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The role of transnational company agreements in the context of increasing international integration

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In the context of the Renewed Social Agenda[1], this document aims to contribute to the Commission efforts to manage the process of globalisation in a balanced way and to help European citizens benefit from the opportunities presented to them. Together with the revision of the Directive on European Works Councils, the Commission Working Document on "Restructuring and Employment: the Contribution of the European Union", and the report on the implementation of the European Globalisation Adjustment Fund, this document contributes to promoting anticipation and adaptation to structural change in times of globalisation, which requires an appropriate and timely involvement of workers.

The present document emphasises the key role and the potential of transnational company agreements[2] in today's increasingly international business environment. It is intended as input for the debate on such agreements and on the contribution of different stakeholders to their development.

The growing need to anticipate developments in terms of employment, flanking measures for restructuring, and managing human resources throws down new challenges for both management and workers in transnational companies. Against the backdrop of new approaches to dialogue and corporate social responsibility, companies and workers' representatives have begun agreeing texts in various forms, drawn up jointly for application in more than one Member State. The Commission has listed 147 joint transnational texts in 89 companies; most of these have been concluded since 2000.

Such initiatives help to create a climate of trust and dialogue that allows balanced company policies to be developed through an approach based on partnership, in particular as regards anticipation of, and accompanying measures for, change. They are also fully in line with the approach developed in the Commission's Communications *Towards common principles of flexicurity: More and better jobs through flexibility and security*[3] and *Restructuring and employment: Anticipating and accompanying restructuring in order to develop employment — the role of the European Union*[4].

The growing international dimension of company organisation and of merger and take-over operations, the emergence of European companies, the increasing mobility of the factors of production and the ever more transnational scale of restructuring operations is bringing an ever greater need for transnational negotiation within firms.

This development, which now affects nearly 7.5 million workers across the world, raises some fundamental practical, legal and political questions for the social actors and the European Union that are related to the discrepancy between the transnational scope of texts concluded and national norms and references.

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1 Communication of the Commission "Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe", COM(2008) 412 of 2 July 2008.

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

3 COM(2007) 359 of 27.6.2007.

4 COM(2005) 120 of 31.3.2005.

This paper forms part of the Social Agenda for 2005-10[5], which envisages the drawing-up of an optional European framework for social partners wishing to formalise the conduct and the outcome of 'transnational collective bargaining' in order to 'support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training'. The European Parliament and the European Economic and Social Committee have expressed support for this initiative and have asked the Commission to consider proposals in conjunction with the European social partners for drawing up a legislative framework on a voluntary basis[6].

1. OBJECTIVES AND SCOPE

As part of a gradual approach to the debate on transnational company agreements and in the light of the contributions of the various players to the drafting of such agreements, the Commission is proposing a number of practical measures to the social partners, the Community institutions and the other stakeholders. A study report prepared by the services of the Commission in conjunction with this document outlines the situation regarding transnational texts already concluded[7].

The Commission is convinced of the potential of transnational company agreements in a context of increasing international integration. However, since this is a new and technically complex subject, the Commission has followed and will continue to follow a step-by-step approach that involves all stakeholders in weighing up the facts and considering options.

Since 2005 the Commission has collated and analysed the transnational texts available to the public and has conducted a survey of cases covering the actors involved in concluding them. It commissioned a study[8] assessing the legal issues arising in connection with transnational collective agreements and identifying the obstacles to their further development and ways of resolving them. It also organised two study seminars attended by the social partners, the Member States, experts and parties with first-hand experience, with a view to making the findings available, exchanging first impressions, considering the analyses and discussing the issues[9].

Some points need clarifying as regards the scope of this paper. First, it concentrates on companies. Social dialogue at other (sectoral and inter-trade) levels is increasingly structured within the Community on the basis of Articles 138 and 139 of the Treaty establishing the European Community, and the Commission has dealt with this in depth in the Communication *Partnership for change in an enlarged Europe: Enhancing the contribution of European social dialogue*[10]. The European social partners also included monitoring of the

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5 COM(2005) 33 of 9.2.2005.

6 Resolution P6_TA(2005)0210 of 26 May 2005 (Rapporteur: R. Oomen-Ruijten) and EESC Opinion 846/2005 (Rapporteur: U. Engelen Kefer) adopted on 13 July 2005 by 60 votes to one, with three abstentions.

7 European Commission, DG Employment, social affairs and equal opportunities, "Mapping of transnational texts negotiated at corporate level", 2008 available online at http://ec.europa.eu/employment_social/labour_law/documentation_en.htm#5

8 *Transnational collective bargaining: past, present and future*, E. Ales (coordinator), S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F. Valdés Dal-Ré.

9 Documents and information at http://ec.europa.eu/employment_social/labour_law/documentation_en.htm#5.

10 COM(2004) 557 of 12.8.2004.

implementation of autonomous agreements concluded and analysis of their impact at various levels of social dialogue in their work programme for 2006-08.

Next, this paper focuses on Europe. Here the Commission is looking at texts largely for application in the Member States. Those relating mainly to compliance with international labour standards outside Europe are dealt with in the Communication *Promoting decent work for all: The EU contribution to the implementation of the decent work agenda in the world*[11].

Lastly, since the analysis set out below is based on concepts developed within widely varying national systems of industrial relations, the way certain terms are used needs to be explained.

Texts intended to apply in more than one Member State and which have been concluded by companies and workers' representatives are referred to by the generic term 'transnational texts'. They cannot generally be termed 'collective agreements' as they are not concluded in accordance with the collective bargaining rules of a particular Member State. Since they deal with specific subjects at company level and do not seek to lay down a general framework for working conditions or wage levels, they cannot be regarded as 'collective conventions'. Where they are referred to as such by the parties or they involve mutual commitments that set them apart from mere declarations, the term 'agreements' is used. The process that leads to the joint signing of texts by representatives of the employer and of the workers and which may range from straight acceptance by one party to an interactive process leading ultimately to a compromise is referred to by the generic term 'negotiation'. It cannot usually be considered equivalent to 'collective bargaining' as practised at national level, such as that covering wages and salaries.

These clarifications are offered in the particular context of this document to facilitate the task of the reader, who needs to bear their limits in mind since the concepts covered by the terms may themselves differ in the various national systems and in different languages[12].

2. THE PURPOSE OF TRANSNATIONAL TEXTS AND TRANSPARENCY

Knowledge of transnational texts is still in its infancy, and during the study seminars in 2006, the social partners stressed the need to continue gathering and exchanging information on the subject. The 88 transnational texts focusing on Europe that the Commission listed mainly deal with the following topics, in addition to the organisation of social dialogue itself:

- specific subjects such as health and safety at work, equality in employment, and data protection;
- restructuring, work organisation, training and mobility;
- the principles behind human resources policy and corporate social responsibility.

They reflect the need for flanking measures to accompany developments in company structure and activities, the determination to develop social dialogue and to deal with the big social issues arising in the company, and the desire to respond to specific needs in terms of health

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11 COM(2006) 249 of 24.5.2006.

12 Distinctions such as that between '*Betriebsvereinbarung*' (company agreement) and '*Tarifvertrag*' (collective wage agreement) or between '*négociation collective*' (collective bargaining) and '*négociation*' (*negotiation*) do not exist, for instance, in all Member States or all Community languages.

and safety, financial participation, data protection and equal opportunities. They deal only incidentally with wages and working hours, the key issues in national collective bargaining.

Anticipating, and providing for accompanying measures for, restructuring are especially important in this process and concern more than one third of the texts agreed. Both the workers' representatives and the company management who have conducted this type of dialogue see it as worthwhile because it leads to a shared, overall view of what is at stake, develops anticipation, fosters a relaxed social climate that is favourable to acceptance of change, encourages the search for innovative professional transitions and heightened security for the workers concerned.

The last few years have also seen the conclusion of transnational texts relating to fundamental rights and corporate social responsibility. Such texts are usually termed 'international framework agreements' where they are signed by international trade-union federations. Most of them mainly concern the non-European sphere and are not dealt with in this paper, except where a key aspect of their application and monitoring takes place within Europe.

The existing transnational texts have varied titles, such as 'joint opinion', 'joint declaration', 'draft', 'programme', 'convention', 'principles', 'framework', 'code of conduct', 'charter', 'framework agreement', 'agreement' or 'European agreement'. They may also be published in the form of brochures or as annexes to agreements setting up European works councils. There is no necessary link between the title of the text, its content, the procedure for negotiating it and the type of commitments it involves.

In 2004 the Commission drew up a typology of European social dialogue texts comprising four major categories[13]:

- agreements laying down minimum standards and implemented autonomously or by a Council decision in accordance with Article 139 of the Treaty;
- process-oriented texts: frameworks for action, guidelines, codes of conduct, policy orientations;
- opinions, declarations and tools for exchanging information;
- procedural texts laying down rules on dialogue between the parties.

The drafting of transnational texts should observe certain principles where the parties wish them to produce effects other than declaratory. For example, texts will be clearer and easier to implement if they are dated and signed and the name and capacity of the person signing are shown clearly, if the persons to whom the text is addressed are indicated, if the date by which its provisions are to be implemented and the way this is to be done are indicated and the rules for monitoring and settling disputes are shown, etc.

The Commission could usefully suggest how transnational texts could be made more transparent, as it did for the European social dialogue texts, without prejudice to the freedom of the parties.

[13] COM(2004) 557 of 12.8.2004.

3. ACTORS IN TRANSNATIONAL COMPANY NEGOTIATIONS

The issue of who the actors are is crucial in a transnational negotiation, as in any negotiations. At present one or more categories of actors play a part in representing workers:

- European works councils play a key role in concluding transnational texts. Almost all texts relating to Europe bear their signatures;

- Almost half of the texts relating to Europe bear the signatures of European and/or international workers' federations by virtue of their coordination or legitimation role in line with the workers' desire;

- Several texts relating to Europe bear the signatures of national workers' organisations, in particular where effects identical to that of national company agreements are sought.

Today none of these three categories of actors has the full legitimacy or the legal capacity needed to conclude transnational texts to which the parties would like to give the effect of company agreements in several Member States.

The competences of European works councils under Directive 94/45/EC are information and consultation, not negotiation. Their membership is tailored to that end and determining their representativeness is problematic given the frequent lack of proportionality when set against the worker head count. Furthermore, their involvement in negotiations is at odds with national systems that make a clear distinction between the consultative role of elected bodies (works councils) and the negotiating mandates entrusted to trade unions or which utilise a single trade-union channel for worker representation.

The representativeness of European and international workers' organisations and their mandates to negotiate and sign are not always clear. Organisations such as the European Metalworkers' Federation have begun to adopt internal rules of procedure in this respect. The involvement of trade-union organisations in negotiations on issues such as restructuring also comes up against national systems under which the works council is responsible for such topics.

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

When negotiating and signing transnational agreements the actors' capacity to represent and enter into commitments on behalf of others is not a theoretical matter. The existing texts may stem from a centralised process involving the management and the coordinator of the European works council and from the active involvement of local actors at various stages. Certain opt-outs have occurred following disagreements on the approach, the substance or compatibility with national law. In other cases, the European text provides a framework for 'transposition' via national agreements.

At the study seminars held in 2006 and in internal resolutions adopted since 2005, the European trade-union organisations, who believe the role of the trade unions cannot be circumvented, highlighted their special concern regarding the issue of the actors in the negotiation.

The type of actors involved and the process followed in concluding transnational texts also pose a problem for the company negotiators, who need to innovate to ensure the text agreed is accepted as widely as possible and has the biggest impact. The issue of the actors is thus crucial for the development of transnational company agreements.

4. EFFECTS OF TRANSNATIONAL TEXTS

Nowadays commitments entered into when transnational texts are agreed vary considerably, ranging from joint declarations of general principles to the explicit determination to give legal force to binding provisions of transnational company agreements. Similarly, while uniform effects across Europe can be expected in terms of data protection, certain transnational texts function as a framework laying down objectives the procedure for implementing which is left to the discretion of, or negotiation by, local parties.

During the study seminars, this diversity led to a debate on the type of commitments entered into by the parties signing transnational texts and on what effects they expect such texts to produce. Several representatives of employers' organisations took the view that the texts agreed are declaratory and are not intended as collective agreements. They also insisted that transnational texts can only lay down general guidelines and are not intended to establish precise rules that are directly applicable.

Irrespective of the intention of the parties signing them, the issue of the legal effects of transnational texts needs to be looked at. In the present situation this is a complex matter, which — depending on the content of the texts in question — is conditional on the national framework that may apply, whether or not they are signed by national trade unions and whether or not there is unilateral commitment on the part of the employer. At present, only texts bearing the signature of national trade unions may be regarded as collective agreements likely to produce legal effects as such, and only where they are concluded in accordance with the rules applying in the Member State concerned.

What makes a collective agreement varies significantly from one Member State to another, in particular as regards the representativeness of the parties signing, compliance with negotiation procedures, requirements as to substance, and registration formalities. National law also varies as regards the legal effect of collective agreements, e.g. whether or not they have a binding effect on employment contracts, whether they affect solely those parties signing them or all employees. Such differences should also prompt reflection on the existing texts and on a possible Community instrument, which should take account of the risk of interference with national industrial relations systems and explore the possibility of making provision for transnational company agreements to have the same sort of effects as company agreements concluded at national level.

Transnational texts also raise questions regarding data protection: on this subject, reference should be made to the opinions and documents of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data[14], which lay down guidelines on

[14] This independent European advisory body was set up under Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). Documents WP 48, WP 117, WP 74, WP 107, WP 108 and WP 133 relate to the processing of personal data in a professional context, the application of European data protection rules to internal whistleblowing schemes and the use of binding company rules for international transfers of personal data within transnational groups (WP 74).

how personal data are to be processed in accordance with the principles set out in Directive 95/46/EC. In particular, in order for binding company rules to constitute a valid instrument for making transfers of personal data processed in the Member States to other companies in a transnational group which are established in non-member countries, the Working Party states that the persons concerned and the national data-protection authorities must be legally in a position to demand compliance with such rules.

Given the potential development of transnational negotiations, thought should also be given to the position of transnational company agreements in relation to other norms and levels of social dialogue.

5. DISPUTE SETTLEMENT

Rights and obligations arising from texts agreed may also include penalties in the event of a failure to observe the provisions of a transnational agreement. The risks of someone 'going it alone', of action being taken by associations external to the company or of non-compliance with previous commitments following a merger or restructuring have been raised in several cases.

Nonetheless, in cases where a signatory party, employee, local employer or third party seeks to have rights under transnational texts recognised by the courts, the situation as determined by the rules of international private law is particularly complex and unclear today. Furthermore, the legal uncertainty created by the difficulty national courts may have in understanding the logic behind a transnational agreement where their only references are national was pointed out by one company during the study seminars.

In terms of law applicable, the Rome Convention, which will be replaced by the 'Rome I' Regulation as from [add date of publication of Rome I in OJ][15], does lay down a special conflict-of-laws rule for individual employment contracts, but makes no provision for collective agreements.

Article 6 of the Convention on the Law applicable to contractual obligations seeks to protect the weaker party, i.e. the employee. Accordingly, the result of the parties' choice of law to apply to the employment contract cannot be to deprive the worker of protection under such mandatory provisions as are applicable by default. The law applicable by default — unless closer links with another country arise from the whole set of circumstances surrounding the employment contract, in which case the law of that other country is applicable — is that of the country where the worker habitually carries out his work or, if the worker does not habitually carry out his work in one and the same country, that of the country where the establishment that employs him is located. However, collective agreements concluded at national or international level do not fall within the scope of this special rule. Several Member States consider, nevertheless, that their collective social legislation are 'mandatory rules' within the meaning of Article 7 of the Convention, which apply solely on condition that the work is carried out within national territory.

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[15] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (COM(2005) 650 of 15.12.2005); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

In terms of jurisdiction, the rules of international private law, and in particular the 'Brussels I' Regulation[16], are also difficult to apply in connection with collective labour relations. According to the Regulation, the competent courts are, in principle, those at the place of residence of the defendant, but the latter may be sued in the courts in another Member State in certain circumstances, for example at the place of execution of the contractual obligation. In connection with individual employment contracts, the employer may be sued in the courts at the place where he is domiciled or at the place where the worker habitually carries out or last carried out his work or, failing that, at the place where the establishment which employed him is located.

Although dispute settlement is far from being the foremost concern of the actors involved in the first transnational texts, the potential development of transnational negotiation makes it necessary to consider mechanisms allowing social actors to protect agreements concluded, to follow their development and to resolve any differences of interpretation and disputes that may arise in their application. Such mechanisms, which exist in national industrial relations systems, do not apply in the case of agreements extending beyond the province of national actors.

The Commission considers that the situation should be more widely known and that thought should be given to the way disputes arising in connection with transnational company agreements can be settled both in and out of court.

6. CONCLUSIONS

The existence of transnational texts and the issues their development throws up for social actors and the European Union are the underlying reasons for this paper, which is intended to lay sound foundations for further consideration by the stakeholders, and in particular the social partners.

The conclusion of transnational company agreements is a key factor in the development of the European actors' future capacity to conduct a social dialogue in keeping with the increasingly transnational nature of company organisation and the need to anticipate change and have strategies to deal with it. Yet actors wishing to conclude transnational agreements today encounter uncertainties and difficulties that may prevent or at least reduce the impact of such agreements. These relate to the determination of the parties to conclude an agreement, its effects and the settlement of any disputes that may arise in its interpretation and implementation.

With a view to promoting social dialogue and supplementing the action of the Member States as regards the representation and collective defence of the interests of workers and employers, the Commission will support initiatives to conclude transnational company agreements without prejudice to compliance with the applicable national or Community provisions.

To that end the Commission will set up an expert group on transnational company agreements whose mission will be to monitor developments and exchange information on how to support the process under way, and it will invite the social partners, governmental experts and experts of other institutions to take part.

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

The Commission will provide the expert group with its initiatives and work on the subject, which will focus on:

- developing a data base of transnational texts;
- organising exchanges of experience and analyses;
- reviewing the effects produced by company agreements and the way norms relate to each other in the Member States;
- clarifying the rules of international private law in connection with transnational texts.

The Commission will also propose that support for the conclusion of transnational company agreements be among the priorities in the budget headings on social dialogue. In this connection the Commission will consider projects to:

- identify ways of ensuring the texts agreed are more transparent;
- facilitate the identification of the actors, approaches or mechanisms that could be promoted in this area,
- determine conciliation or mediation mechanisms that could be promoted with a view to facilitating dispute settlement.