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Issues paper

Implementation and dispute settlement in Transnational company agreements

INTRODUCTION

Where reciprocal commitments are taken by the parties in a transnational text, these parties usually wish them to become reality. Implementing and resolving disputes in company agreements proves however far more complex in a transnational context than in a national one. This paper provides a contribution to the work of expert group on transnational company agreements as regards "implementation and dispute settlement in transnational company agreements", in particular as to the way to resolve difficulties to interpret or enforce texts.

It builds on the analysis carried out in 2008 in different studies, documents and meetings (see references in annex). It is completed by the results of the study addressing international private law aspects of transnational company agreement carried out by Aukje van Hoek and Frank Hendrickx from the Tilburg University for the Commission.

1. FACTS ON IMPLEMENTATION, MONITORING AND DISPUTE RESOLUTION PROVISIONS IN TRANSNATIONAL TEXTS

Status and implementation provisions

Some of the transnational texts recorded have the status of a collective agreement at company level under national legislation and/or practice, notably the *ENI (*2001) agreement on industrial relations, the two *Air France* (2005) agreements on financial participation and profit-sharing as well as the three *Suez* (2007) Group agreements on equal opportunities, financial participation and forward-looking management of employment and skills.

Some texts declare themselves to be "legally binding" on management and/or on employees and provide for direct application. For example, the *Porr* (2004) agreement on data protection: "*the agreement is to apply to all employees of the Group's companies in the European Economic Area and to employees posted to such a company*". Also the *Diageo* (2002) Annex, to the European Works Council Agreement, on restructuring: *"the agreement is intended by the parties to be legally binding"* and *"is governed by Irish law*".

Direct application is usually provided for in all subsidiaries. For example, the *Total* (2005) European agreement on social dialogue and forward looking management of jobs provides that "*this agreement applies to all legally autonomous entities of the Total Group*". It may also be intended to apply to subcontractors. For example, The *GE Plastics* (2004) agreement on pre-employment screening provides that "*The agreement lays down the principles on how to conduct pre-employment screening, which shall apply to its supplier Kroll Background Europe, which will carry out these background checks for GEPE*".

Some transnational texts are intended to become legally binding through national implementation, notably the series of *Ford* and *General Motors* texts on restructuring. For example, the *General Motors* framework agreements include a sentence stating that "*Implementation of this framework shall occur at national level. In line with European legislation and national laws, Management and Employee Representatives will ensure that the agreed provisions will become legally binding for individual employees as well as negotiating partners*". Implementation through national initiatives is also provided for in the *EDF* (2004) agreement on CSR.

As regards the relation between the transnational texts concluded and other transnational norms, most of the texts dealing with fundamental or trade union rights refer to international norms. Transnational texts usually refer to the relevant ILO conventions, despite the fact that these conventions are addressed to States and not to private bodies. Some European transnational texts refer to Community legislation. For example, in the *Axa* (2005) joint declaration annexed to the EWC agreement "*Parties (…) solemnly declare that this agreement is ruled by Community law, in particular the Treaty of the Union, the Social Charter and Directive 94/45 of 22 September 1994. As a result, any difficulty linked to its interpretation or application should come under Community jurisdictions*".

Transnational texts may also recall the intention to respect national legislation. For example, the *Danone* (1988) joint opinion on management of change specifies that the provisions should under no circumstances substitute more favourable clauses existing at the company. The *Porr* (2004) agreement provides that rights are established "*without prejudice to national applicable legislation*".

Follow-up and monitoring mechanisms

Some transnational texts include mechanisms for its dissemination to local management and employees.

Follow-up provisions appear in most of the transnational texts recorded. These provisions include some form of monitoring commitments, usually in the form of an annual review of the implementation of the text concluded and/or the setting-up of a monitoring committee. These committees usually include internal staff and involve the EWC. The European or international trade union organisations are also included where they are signatories and in some cases provide for external monitoring.

The *GM* agreements do not contain any follow-up provisions, but this is not as surprising as it appears to be at first sight. Indeed, these joint texts are designed to be implemented within a brief period and the implementation procedure should be sufficient to ensure that their provisions effectively apply to workers affected by the restructuring plans.

Several texts set up a special body to carry out the follow-up of implementation. For example, in the case of the *EDF* (2004) agreement on Corporate Social Responsibiity (CSR), the follow-up is done by a specific monitoring body involving international union federations and the unions for each of the companies. An analysis of every article of the agreement is carried out once a year. (see also *Arcelor, Ford* 2000, *Schneider Electric*)

In the other texts this charge is assigned to:

- signatories: *Lukoil, Rhodia, Suez* 2007,
- joint local union-management bodies (existing or ad hoc): *Arcelor* ('the local representative authorities are first responsible'), *Danone* 2001 (at all of the Group's entities affected), *PSA* (in each of the major countries)
- EWC's Liaison Bureau (though not signatory): *Total*

The company generally undertakes to pay the organization expenses (*EDF*) or more generally to 'make available the necessary resources to monitor this agreement' (*Arcelor, Lukoil*).

A few joint texts provide precisions about the organization and modalities of follow-up and monitoring. The 2007 *Schneider Electric* agreement thus stipulates that: '*It is agreed that, when making this evaluation [within the monitoring commission], a list will be drawn up of the actions that could have been undertaken in respect of each of the areas of the present agreement and that this will lead to discussion and the setting up of a "good practices" database which will be made available to all the Group's entities. On the basis of this examination, recommendations could be made for improving the application of the agreement*'.

The 2001 *Danone* text also contains a specific provision though it belongs to the first group of joint texts. It specifies that the joint union-management bodies set up at local level will 'monitor developments while the restructuring plan is being carried out and for up to 24 months after the departure of an employee (or longer if necessary, by local agreement)'. On the contrary, there was no follow-up procedure set up in the 1992 and 1997 *Danone* Joint understandings. This weakness can be explained by the fact that these texts were signed at a time when corporate negotiation was not yet formalised.

An annual review meeting (*EDF, Lukoil, Rhodia*) or an annual report (*PSA*) is frequently laid down. Much more exceptionally the update takes place twice a year, during the meetings of the EWC's Liaison Bureau (*Total* 2004). This latter text also lays down the possibility of a meeting devoted to its application, but only in the case of difficulties observed by the social partners in one of the Group's entities, and if the signatories request is approved by the Management of *Total.*

Some texts go beyond this usual follow-up mechanism and establish specific tools. For example, the *Total* (2005) European agreement on equal opportunities establishes a "European social dashboard", including data on recruitment of women or actions undertaken to keep employees with disabilities at work. The EWC is to analyse these data at least annually, as well as the local representative bodies.

Last generation of European texts are particularly attentive to Implementation, even developing projects to that aim. This is the case of *Areva* (2006) agreement on Equal opportunities or *Thales* (2009) agreement on anticipation and professional development.

Dispute settlement mechanisms

Transnational agreements containing provisions addressing dispute settlement are less numerous, and those provisions are generally vague, without any precisions on procedures. Additionally, it has to be noted that the belonging to one or another group of joint texts is not a crucial criteria: dispute settlement provisions are not more frequent in texts addressing restructuring and/or anticipation of change than in global agreements.

Some contain very general provisions for a monitoring committee to "*examine the matter and propose appropriate measures"* (*Schwann Stabilo* 2005), or simply state that "*the parties shall notify each other"* if any "*anomalies"* should arise, which the management will then seek to "*eliminate"* and inform the union organisations accordingly (*ENI*).

This charge is sometimes assigned to the signatory EWC (or an EWC representative) alongside with the management (*EADS*, *Generali*, *Suez* 2007, *Total* 2004) whereas some other texts set up *ad hoc* bodies that are generally joint union-management structures (*Ford* 2000, *Danone* 2001). The 'joint extended steering group' established at European level by the *Danone* joint text signed in 2001 will be charged with the examination and conciliation of any conflicts arising at local level, at the request of IUF on behalf of the IUF-affiliated local union concerned.

In the cases where international trade unions or European federations are signatories, they are also in charge of dispute settlement jointly with management. The *Schneider Electric* agreement stipulates that: 'The EMF and the General Management shall seek an amicable solution for these disagreements within a reasonable period of time and in a spirit of cooperation' (see also the *Rhodia* agreement that links this issue with monitoring).

One text states that the sole EWC is recipient of issues or concerns regarding the framework (*GM* 2000). In one other text, the employees are given 'the opportunity to inform the company of any conduct that does not comply with this declaration' (*Renault*).

Some detailed provisions may be established. For example, the *Ford* (2000) text on the sale of Visteon included some precise follow-up and dispute-resolution provisions: "*1. The parties to this agreement commit to implementing this agreement at national level. A joint working group shall be set up with Ford management and the FEWC select committee. This working group shall monitor implementation of this agreement and shall take a decision in the event of any dispute regarding its interpretation. 2. After legal separation, Newco management shall be responsible for adherence to this agreement vis-à-vis the corresponding Newco employee representatives. In the event of disagreements between Newco management and the corresponding employee representatives that arise from different interpretations of this agreement, the procedure described under 1. above may be applied. 3. Where Newco management and employee representatives agree it is beneficial to make changes to the agreement, then changes will be made by mutual consent and after prior approval by the working group*."

Some transnational texts do specify the applicable legislation and competent jurisdiction as well as the linguistic version to be referred to. It is worth noting that a few texts stipulate that

they are governed by a national law (*Arcelor*: Luxembourg law explicitly, *Suez* 2007 and *Total:* French law implicitly). As a result, any disputes linked with these agreements will fall within competence of the respective national courts (explicitly in the three cases). The *Axa* case is a particular one as the Joint declaration is appended to the EWC agreement. As a consequence, this joint text will follow the rules governing the administration of the EWC agreement.

2. VIEWS OF THE ACTORS ON IMPLEMENTATION AND DIFFICULTIES FACED

Actors directly involved in the conclusion and/or implementation of transnational texts were asked in 2006 questions regarding their assessment of implementation, the problems encountered and how these had been solved. The views of management, the European Works Council (EWC) representatives and the union representatives were very much in step with each other. The fact that most of the texts which were discussed were very recent has to be taken into account in analysing the results.

Ensuring collective ownership and implementing

The main challenge is considered by the actors to be ensuring collective appropriation of the text signed.

Dissemination of the text is often considered to be extremely important for its implementation, in order to make sure that everybody in local management is familiar with the text as well as all the employees who are concerned by it.

Attention is drawn to the time needed to ensure collective appropriation of the text concluded. For example, at the 2006 second study seminar, the *Nordea* union representative described the process as follows: *"As we see it, it is a necessity that the agreement is well known and accepted all over the organisation. This is not an easy task. The agreement is not one-way, but is reached by negotiations. It must be an understanding, a collective ownership. This is extremely important and takes time. I think a year is a short time. We also have to create a common platform to see that both the union and the management have the same goal. Our goal is to have a healthy company, this is not only for the management or the shareholders. It is absolutely in the interest of the employees because it creates more secure jobs. When it comes to the agreement, many persons, both among management and employees, are involved. What we have achieved is that the employees throughout the bank now see the advantages of the consultative committees. They see that it makes a difference. Both management and the unions agree upon the fact that dialogue like this produces better results."*

Collective ownership of the text goes together with developing a European way of thinking, moving beyond the protection of own interests. Companies have done this in various ways, notably by training the EWC or enhancing union coordination.

The third element linked to the ownership of the agreement is that, if it is to be implemented everywhere, managerial action is needed. Some cases involve performance indicators for management linked to implementation of the transnational text on health and safety or equal opportunities.

Monitoring

One essential point is felt to be the follow-up by the union representatives and the EWC. The follow-up might either be carried out by those who actually negotiated the text or by different players. Here it all depends on the relationship between those who negotiated and those who are implementing the text later.

Monitoring mechanisms may correspond to a will to enhance the control of risks, notably health and safety or environmental ones. Monitoring mechanisms, as well as indicators, are seen as necessary in order to be able to assess results.

Applying and adapting

Apart from the main difficulty of ensuring collective ownership of the text, some specific provisions of the text might be difficult to apply over time. For example, one of the texts on restructuring provides that the company will continue to give a certain number of contracts to the sold entity. But all persons responsible for purchasing or for relations with subcontractors have not necessarily fully integrated the terms of this agreement. The provision in this case is to grant compensation: if the provisions of the agreement are not respected for certain purchases, then compensation is paid. This is seen as a solution to the difficulty of having an agreement respected by all the different management levels across the company.

Some actors expressed a need for mechanisms allowing for the adaptation of the texts according to developments.

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

Interpreting

Another point raised is linked to interpretation of the texts. In the 2006 survey, it was felt that there is a need to find ways of resolving differences of interpretation of the text because — obviously — once a text has been finalised, it is possible to interpret it in different ways. It was felt that there is a need to have mechanisms for solving such different interpretations of the texts.

For example, at the second 2006 study seminar, a union representative described the *Nordea* situation as follows: "*Text-making is difficult, very, very difficult. Our text has so far been good, but it is important that the text does not consist of too many factors that make it possible to interpret in many ways. Therefore, the official language in Nordea is English, which none of us has as our mother tongue. This makes it easier for us to avoid misunderstandings. We cannot insure ourselves against that, of course. So far we have solved misunderstandings by dialogue. In the event of disputes, we have a negotiation committee, which has been used once in six years. I think that is very good. We came to a conclusion there*."

Facing change in ownership or management

The consequences of changes in ownership or management for the validity and respect of the transnational text concluded were questioned by the actors during the 2006 study seminars and complementary study.

For example, there were questions about the future of *Arcelor*'s transnational texts after the merger with *Mittal*. The fact that the *EDF* agreement continues to be in use by the new owners of two transferred undertakings was underlined.

The experience of the Nordic *Nordea* bank was also described by a union representative at the second 2006 study seminar: "*In the consultative committees it is possible to make decisions, legally binding decisions as far as they are not in conflict with the national laws. We have not had any problems with that so far. There are issues we do not discuss in the consultative committees, such as salaries, working hours and social benefits. But all other issues, like strategy, downsizing, changes in the organisation, outsourcing, etc., very important matters are being discussed in these committees. This is not an EWC agreement, but a transnational agreement. (…) What we are struggling with is that there are many countries within Nordea now and it is extremely important that we learn to think European. It is the hard way, but we believe it is absolutely necessary. The thing that we are afraid of concerning our agreement, which we are all very proud of, is that we do not know what will happen in the event of a take-over or merger. It is not protected. (…) We would like to have this transnational agreement legally binding in order to be able to keep our system (…). Therefore, we would absolutely like the EU to discuss and reach conclusions on transnational agreements. This would help us*."

However, the strength of parties' commitments is also at stake where such a change occurs, and challenges go obviously beyond legal aspects, as underlined during the second 2006 study seminar.

3. ISSUES ON DISPUTE SETTLEMENT IN TRANSNATIONAL COMPANY AGREEMENTS

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.

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 2006 seminars.

The application of international private law rules to transnational texts in order to determine the applicable legislation and the competent jurisdiction raises particular difficulties. Main

instruments are the Rome Convention, which will be replaced by the 'Rome I' Regulation as from 17 December 2009[1] and the 'Brussels I' Regulation[2], which are very difficult to apply in connection with collective labour relations. The results of the study on international private law aspects of dispute settlement related to transnational company agreements are to be referred to on this issue.

In cases where parties would wish to use extrajudicial dispute settlement mechanisms, such as conciliation, mediation or arbitration, they would also face major difficulties. Although national industrial systems provide for developed mechanisms to that aim, those are not competent nor adapted to transnational company agreements.

In addition, transnational texts raise questions regarding data protection many actors are not aware of. 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[3], which lay down guidelines on 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. In this context, international transfers of personal data from the Member States may be subject to special contracts entered into the EU/EEA controllers and the third country entities receiving the data which provide for specific rights granted to data subjects whose data are transferred in order to ensure the protection of their rights. The binding corporate rules shall be legally enforceable by data subjects whose personal data are processed by the group and by data protection authorities, so that they may have a right to enforce compliance with the rules by lodging a complaint before competent data protection authorities and competent courts.

The Commission considered in 2008 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.

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1 Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6); 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).

2 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).

3 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).

4. IMPLEMENTATION AND DISPUTE SETTLEMENT IN TRANSNATIONAL COMPANY AGREEMENTS : LESSONS FOR TODAY

Management of *ArcelorMittal* has kindly accepted to present its approach to implemetation and disputes in *Arcelormittal* transnational company agreements, notably the latest on anticipating change. Aukje van Hoek and Frank Hendrickx from the Tilburg University will present the results of the study addressing international private law aspects of transnational company agreements just carried out by for the Commission. Fernando Valdés Dal-Ré from the Complutense University will share with us his knowledge of labour conciliation, mediation and arbitration mechanisms in Europe.

How to allow social actors to implement and protect transnational company agreements concluded, to follow their development and to resolve any differences of interpretation and disputes that may arise in their application is the purpose of the discussion of the expert group with them

ANNEX: REFERENCES

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