreement (either chosen by the parties or designated in accordance with Article 4 Rome I may therefore strengthen or weaken the legal meaning of the agreement (Ales et al. 2006 p. 21). In particular, it may turn out that the agreement is a mere ethical obligation (which is the case for the first generation of agreements), has the nature of a collective agreement, or *sui generis a* civil law contract (in favour of a third party[4]).

TCA as a collective agreement

From a private international law perspective, the case of the qualification of an agreement under national law as a collective agreement seems particularly interesting. This applies in particular to TCAs concluded in France in view of the application in this respect of the national procedure appropriate for a collective agreement, taking into account the representation of the signatory parties in accordance with the national requirements. In this context, it is necessary to distinguish between the structural elements of a collective agreement which in the continental view consists of an obligatory part, which regulates the mutual obligations of the signatories, and a normative part, which regulates the rights and obligations of the employees. Doubts arise in particular as to whether the law chosen by the parties or applicable under Article 4 of Rome I may determine the normative effect of the agreement in addition to the obligatory effect.

Normative effects of TCAs

National legal systems are not adapted to collective agreements with a cross-border element, which either extend beyond the borders of one country or have been concluded by cross-border representations such as international trade union associations (van Hoek, Hendrickx 2009, p. 7) It seems therefore that a TCA which will be recognized as a collective agreement at the national level cannot regulate employment relations in other legal orders under the same rules as in the country of “origin” (van Hoek 2016, p. 15, Czarzasty ed. p. 38). This is because it is reasonable to assume that the procedure applied to the TCA in that country, as a rule, will not correspond to the conditions provided for the conclusion of collective agreements in other countries covered by its scope. This may, for example, be due to the lack of power of national trade unions to represent workers from other countries in the agreement procedure (van Hoek, Hendrickx 2009, p. 33).

TCA provisions as overriding mandatory rules

The extraterritorial applicability of a TCA recognised as a collective agreement in the country of origin could possibly be contemplated if its normative part were qualified as overriding mandatory rules within the meaning of Article 9 (1) Rome I. An overriding mandatory rule is a rule which is considered by a state to be so important for the protection of its public interests, such as political, social or economic organisation, that

it applies to the facts falling within its scope irrespective of the law applicable to the employment relationship. This construction has been applied in Directive 96/71/EC[5], which indicates the application of employment law in the host country deriving from collective agreements or other social arrangements which are declared universally applicable to posted workers (Article 3 (8) of Directive 96/71/EC). However, in the case of the TCA, there is no explicit legal basis for this. Besides, it is argued that it is difficult to link TCAs to the protection of the interests of a specific legal order (van Hoek 2016, p. 16), as they are of a private, corporate nature (van Hoek, Hendrickx 2009, p. 34). One may wonder whether the opposite conclusion would be defensible in a situation of generalisation of an agreement[6], due to the possibility of identifying the public interest premise, which appears relatively often as a premise for the generalisation of collective agreements[7]. However, it is possible that the extension of the effectiveness of the agreement would be negated on the basis of the public policy clause of the respective states (van Hoek 2016, pp. 15-16). Indeed, labour law systems may differ, for example, against the background of the mechanism for influencing the situation of employees, or the competences of employee representatives in a social dialogue (e.g. the division of competences between trade unions and works councils).

Enforcement of TCA claims by employees

The applicability of the TCA to employment relationships depends on the law to which those employment relationships are subject (Pazdan 2015, marginal no. 843). The mere fact that employees are covered by a cross-border agreement does not make such a cross-border aspect appear in the content of their employment relationships. According to Article 8(2) of Rome I, to the extent that the parties have not chosen the law applicable to an individual employment contract, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually performs work under the contract. Thus, if the employees were to claim the benefits guaranteed in the TCA, their claims would be based on the national law - since they would arise from the employment relationship, the content of which is to be affected by the agreement (van Hoek, Hendrickx 2009, p. 20). This means, for example, that if a German employee were to demand the enforcement of an agreement that has the status of a collective agreement in France, the determination of the nature of the TCA in relation to them would be subject to German law. The agreement could therefore be classified under different legal categories depending on the legal system that would be the reference point (van Hoek, Hendrickx 2009, pp. 36-37).

TCA under Polish law

In the case of Polish employees, the issue may be even more complicated. Many Polish companies are covered by the TCA provisions (Czarzasty ed. 2017; Pisarczyk, Skupień 2019, p. 436). However, in majority, the agreements are "transmitted" by transnational corporations, and Polish employers and employee representatives are not the signatories. The question arises as to how to qualify agreements made under foreign law in the Polish legal system. Recognising them as sources of labour law would require prior examination as to whether they meet the requirements provided for in this respect by the Polish labour law provisions. This means, in particular, examining whether the procedure provided for in Polish law (e.g. appropriate for collective bargaining agreement) was applied to them, as well as whether their subject falls within the category of matters covered by the intra-company act and whether they were concluded by entities authorized to do so. It seems reasonable to assume that in general, a TCA will not have the nature of a collective bargaining agreement (special procedure, obligation to register). However, it is possible to recognise it as a normative collective agreement, especially in the case of a broad interpretation of the premise that it is "based on the Act" (see resolutions of the Supreme Court of 7 judges: of 23 May 2001, III ZP 25/00, of 23 May 2006, III PZP 2/06). If we deny the possibility to consider TCAs as sources of the labour law, one may consider granting them the status of civil law contracts. Against this background, however, a problem arises related to the subjectivity of the parties to the agreement. European works councils which often act as signatories of the agreements, do not have legal personality under the Polish law. One may wonder, however, whether it is necessary in collective labour relations to decide on the effectiveness of the obligations undertaken.

Admissibility of legal action based on the content of the TCA

When assessing the legal nature of the agreement, as well as the possibility of pursuing claims based on it, the content of the agreement itself cannot be ignored. The parties may have excluded the legal enforceability of the TCA on the assumption that their agreement is of a merely moral nature. Provisions that the autonomous dispute resolution mechanism established in the agreement is exclusive or that third parties (e.g. employees) have no right to claim under the TCA could also lead to this conclusion. Another issue is the level of definiteness of the provisions of the agreement, which may preclude its attribution as a legally binding obligation due to the impossibility to decode

the rights and obligations of the parties to the agreement (Hadwiger 2018, p. 66; Jaspers 2012, pp. 242-243, 245).

Conclusion

Private international law provides a certain legal framework for TCAs. However, the conflict of laws rules have only the nature of technical standards and can only indirectly affect the assessment of the TCA under national law. The implications of such an assessment may not be obvious, especially given the diversity of industrial relations systems in Europe. The same TCA will function as different legal instruments depending on the reference point (in the form of a specific legal order). To avoid these doubts, it is recommended to implement the TCA in the form of instruments known to the national law (van Hoek 2017, p. 18). However, such a solution is not without its drawbacks either. First of all, it can be expected that as a result of national negotiations (if any), the text of the agreement would lose its fundamental role, i.e. the standardisation of certain rules at the level of the entire transnational corporation.

*Elaborated paper based on the speech delivered on 25 February 2021 at the Seminar **"Can transnational framework agreements allow for negotiating approximation of work standards in multinational corporations in the EU"**, organized by NSZZ Solidarność, Gdansk*

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[1] The first European framework agreement was concluded by the French corporation BSN (now Danone) in 1988.

[2] Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

[3] Except for Denmark.

[4] Thanks to this construction, employees can obtain the benefits of a contract between other parties without participating in it.

[5] Directive 96/71/EC of the European Parliament and of the Council of 16December 1996 concerning the posting of workers in the framework of the provision of services.

[6] Under Article 3(8) of Directive 96/71/EC, there is a presumption of the general application of collective agreements, which means collective agreements which must be observed by all the undertakings in the geographical area, profession or industry concerned.

[7] On the generalization of agreements in the EU, see B. Surdykowska, Generalizacja układów zbiorowych pracy – poważne pytanie dla Komisji Kodyfikacyjnej Prawa Pracy, Dialog. Pismo Dialogu Społecznego, 4/2017 (55), s. 33-36.

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Supreme Court building in Warsaw. Source: www.wikipedia.org

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Disputes arising from the enforcement of transnational framework agreements

Preliminary remarks

The phenomenon of transnational framework agreements (hereinafter also referred to as TCAs) has highlighted many problems resulting from the complete lack of their regulation at both the transnational and national level. Problems occurred not only in the sphere of negotiation, conclusion of TCAs and implementation, but also in their enforcement in practice. Therefore, actions have been taken at the institutional level within the European structures. The European Commission has noted the great development potential of TCAs for social dialogue (SWD 2012, p. 2), and the European Parliament has made a proposal to the Commission to develop a voluntary legal framework for transnational framework agreements which would be designed to support the process of cross-border negotiations but also in mediation of disputes arising from the implementation of TCAs (EP Report 2013).

The social partners believe that the key to the development of a common legal framework for TCAs is to preserve the voluntary conclusion and autonomy of TCAs (Sciarra et al. 2014, p. 19). Such a framework should of course include settlement procedures for disputes arising from the implementation of TCAs in individual countries. The multiplicity of countries involved in the negotiation of such transnational framework agreements and, above all, the differences within collective bargaining regulations, create a potential field for disputes arising from the implementation of the content of the same TCA in different countries. In principle, TCAs can be implemented and enforced in countries where there is representation of transnational corporations undertaking negotiations. Occasionally, TCAs also cover business partners, or suppliers to create common business standards (ETUC Report 2017, p. 12). This scope of covering not only employers and employees but also third parties by TCAs broadens the potential range of actors benefiting from TCAs, but unfortunately also the potential participants in disputes over their enforcement.

The implementation of the TCA is a process involving a significant burden of administrative procedures and high costs for the parties. As practice shows, parties very often must repeat the bargaining process at the national level to implement the TCA or mediate in the event of disputes arising from TCA enforcement (ETUC Report 2017, p. 13). These burdens lead to a twofold conclusion, either to a strategy of non-intervention and not introducing any common legal framework or, on the contrary, to make it easier to foresee the consequences of concluding such TCAs in the form of a common legal framework used, inter alia, for the implementation and subsequent enforcement of TCAs.

Such a voluntary and autonomous legal framework could provide for direct effectiveness of the TCA. The direct effect of the TCA would then guarantee the applicability of the transnational framework agreement to all workers in the different countries whose representatives have concluded the TCA, and not only to the signatories. Obviously, this solution is the most predictable in its effects as such a transnational framework agreement would be implemented under the national law and its binding force would be the same as national collective labour agreements (ETUC Report 2017, p. 61). While it is not necessary to implement a TCA as a national collective agreement (this is just a way to guarantee their direct effectiveness), the nature of collective agreements also corresponds to the characteristics of TCAs without standing in the way of such implementation (Sciarra et al. 2014, p. 41). However, implementation in the form of an agreement would result in functional differentiation of such TCAs between countries. Such a legal effect would be a consequence of the absence of uniform arrangements for cross-border enforcement of TCAs within an optional legal framework. The framework would not be expected to impose any enforcement conditions on social partners in order to preserve their autonomous nature. The great advantage of the direct effectiveness of TCAs is therefore the clarity of the legal status of the TCA in each country where it will be applied and, on the other hand, also ensuring differentiation between countries. Besides, this solution predicts what the next course of action is - the TCA is registered according to national rules and does not require another costly and time-consuming round of negotiations (ETUC Report 2017, p. 61). This is because the main objective of the TCA is to make the application of the transnational framework agreement as effective as possible in practice. This is possible because once a TCA is signed, it must be implemented at national level under the national rules, which ensures that the TCA is enforceable under national law. This also opens the way for industrial action based on the TCA at national level.

How to prevent disputes? Methods of enforcing the application of transnational framework agreements in practice

There are several methods to prevent disputes concerning the implementation of TCAs, including the obligation to distribute the contents of TCAs among individual companies, monitoring of TCAs after they enter into force, or cooperation with third parties. A frequently used method is also for partners to indicate the applicable law and determine the jurisdiction in case of a dispute arising from a TCA (SWD 2012, p. 17).

Monitoring of TCAs after their implementation should reduce the risk of abuse, breaches and poor functioning of TCAs in individual countries (Jagodzinski 2012, p. 182). Monitoring can take place in the form of annual meetings or even with the support of the third sector (NGOs). Additionally, it should be emphasised that in the absence of a legal framework, TCA monitoring remains entirely voluntary for the signatory parties (Schömann 2012, p. 204).

The enforcement procedure could be either compulsory or voluntary. It could be "effectuated via" cyclical implementation reports from the subsidiaries submitted to the parent company. Another way would be for the parent company to monitor directly the implementation of the TCA in its subsidiaries. The establishment of control mechanisms in the subsidiary could then become a prerequisite for joining the TCA (Schömann 2012, pp. 223-224).

Monitoring compliance with the original purpose of the TCA could be applied for the third parties - suppliers and other entities with which the TCA parties work (ETUC Report 2017, p. 24). Such enforcement could be based on monitoring whether fundamental rights under the TCA are being respected. Another option would be to voluntarily encourage cooperating entities to comply with standards under the TCA (Hendrickx et al. 2009, p. 99). Obviously, the latter solution seems more feasible in practice and could function as an opt-in obligation for external actors (ETUC Report 2017, p. 24). For, it should be borne in mind in any attempt to impose on individual states the adoption of nationwide (or EU) TCA regulations, that the adoption of a legal framework for collective bargaining can only take place on a voluntary basis. In addition, currently only national law guarantees the enforceability of TCA provisions in practice, especially in the court proceeding.

Potential disputes and TCA enforcement – judicial or extra-judicial

Discussion on how to enforce the TCA requires referring to national measures, which can be both procedural and non-judicial, provided, however, that the domestic legislation of the country provides for such alternative means of dispute resolution. Unfortunately, domestic means of dispute resolution are not adequate for the TCA (SWD 2012, p. 17). During the discussion on the optional legal framework, there were ideas of granting direct effect to the signed TCAs. Parties to transnational TCAs could then, in the event of non-compliance or non-implementation of the TCA (lack of national implementation), enforce their rights out of court or even in national courts (ETUC Report 2017, pp. 29, 35). Such an entitlement would apply to both the employee and employer. However, this solution remains purely theoretical for the time being, as in the absence of a voluntary legal framework, many corporations enter into TCAs on the basis of a unilateral commitment by the employer (to comply with the TCA) which remain in force until the employer revokes the commitments it has made.

Extrajudicial means of Alternative Dispute Resolution (ADR) such as mediation, negotiation or arbitration may be introduced by adapting the existing national mechanisms to the needs of the TCA in each country. However, transnational framework agreements may also include a private complaint mechanism in the event of non-compliance with TCAs, independent of national and any international regulations (ETUC Report 2017, p. 44). Moreover, the complaint mechanism included in many transnational framework agreements highlights the autonomy of these documents. The trend to include such dispute mechanisms is growing, however, the scale of disputes arising under TCAs and the types of mechanisms used in practice remain unknown (Schömann 2012, p. 209). Despite the lack of data on effectiveness, it seems that the adoption of some mediation regulation at the European and therefore cross-border level would positively contribute to the development of social dialogue in the form of TCAs (Sciarra et al. 2014, p. 34). In order to support the further development of transnational framework agreements, the European Union is promoting the stimulation of TCAs and alternative dispute resolution instead of imposing a top-down rigid legal framework. Concerning dispute resolution, minimum requirements are proposed for the TCAs and subsequent dispute resolution mechanisms. It should be remembered that in this case mediation will take place in a cross-border context, so any regulation at EU level could be helpful. Another way to stimulate the development of social dialogue in this dimension is to offer practical mediation services, to collect practical experience during dispute resolution, and to make proposals for clauses for the future TCAs, or to draw up a list of available mediators (ETUC Report 2017, p. 45). These ways of promoting dialogue will not require binding

TCAs. Future mediation solutions to be adopted in labour law could be inspired by already functioning mediation procedures developed in international trade law.[1] As these examples show, the mediation is not a new way of solving disputes at cross-border level, but rather one that has been gaining in importance over the last years.

Most often, disputes arising from the enforcement of TCAs are between the workers and the employer(s). Dispute resolution procedures may take the form of a right of complaint by individuals deriving rights from the TCA or a mechanism for resolving disputes between TCA parties (ETUC Report 2017, p. 48). Very often, dispute resolution regulation is done at two levels - first at the national level and then at the international level, usually in the absence of successful resolution at the national level. Sometimes the next level is an attempt by a third party to resolve the dispute (Sciarra et al. 2014, p. 31)[2], but only if the parties have provided for such a solution in their TCA. Typically, disputes relate to disagreements between the cross-border level of the corporation and the national level, when a country's trade unions try to change the scope of rights and obligations under an already signed TCA (ETUC Report 2017, p. 49). Mediation procedures can help to resolve such conflicts.

The resolution of disputes arising from TCAs can take place at different levels, from the formal level (mediation through an ombudsman) to the local level - most often at the initiative of local employee representation (Schömann 2012, p. 209). Relatively often, transnational framework agreements include several levels of regulation for resolving disputes internally without the involvement of third parties. Only if no agreement is reached at the local level, the dispute will be taken to a higher level (it will often be the level of the national employee representation), which, however, does not yet imply the involvement of an external mediator. However, the actual scale of the problem is unknown, as both the employer side and the employee representation are reluctant to publicly disclose information on the disputes around their TCAs (Schömann 2012, p. 209).

Disputes arising from the TCA, industrial actions and strikes

While looking at the different ways of resolving disputes concerning the enforcement of the TCA, it is worth considering the possibility of using the industrial action measures. Collective disputes may concern the rights or interests of employees. Translated into collective bargaining terms, the dispute over the employees' rights concerns the implementation or interpretation of rights as defined by the collective agreement.

A dispute over the employees' interests, on the other hand, focuses on the determination of rights and obligations under collective agreements and their possible modification, usually arising while the collective agreement is not functioning or is being renegotiated (Sciarra et al. 2014, p. 31). Disputes over TCAs, on the other hand, relate either to their implementation or to their interpretation (SWD 2012, p. 17), during or after implementation. However, the distinction between disputes over rights and disputes over interests cannot be applied directly to the TCA, as different countries have different regulations on the admissibility of industrial disputes. In some countries such a division is eligible while others do not provide for it, e.g. the UK (Hendrickx et al. 2009, p. 99). In Poland, on the other hand, the procedure for resolving collective disputes does not offer the possibility of enforcing the employer's failure to respect the rights arising from the TCA to a group of employees. In order to do so, trade unions would have to convince employees to individually enforce their TCA rights before the labour court, which seems an unlikely scenario. In the context of TCAs, national legislation will therefore decide whether a dispute around the implementation or enforcement of the TCA can be exercised under national law on industrial disputes and whether it can turn into a strike action.

For the consideration of TCAs and the shape of their potential voluntary legal framework, the right to exercise such collective rights by cross-border bargaining partners is of fundamental importance. A transnational right to collective bargaining and, consequently, to strike would provide a clear route for workers to claim TCA rights. Currently, the legislation is highly diverse and both the right to collective bargaining and the right to strike are regulated exclusively at national level. In addition, in most countries the right to strike is the last resort (*ultima ratio*) and it should not be abused by the social partners. On the other hand, there is no denying that the right to strike remains a specific emanation and consequence of the right to collective bargaining. Therefore, it can be expected that collective disputes, and consequently also strikes, will be initiated, especially in the case of non-compliance with the provisions of TCAs registered as collective agreements.

Under the EU law, the right to bargain and, in the event of dispute, the right to take collective action, including the right to strike, is guaranteed by Article 28 of the Charter of Fundamental Rights, without limiting this right to issues affecting only one country (Adamczyk, Surdykowska 2013). However, pursuant to the Charter of Fundamental Rights, the right to strike can only be exercised in accordance with national laws and practices (Mitrus 2020). Additionally, the right to collective bargaining and the right to strike is derived from Article 11 ECHR on the right to form and join unions. In line with

the recent ECtHR case law, in *Demir and Baykara* v. Turkey[3], the Court confirmed that the right to strike is an indispensable element of collective bargaining in order to defend the professional interests of trade union members.[4] Although the *Demir and Baykara* case did not directly concern the right to collective action, the judgment was delivered by the Grand Chamber of the ECtHR (composed of 17 judges) and is therefore considered fundamental to the interpretation of trade union freedoms and the right to strike. The judgment gave the coalition's right a broader content by allowing it to invoke the norms of the CFR, the ECHR and the ILO, going beyond mere trade union legitimacy, which may have positive consequences in the future also in terms of broadening those entitled to a strike action. The Court stressed in this judgment that the ECHR and other acts are not static, but are living instruments, so they must consider the changing socio-economic conditions (Grzebyk 2019, p. 103).

When analysing the right to strike at the national level, the legislation differences between the countries can be clearly seen. For example, Belgium, France and Italy would most likely, due to the lack of sufficient regulation of industrial action, allow collective action to enforce the TCA, however in France in the form of a strike only (Hendrickx et al. 2009, p. 98-99). Dutch law would only allow such a strike as a last resort (*ultima ratio*) for the enforcement of international obligations. German legislation, on the other hand, allows strikes in the context of the TCA only for the purpose of concluding a collective agreement (in this case the TCA). Unfortunately, national legislation differs too much to conclude unanimously that enforcement of a TCA once it has been signed, can take place in the shape of industrial action equally with disputes arising from national collective agreements (Hendrickx et al. 2009, pp. 98-99). Without first verifying in which mode the TCA was to be implemented in each country, this position cannot be taken.

However, given current international standards of collective bargaining and industrial action, the conclusions of the Hendrickx, van Hoek et al. report seem insufficient. However, later reports on the TCA indicate that the right to strike is guaranteed by the aforementioned Article 28 of the CFR, which allows workers' representatives to go on strike in order to influence the management. Of course, this right can only be enforced according to the *ultima ratio* principle and remain within the framework of national legislation (Sciarra et al. 2014, p. 33). However, experts rightly point out that European Union law does not provide for a transnational right to strike, neither at the level of the legal basis (Article 153(5) TFEU) nor at the practical level (bargaining of the social partners). However, they also note that the right to strike can be enforced at national level if a subsidiary company does not implement the TCA properly or if it avoids us-

ing the collective dispute resolution mechanism contained in the TCA (ETUC Report 2017, p. 36). There are also voices in the doctrine of transnational strike which suggest interpreting Article 153(5) TFEU as merely limiting the possibility of harmonising EU legislation on the right to strike. Such a basis for a transnational strike could then be found in other provisions of the TFEU concerning the adoption of regulations (Article 352 TFEU) and directives (Article 115 TFEU) (Miranda Boto 2016). However, this view seems to contradict the content of Article 153(5) TFEU. The first solution allows to take advantage of the protection existing at national level, but only when problems with the enforcement of the TCA occur in one country, and no longer when similar problems occur in several countries where the TCA has been implemented. However, even from the content of the report itself, it appears that such a power at the TCA is considered mainly at a theoretical level. It results, inter alia, from the fact that social partner relations are firmly embedded in a system in which trade unions retain the right to collective bargaining and the right to strike exclusively at national level (ETUC Report 2017, p. 28). This right serves them to ensure that collective bargaining is effective and that the results of collective bargaining are respected, however only within one country.

Unfortunately, however, the European Union has no competence to create a legal framework for a transnational right to strike, as this is excluded by Article 153(5) TFEU. In the context of the TCAs, this means that, for the time being, the resolution of disputes arising from their implementation is only possible through industrial action where such a right is permitted under the national law. While the EU Charter of Fundamental Rights explicitly leaves open the possibility for partners to exercise the right to industrial action and the right to strike in order to defend their interests and does not limit this right to domestic situations, common regulations are lacking and any practical attempt to initiate cross-border industrial action will have to rely on national law standards. Ultimately, national procedural problems in the initiation and conduct of an industrial dispute should not prevent the social partners from exercising their rights under Article 28 of the CFR. In this situation, the only practical solution seems to be to conduct an industrial dispute (strike) simultaneously in several countries where there is a dispute about the implementation or interpretation of the TCA, or a dispute about interests derived from the TCA. After all, since the dawn of time, the tradition of strikes has been to carry out actions and not to seek legal grounds for such actions.

In view of this far-reaching lack of regulation of the resolution of industrial disputes arising from the TCA, social partners are therefore placing considerable emphasis on alternative ways of resolving industrial disputes. It is this solution that is being promoted in the discussion of a voluntary legal framework. In the absence of a transnational ef-

fective right to strike and effective collective bargaining, a voluntary legal framework for TCAs seems essential (Adamczyk, Surdykowska 2013).[5] A legal framework for TCAs could provide a predictable system for resolving disputes arising from TCAs, not only at the national level, but also at the transnational level, which is indispensable in case of e.g. incorrect implementation of TCAs in several subsidiary companies. However, apart from the lack of a legal framework for cross-border dispute resolution, there are several other unresolved issues. Among others, disputes existing between employee representative organisations of different countries may prove problematic (Adamczyk, Surdykowska 2013). Besides, even choice of the language in which the dispute is to be conducted remains unresolved. Despite many problems, from time to time at the European level, voices are raised that collective rights need to be embedded in the European law. Such embedding would require the provision of a legal framework for freedom of association, the right to collective bargaining with the right to strike as its guarantor modelled on the German Collective *Agreements* Act (*Tarifsvertragsgesetz)* (Blank 1998, pp. 157-168). A legal framework would guarantee the enforceability of TCA provisions in practice. However, it would be a questionable scenario to adopt the regulation of one Member State as a common European legal framework for industrial disputes. In addition, it should be noted that with the current state of the law, such an opinion, although tempting, is incompatible with the content of Article 153(5) TFEU, which leaves collective rights of social partners exclusively to the Member States.

Concluding remarks

The current regulation of the possibility of collective disputes or strikes based on the obligation contained in the TCA does not give any positive landscape. In view of this, the social partners and experts have been consistently pushing the idea of an alternative solution to disputes arising based on the TCA. Considering the current state of the law and trends at the European level, it should be assumed that this is the best possible solution from a practical point of view and, moreover, it obliges social partners to mutual cooperation by increasing their involvement.

To end on an optimistic note, the participation of social partners in TCA negotiations can also have a positive impact on potential disputes. Participation of global or European trade union federations leads to mediation at local or transnational level and resolves disputes arising during TCA negotiations and beyond, thus influencing the development of social dialogue within a group of companies at local level (ETUC Report 2019, p. 11). In summary, at the collective level, in addition to the risks of potential dis-

putes, during the negotiation of transnational framework agreements, conflicts can be resolved at the local level, which has a positive impact on the social dialogue.

Elaborated paper based on the speech delivered on 26 February 2021 at the Seminar ***"Can transnational framework agreements allow for negotiating approximation of work standards in multinational corporations in the EU"****, organized by NSZZ Solidarność, Gdansk.*

[1] See inter alia UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018, https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation oraz OECD Guidelines for MNEs, http://mneguidelines.oecd.org/.

[2] See also the definition of ADR in COM(2002) 196 Final.

[3] ECtHR judgment of 12 November 2008 in Demir and Baykara v. Turkey, no. 34503/97, paras. 140, 144.

[4] On the ECtHR Judgment in Demir and Baykara v. Turkey, see, inter alia J. Unterschütz, *Prawo do rokowań zbiorowych, prawo pracowników czy związków zawodowych?* Studia z Zakresu Prawa Pracy i Polityki Społecznej 2017, 24, nr 3, pp. 239–263; M. A. Nowicki, *Komentarz do Konwencji o ochronie praw człowieka i podstawowych wolności, art. 11* [w:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, wyd. VII, Gdańsk 2017.

[5] See also ETUC Report 2017, p. 36.

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Source: KK NSZZ „Solidarność”

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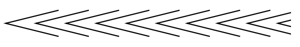
Transnational Company Agreements as an example of hardening soft law



1. Introduction

Transnational Collective Agreements (TCAs) are legally non-binding and hence a form of soft law. One of the main reasons is the lack of a legal framework to give them legal status. Despite efforts to create such a legal framework, so far they have failed. When viewed from the EU level, in the words of the Commission, TCAs can best be defined as agreements that create reciprocal commitments whose scope extends to the territory of several Member States (CSWD 2008). In other words, whether the obligations and rights created by TCAs can be enforced is at the mercy of the recognition of the legal status of these agreements at the national level. Nevertheless, I see two developments that make me argue that the soft law nature of TCAs is hardening.

Before I elaborate on these developments, a few caveats number one. First, it is clear that the legal situation of TCAs is complex. Just being transnational makes them complex. Second, I approach this from a purely theoretical point of view. I realise that, of course, there is a big difference between what can be read on paper and how these instruments work in practice. Nonetheless, changes on paper will eventually lead to changes in practice. Therefore, changes that can be found from a purely theoretical point of view may also result in changes in practices. Third, because of the complex nature of TCAs, due to their transnational nature and the multi-level governance structure these agreements and the actors are part of, I consider any change, no matter how big or small, as something potentially positive. At least, as long as it is a change that offers something more than already existed. I realise that with these caveats in mind, I may present a somewhat optimistic narrative.

Furthermore, it should be noted that this presentation in a way builds on a study I did in 2011 together with Attila Kun and Antonio García-Muñoz Alhambra (García-Muñoz Alhambra, ter Haar, Kun 2011). More precisely, I use here the analytical framework that was used in this paper and that I developed as part of my PhD thesis on the open method of coordination (ter Haar 2012). This analytical framework is helpful with the

analysis of the first development that I see, i.e. a hardening of the content, the *negotium*, of TCAs. The second development I see is a hardening of TCAs via: a) international and supranational initiatives ; and b) national (quasi-)legislative initiatives which are both taking place in the context of Corporate Social Responsibility (CSR) / Responsible Business Conduct (RBC).

2. Development 1: hardening of the *negotium* of TCAs

The argument that the soft law nature of TCAs is hardening because their content is becoming more and more precise is based on views on soft law found in international legal philosophy. A good part of the doctrine on international law is about the legal status (or bindingness if you will) of international instruments. This concerns for example Treaties, Conventions, Declarations, Resolutions, Recommendations, Agreements, etc. The reason for this is that, unlike national legislation, often the option of sanctions lacks. Afterall, the field of international law deals largely with States that are sovereign and therefore cannot be forced to comply with laws they do not want to commit to. Moreover, many international instruments often do not even include enforcement mechanisms and if they do, like for example the International Court of Justice of the United Nations, it is used with huge reservation[1]. This has resulted in a rich doctrine about law, including soft law.

When it comes to soft law, in general there are as many views and thoughts as there are scholars addressing the issue. In general these scholars can be divided into two groups on the basis of the underlying theory or philosophy of law: legal positivism or naturalism. There are more legal theories, however when brought back to their basics they all lead back to one of these two. In essence, legal positivism, takes a dualistic approach to law: either it is law or it is not law. Whether a legal initiative qualifies as law depends on the adoption procedure that is followed. If this is a recognized law-making procedure which is followed correctly, the initiative adopted via that procedure qualifies as law. Naturalism, in its pure sense, is based on the belief that there exists a higher entity that defines our norms. In this view laws can also exist without being adopted via the required procedure. A typical example to illustrate this idea are human rights. Since humans exist, they have rights, for example the right to live, the right to be treated equally, etc., even when these rights have not been adopted via the required procedures.

For legal positivists, with a strong dual approach to law, the existence of soft law is hard to accept. One of the main reasons for this is because soft law is often the result

of a procedure that is not a recognized or full law-making procedure. Those who follow a more naturalist approach to law have fewer issues accepting the existence of soft law. Afterall, for them it is not the procedure that counts, it is the content, the *negotium*, of the initiative that is determinative.

There is a way however, to sort of escape this divide and not think about legal initiatives, like TCAs, in terms of whether they are legally binding or not, but in terms of their normative effect. The latter refers to a situation in which the (quasi - legal initiative creates a change of behaviour in practice. Whether an initiative may have a normative effect can be assessed by three aspects that are characteristic for law: lawfulness/legality; substance/negotium; and structure (García-Muñoz Alhambra, ter Haar, Kun 2011, p.342-345; ter Haar 2012, chapter 3). More particularly, thinking in this model or approach to law, the argument can be (and has been) that hard law can be softer than soft law and soft law harder than hard law. Hard law can be soft, because the content can be very vague and therefore it will be impossible for a court to enforce it. Soft law can be hard when its content is clear and unconditional, and as a result leaves little doubt about the expected behaviour. This creates a strong moral, but also quasi-legal pressure, on the addressees of these initiatives to comply with its content[2].

When reviewing the content of TCAs over the course of time we can see that the content is changing and is actually becoming more concrete, more precise. The comparison can be made in two ways. The first way is by comparing the content of TCAs adopted in the mid-1990s, i.e. the moment the European Works Council Directive became effective and TCAs became a more commonly used instrument, with the content of TCAs that have been adopted more recently, let's say since 2015. The second way is by analysing changes over the course of time in the content of TCAs of one company. The EU's TCA database includes updated, amended, newly adopted, etc. TCAs of about ten companies[3]. Ten is of course not a lot, but it is enough to get a prima facie impression about the changes, if any, of the content of TCAs within one company.

The EU's TCA database provides several elements that make it rather easy to make a quick assessment of the content of the TCAs. These elements include besides general information about the company (name, headquarter, turnover, number of employees), also information about the key objectives of the TCA, an overview of the topics that are addressed, summarized information about implementation and dissemination, review and monitoring, and dispute settlement and sanctions. Tables 1 and 2 give an overview of the assessment I made of a number of TCAs to give you an impression of the changes in the content over the course of time. Table 1 gives an overview of different companies. Table 2 shows companies that have changed their TCAs over time.

For the assessment I have used a technique called coding. It is a rough coding and done briefly only, just to give you an impression. The samples are also not intended to be representative. The coding is as follows. For the assessment of the key objectives and topics that are addressed, I have scored them: 0 when the description is abstract and general; and 1 when the description is more concrete and defined[4]. For the assessment of the other three elements (implementation & dissemination; review & monitoring; and dispute settlement & sanctions), I have scored them: 0 when nothing is mentioned at all; 1 when something is mentioned; 2 when it is elaborately mentioned.

Table 1 Assessment of the quality of the content of TCAs of various companies

Name Company	Year of TCA adoption	Key objectives & topics addressed	Implementation & dissemination	Review & monitoring	Dispute & sanctions
Vivendi	1996	0	1	0	0
Hartmann Group	1999	0	0	0	0
General Motors	2000	0	1	1	0
Bouygues	2001	0	1	1	0
Marazzi	2001	1	1	0	0
Unilever	2001	1	0	0	0
Etex	2002	0	1	0	0
Deutsche Bank#	2004	0	0	0	0
EADS	2005	1	0*	0*	0*
Suez#	2007	1	2	1	1
Santander#	2008	0	0	0	0
ABB	2008	1	1	1	1
Europcar	2008	0	1	0	0
Santander	2009	0	0	0	0
Elanders	2009	0	1	1	1
Volkswagen#	2009	1	2	1	1
RWE#	2010	0	0	0	0
Allianz#	2011	1	1	1	0
PNB Paribas#	2012	0	0	1	0

Michelin	2014	0	0	1	1
Pernod	2014	1	1	1	0
Scor SE#	2015	0	1	1	0
Société Generale	2015	0	1	1	1
Tchibo	2016	1	2	2	2
Asos	2017	0	2	2	2
Generali#	2017	0	1	0	0
Stora Enso	2018	1	1	1	2
Schreiber#	2018	1	1	1	0

*** includes a notification that these elements are not relevant.**

 # specific in scope, e.g. on equal opportunities or restructuring

Table 2 Assessment of the quality of the content of TCAs of companies that have changed it over time

Name Company	Year of TCA adoption	Key objectives & topics addressed	Implementation & dissemination	Review & monitoring	Dispute & sanctions
H&M	2004	0	1	0	0
	2015	1	2	2	2
Solvay	2008	1	0	0	0
	2017	1	1	2	1
ENI	2009	1	1	1	1
	2016	1	1	1	1
EDF	2009	1	2	2	1
	2018	1	2	2	2
PSA Peugeot	2010	1	2	1	1
	2017	1	2	2	2

What these two tables illustrate is that the content of the agreements has changed over time. While the coding assessment shows mostly 0s and 1s till about 2010/2011, this shifts slowly to more 1s and in the later years, from 2016 onwards, also more 2s. With the exception of the EDF agreements, this is an image that emerges from both tables. And even the EDF agreements show a slight improvement in the clarity and precision of the agreement: the 2009 EDF agreement scored a 1 on dispute resolution

& sanctions, whereas the 2018 Agreement scores a 2 because of the inclusion of third-party mediation.

Of course, this is only on paper, it doesn't say much about what it actually means in practice. However, in that sense this assessment also shows something interesting. Namely, most of the changes are in the procedural aspects of the agreement, i.e. provisions that intend to make the material content of the agreements grasp a more solid footing in the business practices of the company. Thus, more attention is paid to the implementation and dissemination of the agreement throughout the company. This contributes to raising awareness about the existence of the agreement. And the more people within the company know about the agreement, the more likely it is that something is done with it. Also, review and monitoring activities are stepped up from not being included at all (coded as 0) to something being mentioned (coded as 1) to rather serious forms (coded 2). Lastly, dispute settlement and sanctions develop from not mentioned at all in the early years to becoming a more common feature for at least internal dispute settlement, to forms that include third-party mediation or even committing to the option to have a dispute about the (interpretation of the) agreement settled in court.

So, it is not the material content *perse*, that becomes clearer, but the company's obligations, mostly procedural are becoming more clear. This means that it becomes easier to hold the company accountable for what it is not doing. Not complying with its own procedural rules may have spill-over effects regarding the company's credibility towards, for instance, investors and consumers. Damaged credibility may thus harm a company where it is most sensitive: investments and profits.

To conclude this part, the first part of my argument that the voluntary, legally non-binding, soft law TCAs are hardening is because the content of these agreements has become more precise and clearer. Hence, it is clearer what the expected behaviour of the company is and therefore easier to address failures to comply with those expectations.

3. Development 2: hardening via external (quasi-) legislative developments

The second development I see is a hardening of TCAs via a) international and supranational initiatives and b) national (quasi-)legislative initiatives. These two developments find their roots in corporate social responsibility (CSR) or responsible business conduct (RBC). They build on the same principle: because more rules on CSR/RBC are adopted at the international, supranational, and national level, the inclusion of such policies in the general corporate business conduct becomes less voluntary. When these international, supranational, and national rules are clear and precise in what they expect from companies, this also has a knock-on effect on the content of companies' (CSR/RBC) policies, including that of TCAs.

3.1. International and supranational (quasi-)legislative developments

International organisations such as the International Labour Organisation (ILO), the Organisation for Economic Cooperation and Development (OECD), and the United Nations (UN) adopted their first initiatives in the 1970s. However, it is only since 2011 with the inclusion of human rights due diligence that their initiatives have made a difference. For the ILO this is its *Tripartite Declaration of principles concerning multinational enterprises and social policy*[5]; for the OECD it is its *Guidelines for Multinational Enterprises,*[6] including practical support *Due Diligence Guidelines for Responsible Business Conduct*[7]*;* and for the UN it its *Guiding Principles for Business and Human Rights*,[8] which are based on the *Ruggie Framework Protect, Respect, Remedy*[9].

All three initiatives are rather strong on due diligence as a quality requirement for a company's CSR policy. This due diligence is a form of risk management in which a company identifies, prevents and mitigates actual and potential adverse impacts, and accounts for how these impacts are addressed. Principle 10 of the OECD Guidelines for MNEs, further stipulates that '[t]he nature and extent of due diligence depend on the circumstances of a particular situation.' This is further worked out in Principles 11 and 12, which read as follows.

'11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations,

products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.'

The *Due Diligence Guidelines for RBC* include additional explanations, tips and illustrative examples of due diligence. This is a document of a hundred pages, mostly consisting of Annexes that explain in detail various aspects of due diligence. In essence due diligence: is preventative (avoid causing or contributing to adverse impacts); involves multiple processes and objectives (including implementation, and review and monitoring); is commensurate with risk (risk-based); can involve prioritisation (also risk-based); is dynamic (it is an ongoing process that is responsive and changing, including feedback loops for double learning); does not shift responsibility (not from government – task to protect – to enterprises, and not among enterprises); is informed by engagement with stakeholders (characterised by two-way communication and based on good faith); and it involves ongoing communication (about its plans and its activities)[10].

Similar guidance can be found at the supranational level in the rules of the EU. Although in general the EU's CSR policy is peppered by voluntarism and soft law, the EU has also adopted two directives: Directive 2014/95/EC on non-financial reporting; and Directive 2014/24/EU on public procurement. Especially the directive on non-financial reporting is interesting, since this too makes a reference to the above-mentioned international initiatives and makes it mandatory for enterprises to report on their due diligence processes (to be inserted Art. 19a, par. 1, sub b on the Non-financial statement; and to be inserted Art. 29a, par. 1, sub b on the consolidated non-financial statement).

To summarize and conclude, all these (quasi-)legal initiatives require companies to execute their CSR policies by means of human rights due diligence. It is a risk-based management system that has been worked out in great detail by the OECD. In essence, due diligence is very much about processes and transparency. It is about building trust, being engaged and communicating the activities undertaken to prevent or mitigate adverse impacts. This guidance on process and procedures is something that I see reflected in TCAs. As tables 1 and 2 in the previous section illustrated, the changes in the content of TCAs are mostly found in the procedural elements of TCAs, rather than their material content (i.e. the formulation of concrete and unconditional rights).

3.2. National (quasi-)legislative developments

For this part I draw on some research I have done together with Attila Kun (ter Haar,

Kun 2019). Although the main focus of this research was on CSR initiatives by the EU, we also explored some initiatives Member States developed. Often these initiatives are developed under the pressure of the international organisations mentioned in the previous section and the EU. Besides “guiding” enterprises in what kind of behaviour is expected from them in terms of responsible business conduct, these organisations increasingly assign a role to States. The European Commission, for example, recognises a role for its Member States ‘through a smart mix of voluntary policy measures, and where necessary, complementary regulation. For example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability[11].

The UN Guiding Principles on Business and Human Rights invites States to develop national action plans for the implementation of the guiding principles. To support States two guides have been developed. The first guide is developed by the UN Working Group on Business and Human Rights and is called ‘Guidance on National Action Plans on Business and Human Rights’ (further referred to as UNWG Guidance)[12]. The second guide is developed by The Danish Institute for Human Rights and the International Corporate Accountability Roundtable and is called ‘Toolkit on National Action Plans on Business and Human Rights’ (further referred to as Toolkit)[13]. One of the things that is expected from States is that they should ‘translate the concept of labour rights due diligence into an enforceable duty of care (Bueno 2019). Ideally this duty of care should also regulate liability for adverse impacts of business conduct along the value or supply chain. However, to what extent this should and could be regulated (this would require extraterritorial effect of national measures) is not clear and is in fact still debated in courts and by legal scholars (Bueno 2019). Hence, States are left with some pioneering actions and as a result, we see the adoption of various (quasi-)legislative initiatives requiring enterprises to respect human rights throughout their business operations, often including their transnational supply chain. Box 1 gives a few examples that are basically copy-pasted from the study I did with Attila Kun (ter Haar, Kun 2019).

Box 1. Examples of national (quasi-)legislative initiatives[14]

France, for example, promulgated on 27 March 2017 an Act on a duty of vigilance (*devoir du vigilance*) requiring parent companies and outsourcing companies that employ more than 5000 employees in France or more than 10.000 employees in France and abroad to draft and implement due diligence plans. Such plans ‘must set out reasonable measures to identify risks and

prevent serious abuse of human rights, fundamental freedoms, health, personal safety and the environment, arising as a result of the operations of the company, of companies under its direct or indirect control, or of subcontractors and suppliers with which it has well-established commercial relationships. It is still being discussed to extend the duty of vigilance to the parent company in the case of human rights violations committed by a foreign subsidiarity. This would mean that the national act on a duty of vigilance would have extraterritorial effect. Another development of institutionalisation of CSR within France concerns the fact that several French public institutions, such as the French export credit agency COFACE and the French Development Agency AFD, incorporate CSR in their governance systems and operations. COFACE, for example has to complete detailed impact assessments before it awards government guarantees to projects likely to have major impacts on CSR-issues, especially human rights.

In its update report of 2016 the UK mentions to have given effect to the UNGPs through, among other activities, the Modern Slavery Act and Modern Slavery Strategy. The Modern Slavery Act, which came into force on 31 July 2015, 'makes the penalties for those who perpetrate Modern Slavery simpler and tougher and provides help for victims, including through a statutory defence for victims of modern slavery who are forced to commit some offences as a direct consequence of their slavery. Part of the Act is an Independent Anti-Slavery Commissioner whose work is expected to lead to more investigations and convictions. The Commissioner will also look at the countries of origin for victims of slavery and recommend measures to address the problem at source. The Act requires all large businesses to produce an annual statement setting out the steps they have taken to prevent modern slavery in their business and supply chains. Statements alone will not suffice, businesses are expected 'to take serious and effective steps to identify and root out contemporary slavery which can exist in any supply chain, in any industry. All businesses must be vigilant and aim to continuously improve. If the reporting enterprise has taken no steps to prevent modern slavery in their business and supply chains, they have to report this too, however, no consequences will follow; the aim of the Act is to create a level playing field between the businesses that are covered by the Act. The Act is complemented with a practical guide on the basic requirements of the legislation and what to address in the annual statements.

The Dutch report focusses on the role of the government to support businesses in their CSR due diligence. Most of this support is organised through the Social and Economic Council (SER). Two of the SER's activi-

ties are especially noteworthy. The first is a full-fledged risk management cycle to make due diligence more palpable. More particularly, the SER initiated sectoral Agreements on International Responsible Business Conduct, in Dutch named Convenants, i.e. a type of “gentlemen’s agreements”. These agreements offer companies within a sector the opportunity to work jointly, with the government and other parties to address specific complex problems. The aim of these agreements is twofold: First, to achieve substantial improvement of specific risks for groups facing adverse impacts within an ambitious yet realistic time frame of three to five years. Second, to offer shared solutions to address problems that companies cannot solve entirely by themselves. The content, form, parties, and means of dispute resolution are to be customised to the context of the sector in question. The Convenants that have been adopted so far, in the fields of Textile, Banking, Insurance, Food and Gold, include dispute resolution and arbitration clauses. The Convenant Textile for example establishes a dispute resolution commission which has competence to deal with complaints about a specific company’s action plan or progress report thereof, and with complaints of individuals or groups of individuals who have suffered harm due to non-compliance by the company with the rights and obligations covered by the Convenant. The dispute resolution commission first seeks to solve the dispute with dialogue or mediation, if that is not possible it may resort to a binding conclusion. When the company does not comply with the binding conclusion, one or more signatories to the Convenant, may bring a claim to the Netherlands Arbitration Institute (NAI). Although the convenants create a strong legal context for CSR due diligence, the choice to initiate such a convenant is voluntary.

Another interesting initiative in the Netherlands is the Act Duty of Care to Prevent Child Labour. Very briefly, the Act requires companies that sell goods and deliver services to Dutch end-users to determine whether child labour occurs in their supply chains. If so, these companies must develop a plan of action on how to prevent it or minimize child labour, and they have to issue a due diligence statement on their investigation and a plan of action. The Act has passed the Second Chamber of Parliament and the Senate, but is not effective yet. Although it has not been communicated explicitly, the Dutch Government is awaiting the EU’s initiative for a Human Rights Due Diligence with the idea that an issue like this should be dealt with EU-wide.

With respect to some CEE Member States, we found the following.

In Hungary, the government’s first major targeted action on CSR was Government Resolution No. 1025 from 2006 ‘for the reinforcement of the social responsibility of employers and for measures to stimulate

it. Although the Resolution clearly announced the public political commitment to CSR (in line with EU CSR-policies) and put forward some ambitious proposals (e.g. extensive public CSR-debate and a state-controlled 'Social Label'), most of the declarations have never been realized. In 2015, the government adopted an Action Plan to Promote CSR. The Action Plan identified three "vertical priority areas" (economic development; labour and equal opportunities; environmental protection) and four "horizontal priority areas" (promoting young people's employment; strengthening the active role of SMEs, ensuring non-discriminatory employment; encouraging the creation of worker and family-friendly jobs). In general, the Plan is not really a genuine CSR-strategy, but only a purposive collection, a purposive "thematisation" of already existing policies. As such, the Plan is more like "ticking the box" of having a national policy, rather than putting forward meaningful, original and innovative commitments. The document put forward a plan to draft an NAP on business and human rights, but it has not been realized so far. In general, we can witness that very little adaptation of CSR to the local context can be identified in Hungary, and this might also be true - to a great extent - for other post-socialist countries.

The Czech National Action Plan for Business and Human Rights (2017-2022) - in addition to prescribing several concrete tasks for public policy - pertinently points out the very important general governance role of NAPs by stating that 'the preparation of the Action Plan was an opportunity to take stock of past processes and measures being carried out in business and human rights independently of this Action Plan.' Furthermore, it states that 'the Action Plan could be interpreted as an opportunity to scrutinise how the law and public institutions work in this area, to review and sum up processes already under way in this field, and to identify areas where there is room for improvement.' As such, the preparation of an NAP in itself is an important learning and governance process, especially for the CEE Member States.

The Polish NAP also reveals some important general features of the overall NAP-related governance process. For instance, it refers to the importance of the stakeholder-oriented approach as it states that 'the development and regular updating of the NAP requires the cooperation of many entities: governmental institutions, industry and non-governmental organisations.' In general, the Polish NAP is an extensive and in-depth Business and Human Rights-related reflection on the Polish legal system. This function of the NAP-process is very significant, as it offers a new narrative for interpreting and developing national laws.

What we get from these examples is that in the CEE Member States, so far, few original and ground-breaking grass root initiatives have been developed. Instead, it seems that existing policies and (quasi-)legislative initiatives are reframed to fit in with the idea of CSR. Whereas in countries such as France, the UK, and the Netherlands (quasi-) legislative initiatives have been adopted that promote especially forms of human rights due diligence. As a result, companies that are headquartered in or operate from these countries, have to take human rights due diligence into account when doing business. As already established in the previous section that human rights due diligence is highly procedural in nature, it is not surprising to find this also reflected in the CSR policies of enterprises, including TCAs.

4. Conclusions

I started with a rather positive claim that voluntary and legally non-binding TCAs are hardening. Such hardening would, from a legal point of view, be welcomed as it would mean that the potential impact of such instruments would be more significant. I have substantiated this claim with two arguments. First, the content of TCAs is becoming clearer, and more precise. I have illustrated this with a simple coding technique of a number of TCAs that have been adopted over time. Second, I argued that there are external developments that put pressure on companies to have more resilient CSR policies, which includes TCAs as a form in which CSR policies can be expressed. I have substantiated this with descriptions of developments in international and supranational initiatives by the ILO, the OECD, the UN and the EU. All these initiatives have at their core human rights due diligence. In essence human rights due diligence is a form of risk-management that is process-based in order to prevent or mitigate adverse impacts a company's business activities may have. This strong focus on human rights due diligence can also be found in national (quasi-)legal initiatives, as is substantiated with a number of examples from EU Member States.

With the developments at international, supranational and national level, it is not surprising, that the changes in the content of TCAs over time, mainly concern procedural aspects, i.e. implementation & dissemination; review & monitoring; and dispute settlement & sanctions. Especially the first two (implementation & dissemination and review & monitoring) fit in very well with the requirements from human rights due diligence.

The combination of external pressure and a clearer and more precise content of TCAs results in a hardening of TCAs because it becomes more and more clear what the expected behaviour is. Especially procedural requirements are rather easy to check and hence to hold companies responsible (or maybe even liable) in case of non-compliance.

Although, from a legal point of view, this hardening of TCAs is a positive development, there are some downsides. Let me highlight a few. As I already emphasized in the introduction, this is a development that can be seen on paper. As is well known, there is always a difference between the "law" in the books and the "law" in practice. Which gets us to the second caveat. While compliance with the procedural requirements can be monitored and enforced rather well (e.g. a meeting took place or not; an assessment has been made or not; etc.), but underlying these procedural requirements are obligations of "efforts". Namely, efforts to prevent or mitigate adverse impacts of business activities on human rights. An obvious question here is: When are efforts sufficient to prevent or mitigate adverse impacts? When the impact doesn't occur anymore, or when the company complies with all the procedural requirements? When the emphasis is on the latter (which seems to be the case with the attention on due diligence) there is a risk that a company is going to hide behind procedures and will use that as a shield not to have to take real responsibility.

This leads us to a third downside. The hardening of TCAs is thus mostly procedural in nature and requires efforts to prevent or mitigate adverse impacts on human rights. However, to be able to understand the severity of the adverse impact, we need to understand what the human right exactly entails. When this remains a general principle or a vague indication, what will then be infringed? Is a statement that the freedom of association will be promoted throughout the company clear enough to identify when this is achieved or negatively impacted?

Thus, while in principle I am positive about the changes that can be found in TCAs over time as they reflect a hardening of their soft law nature, at the same time, I have to express some scepticism whether this hardening, which concerns mainly the procedural elements in TCAs, is indeed positive. As Tim Bartley strikingly put as title of his book, aren't we heading towards a situation of *Rules without Rights*? (Bartley 2018).

Paper based on the speech delivered on 25 February 2021 at the Seminar ***"Can transnational framework agreements allow for negotiating approximation of work standards in multinational corporations in the EU",*** *organized by NSZZ Solidarność, Gdansk.*

[1] Over a period of 70 years the International Court of Justice listed 178 cases on its General List (https://www.icj-cij.org/en/cases), which compared to any national court or the European Courts (CJEU and ECHR) is extremely little.

[2] Although somewhat out of scope of TCAs, an interesting example of the effect of moral, or quasi-legal, pressure to comply are the observations of the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations (CEACR). As elaborated on by Claire La Hovary, although the CEACR is not a court, its "observations", which she calls "soft law jurisprudence", are clear enough to be perceived in practice as setting the behavioural standard. Or in the words of La Hovary: 'this "soft law jurisprudence" is having an impact outside the ILO.' Cf C La Hovary, 'The ILO's supervisory bodies' 'soft law jurisprudence'', in A Blackett and A Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Cheltenham, Edward Elgar, 2015), 316-328, citation at 317.

[3] This number is not representative of the actual number of revisions, amendments, etc., that have taken place. As was indicated by one of the other speakers at the seminar, an increasing number of companies is requesting to have (outdated) TCAs removed from the database.

[4] To give an example of abstract and general: the TCA of Vivendi states the key-objectives: 'The members of the European Social Body – management of the undertaking and representatives of the employees – express the wish, in this context, through the adoption of a joint declaration, to recall their firm attachment and respect for the fundamental rights set out in the International Labour Organisation.' And as topics to be addressed: main topics – fundamental social rights; secondary topics – child labour, forced labour, freedom of association.

[5] Available at: <www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm> accessed 15 March 2021.

[6] Available at: <mneguidelines.oecd.org/> accessed 15 March 2021.

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[10] OECD Due Diligence Guidance for Responsible Business Conduct, p. 16-19.

[11] Commission Communication *A renewed EU Strategy 2011-14 for CSR* COM(2011) 681 final, par 3.4.

[12] Available at www.ohchr.org/documents/issues/business/unwg_%20napguidance.pdf > accessed 15 March 2021.

[13] Available at <www.icar.ngo/publications/2017/1/4/national-action-plans-on-business-and-human-rights-a-toolkit-for-the-development-implementation-and-review-of-state-commitments-to-business-and-human-rights-frameworks > accessed 15 March 2021

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Figure of Themis at the District Court in Gdańsk. LukaszKatlewa - Own work.
Source: www.wikipedia.org

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Conclusion

Transnational framework agreements (TCAs) should also be viewed from the perspective of collective agreements. This perspective is closely in line with the purpose of this brochure. Assuming that TCAs are, or will become in the future, a global development stage for collective agreements that are binding for its parties - the actors of collective labour relations - across borders, they should be approached in a similar way as "conventional" collective agreements, i.e. those that exist at national level. Collective agreements are generally concluded by trade unions. With some exceptions at national level (e.g. Australia, cf. Bray et al. 2020), trade unions generally maintain a monopolistic position when it comes to participation in collective bargaining on behalf of workers. Consequently, it is advisable to analyse TCAs - as a specific, albeit for the time being potential rather than real form of collective bargaining - in the context of a theoretical framework known as the '*power resources approach'*. To be clear, TCAs are not the focus of this section *per se* but will be considered in the context of their significance for trade union's power and influence.

It is therefore necessary to begin by explaining what the *power resources approach* is. This theoretical approach in the field of *industrial relations* has its roots in the debates that took place in the late 1960s and early 1970s (see Korpi 1985). At that time, the starting point was to remind of the issue of class divisions in society and to address the question of the representation of working-class interests under the conditions of a mature *welfare state*. Trade unions had by then become part of the establishment, they did not challenge the existing institutional order (in other words, they accepted capitalism as an economic and political system) because they actively participated in it. This was, of course, in line with the spirit of the era now called the "golden age of capitalism", or Fordism, which lasted from the end of World War II until about the mid-1970s (ended by the 1973 oil crisis and its aftermath). The working class (and its organised representation, above all trade unions) had experienced co-optation to the system: wage earners were to refrain from contesting capitalism in exchange for a negotiated share in the fruits of rapid economic growth, or, to put it more simply, for the opportunity to benefit adequately from general affluence through raised wages, labour

rights, and participation in consumption (see Gardawski 2009).

The influence of trade unions on the world around them stemmed from the power with which they could influence the other actors of industrial relations (employers and the state). This power, in turn, was embedded in specific resources and the ability of the protagonists to use them effectively. In other words, *power resources* are resources that could create power, but do not constitute real power themselves; they can only be translated into it. Certainly, this approach can also be applied to organisations other than trade unions, e.g. employers' and/or business organisations (see e.g. Schmitter, Streeck 1981). In the literature reporting modern research on trade union resources and power, four main categories of trade union power are generally identified. These are respectively: 1) associational, 2) structural, 3) institutional and 4) societal power (Schmalz et al. 2018). Briefly characterising each of these, it can be argued that associational power is primarily driven by the size of trade union organisations, as expressed by the level of union density, but is also shaped by factors such as the composition of membership (the degree to which key socio-occupational groups are organised in trade unions) and employee participation. Structural power is related to the position of workers in an economic system, resulting mainly from a country's position in the global division of labour and value chains. In other words, it is crucial whether a country is located closer to the centres of global development or rather on its periphery. Clearly, the more peripheral the economy, the weaker the structural power, and vice versa. That is why the structural power of German trade unions is, and will certainly remain, greater than that of Polish, Estonian or Greek unions in the coming years. Institutional power derives from the skilful use of associative and structural power to shape the institutionalised processes of industrial relations, mainly collective bargaining and social dialogue, in such a way as to conclude collective agreements and social pacts with the most favourable provisions from the employees' point of view. Finally, societal power is of a "soft" nature, manifesting itself in the ability of unions to influence public opinion through participation in the public debate, shaping its content and language. Societal power affects industrial relations indirectly, impacting their environment of. Trade union campaigns in Poland in 2011-2013 opposing changes in the pension system, during which unions positioned themselves as the 'spokesperson' for a significant part of the society reluctant to the changes imposed by the government may serve as an example.

Analysis of TCA from the perspective of the *power resources* approach should focus mainly on institutional power, with structural and associational power remaining in the background. This is rather obvious, since we perceive TCA as part of the emerging global dimension of collective bargaining. Let us therefore look at trade union resources

that can translate into institutional power in the context of TCA negotiations and implementation. These resources are, as initially signalled above, union density and its sectoral distribution, the relative strength of the local economy in the global context and position of workers in the economic system.

In the context of TCA, an important resource that may determine structural power is the domicile of the corporation and the headquarters of the parent company. Specifically speaking, there is a possibility for transmission of locally-embedded structural power to transnational level through reproduction of industrial relations patterns dominant in the corporation's country of origin. For example, in a corporation originating from Scandinavia one could expect a transfer of corporatist patterns with a significant role of trade unions, advanced employee participation and a climate conducive to social dialogue to subsidiaries, and possibly also to the global level, e.g. with the EWC evolving into a participatory type (Lecher et al. 2018) or by introduction of TCA. However, as the research on Polish subsidiaries of transnational corporations shows, it is naive to assume that such an imitation mechanism works smoothly (Czarzasty 2014).

The results of the project "European Works Councils as a support platform for transnational framework agreements (TCAs)" suggest that trade unions are not the dominant party when it comes to taking the initiative to introduce TCAs. Trade unions (European sectoral federations) initiated negotiations in only 4 (out of 15 cases described). This happened in the following corporations: Alstom, Carrefour, Inditex, Whirlpool (partly). Meanwhile, central management initiated negotiations in as many as 7 cases (three agreements in UniCredit, Pernod Ricard, ArcelorMittal, EDF, Sodexo).

It is difficult not to agree with the statement of Łukasz Pisarczyk, who back in 2017 claimed that ‹the lack of a legal framework is an obstacle to the development of transnational framework agreements› (Pisarczyk: 58). That obstacle seems to be recognised and taken seriously by trade unions in Europe. Such conclusion can be drawn, for example, from research conducted within the ARTUS-CEE project (Czarzasty 2020). The surveyed trade unions representing six New Member States of the Central and Eastern Europe (Bulgaria, Lithuania, Poland, Romania, Slovakia, Slovenia) expressed general support for the idea of an optional legal framework for TCAs, despite the lack of due support for the concept from the European Trade Union Confederation (see Czarzasty, Adamczyk, Surdykowska 2020). However, an interesting phenomenon was observed in the research: trade unions from all the countries surveyed, apart from Slovenia, had high hopes for cross-border industrial relations institutions (not only TCAs but also EWCs), although their view was far from uncritical. Trade unionists interviewed for the study pointed out, among other things, the reserved attitude of Western unions from

the so-called old EU (EU-15) towards these institutions. The Slovenian trade unionists had a similar approach which gives rise to the hypothesis that the better the assessment of one's own national industrial relations institutions, the more subdued the expectations towards cross-border institutions, such as TCAs. In other words, there seems to be the following pattern present: the higher the sense of agency at the national level, the weaker the need to seek support at the transnational level. This, of course, has consequences for the promotion of TCAs: the lower the interest in TCAs, the weaker the support for their strengthening, thus they have no chance to expand, and this perpetuates the lack of interest in them. Paradoxically, the greater the institutional power of trade unions at the national level, manifested in robust and far-reaching collective bargaining, the weaker the incentive to build resources (cross-border cooperation resulting in the thickening of social networks linking trade union organisations from different countries) that could translate into improvement of the institutional power globally.

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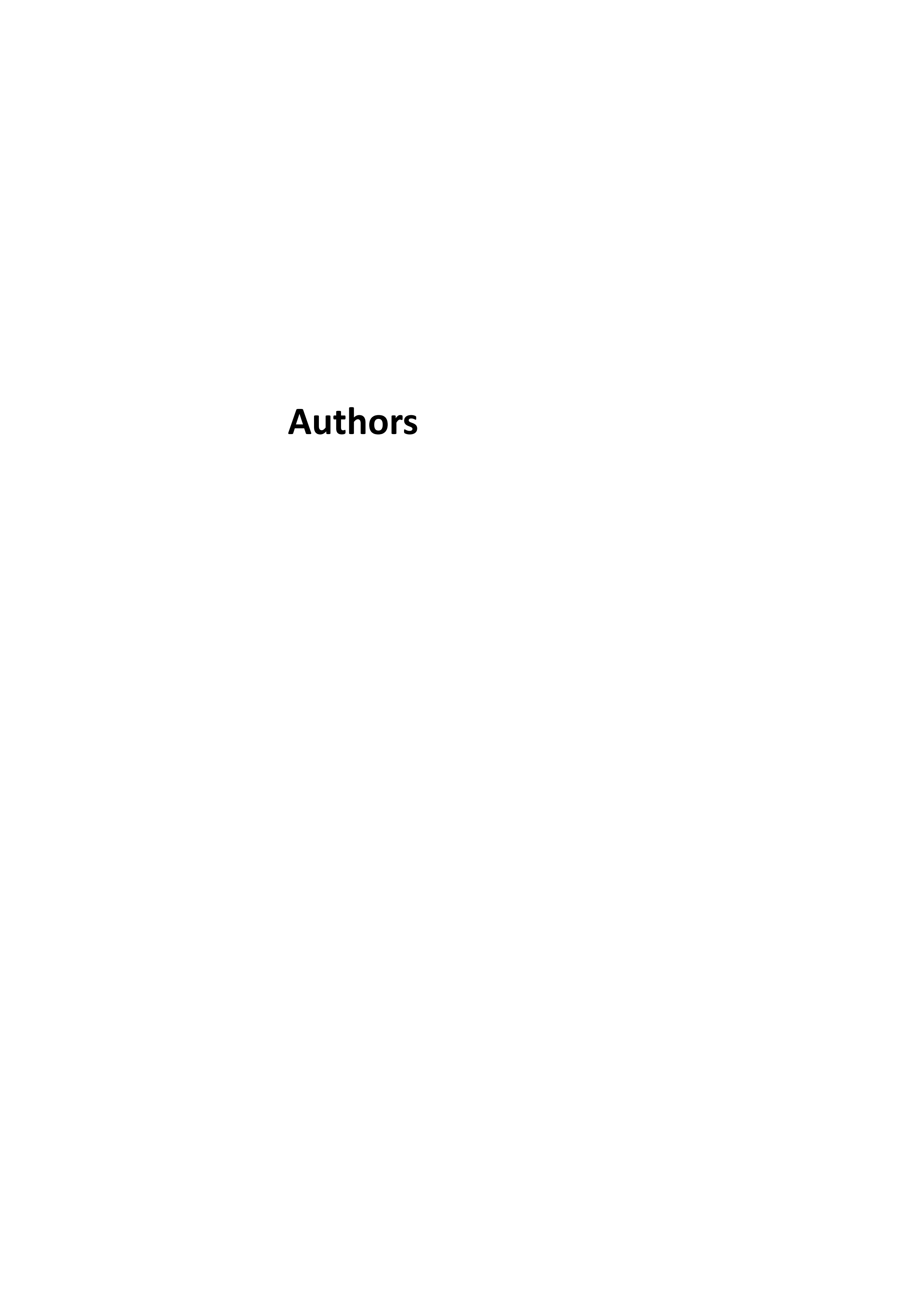

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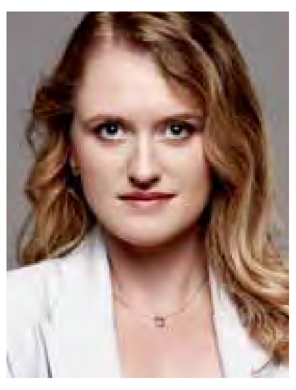

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