



**Conférence « Accords transnationaux
d'entreprise »**

**« *Transnational Company Agreements* »
*Conference***

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Quelles relations, quelles articulations entre niveaux et acteurs du dialogue social?

Transnational Company Agreements.

Backgrounds, Properties, Legitimacy & Effectiveness

Prof. Dr. Ulrich Mückenberger/Univ. of Hamburg

ulrich.mueckenberger@wiso.uni-hamburg.de

Quelles relations, quelles articulations entre niveaux et acteurs du dialogue social?

General Assessment

- 1. Transnational Company Agreements (TCAs) are gaining increasing importance – in Europe as well as beyond Europe**
- 2. Particularly in the area of company restructuring they are important**
 - transnational character of decision-making**
 - transnational impact of restructuring decisions**
 - transnational articulation of employees and trade unions****= transnational bargaining and agreement.**

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Background (1)

3. The reasons for the increase of TCAs are multifold:

- **In Europe a shift from « regulation » to smoother forms of management of change**
 - **Open Method of Coordination (OMC),**
 - **Social Dialogue (SD).**
- **Outside Europe**
 - **no state as regulator**
 - **or international regulation not sufficiently effective**
 - **or international regulation not adapted to sectoral conditions.**

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Background (2)

4. Globalisation tends to

- « **Fragementation** » (fragmentation + integration) (James N. Rosenau)
- « **Glocalisation** » (globalisation + localisation) (World Bank)
- « **Decentration** »: loss of importance of former « **centres** » (nation-state, enterprise, family) under impact of centralisation + decentralisation (CIS Hamburg)
 - **Problem: where does « voice » go under conditions of decentration?**

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Strategic Orientation

6. Transnational Normbuilding Networks Approach:
A Democratic need for a new voice-entitlement-nexus – TCAs can represent such nexus

Eur. Commission Approach « Flexicurity »:

- Transfer from individual to collective labour relations
- Flexibility: TCAs near to the actors and problems (« subsidiarity »)
- Security: Agreements help to effectively solve problems of restructuring

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Definition TCA

- 7. TCA: « an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives » (SEC(2008)2155) – to be completed:**
- « and which is probable of being effective with a view to all parties concerned « (UM).
 - « Transnational »: as opposed to « inter- » or « supranational » means cross-border involvement of non-state actors.**

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Legitimacy & Effectiveness of TCA

8. Within the triade

- « governance by governments »
- « governance with governments »
- « governance without governments »
(Czempiel/Rosenau),

TCA's belong to the two latter categories.

Three new challenges are connected with this type of governance:

- **Blurring boundaries between social and legal norms,**

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Legitimacy & Effectiveness of TCA

- **Blurring boundaries between norm creation and norm enforcement,**
- **Substantive individual rights may be secure, but collective procedural rights not.**

Therefore two basic problems have to be solved:

- **Legitimacy of norms so created.**
- **Their effectiveness.**

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Legitimacy of TCA

9. Legitimacy of TCAs follows – like agreements of the Social Dialogue – from the contract regime (« *volenti non fit iniuria* »)

In terms of the nexus of voice and entitlement rights and obligations are directly linked with the given consensus.

Except for representativeness TCAs do not seem to pose problems of legitimacy.

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Effectiveness of TCA (1)

**10. « Effectiveness » (as opposed to « efficiency »)
means**

the actual achievement of effects intended by a certain measure or agreement - according to intersubjectively verifiable criteria.

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Effectiveness of TCA (2)

11. For being effective a measure like a TCA does not necessarily require legal force or state involvement. So-called « social norms » can have vigour and be effective.

Legal sociology and economics teach us that effectiveness depends on the specific conditions of agreements – particularly from the condition whether one side to the agreement has an interest not to comply with the agreement.

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Effectiveness of TCA (3)

12. There are conditions under which parties to an agreement voluntarily comply with its terms although these terms (or some of them) are not in their economic interest. The reason is that they have higher incentives to comply. Incentives to comply are:

- Repeated game,
- Prestige,
- Network effects.

Economists (game theorists) here speak of a « Nash equilibrium ».

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Effectiveness of TCA (4)

- 13. Where such strong incentives do not exist external mechanisms for compliance – i. e. of effectiveness of agreements - are required. They can be non-legal without or with third party-intervention, legal and/or with state-support.**
- **A non-legal mechanism without third-party intervention is compliance due to collective bargaining and conflict-handling (B. Bercusson).**
 - **An effective non-legal mechanism with voluntary third-party intervention can often be found in transnational obligations or agreements concerning Codes of Conduct (B. Hepple).**

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Effectiveness of TCA (5)

(Still) 13.

- **A legal, but not necessarily state-supported mechanism of effectiveness can be that the parties to the agreement agree on conciliation or arbitration procedures. In most of these cases effectiveness of the agreement is achieved. In case of conflict these procedures require recourse to state authorities. The *lex mercatoria* developed this way.**
- **Both foregoing mechanisms can be provided for by agreement of the SD and – as art. 137 para. 5 ECT does not apply – by directive of the Council.**

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Effectiveness of TCA (5)

(Still) 13.

- **The two mechanisms can equally be provided by council & EP-directive.**

14. A European directive and its transposition into national law can produce an effective framework for the implementation of TCAs covering legal requirements as well as legal effects of TCAs and their means of enforcements. Member States know framework legislation from collective agreements law. The directive would have to take into account the diversity of MSs' legislation.

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Type of Enforcement	TCA Implementation Mechanism
Non-Legal, unilateral	Selfexecuting (Nash equilibrium)
Non-legal, bilateral	Collective bargaining and dispute
Non-Legal, trilateral	Voluntary third-party monitoring
Legal, not always state-involving	Conciliation and arbitration procedure
Legal, not always state-involvement	Social Dialogue Agreement
Legal, State-Involvement	Council Directive on SD Agreement
Legal, State-Involvement	Framework Directive for TCAs

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Actors and Levels of Regulation

15. Double principle of proactive subsidiarity

-« horizontal » subsidiarity: non-state actors preferred on a European level: Social Dialogue – social partners

-« vertical » subsidiarity: regional – establishment-level preferred to European or national level

But: « proactively » = the state and the higher level actors « empower » non-state and lower level to be capable of acting autonomously.

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Conclusion

16. A clarification of legal status and effectiveness of TCAs on an European level is desirable and possible.

17. Norms and agreements the effectiveness of which remains uncertain (cf. study to telework-agreement) have unintended disadvantageous effects:

- They challenge the envisaged objectives.**
- They undermine the populations' confidence in norms and in state authority.**
- They lead to distortions of competition between enterprises (« freerider problem »).**

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