LABOURasociados consultores

Study on the characteristics and legal effects of agreements between companies and workers' representatives

Executive summary

Key points

- Company agreements co-exist signed solely by trade unions in those countries in which a one-way channel of union representation in the undertaking is prevalent, along with other company agreements in which a two-way channel (trade unions and representatives chosen by the workers) is also considered valid. This leads us to identify the signatory parties as one of the main obstacles to conferring legal effects on a transnational company agreement.
- A transnational company agreement's legal effects are rooted in its not simply repeating what is set out by the company agreement regulating aspects of industrial relations for the same workers affected at a national level. In order to ensure that a transnational company agreement qualify to enjoy legal effects at national level, it is vital that it occupy its own space and not overlap with national company agreements, and this means that before the transnational company agreement is signed, attention must be paid to the way specific collective agreements are structured in each member State.
- The subject content agreed on in a transnational company agreement does not present any insurmountable obstacles with regard to recognising its legal effects.
- Conferring legal effects on transnational company agreements constitutes not only a legal challenge, but also a fundamental cog in the development of European-scale labour relations, in which transnational collective bargaining is cutting a wider and wider trail through multinational companies. The hurdles encountered are the result of the enormous diversity in systems of industrial relations existing between the 27 member states, although they also originate in the singular legal nature of the transnational company agreements themselves, which also still vary greatly. However, we cannot ignore their growing quantitative and qualitative importance which would call for EU legislative attention, before legal problems begin to arise in their application in certain particular countries.
- The results obtained indicate the need to favour European initiatives based on a voluntary legislative framework which would permit the bringing about of the objectives being pursued, succeeding in providing legal effects for transnational company agreements in each member state covered by the agreement in question.
- This voluntary and, as such, optional framework, should light the way towards achieving this goal and, as such, needs to be flexible, combining the interaction between the transnational or European level and domestic ones.
- Alternatives based on invasive European interventions which aim to bring about profound modifications to domestic legislations regulating systems of collective bargaining do not seem advisable in an area which is not essentially conflictive (as yet) and which depends on the autonomy and free will of transnational company agreement signatory parties.
- The possibility of promoting an optional European framework to cover those transnational company agreements which wanted to guarantee legal security in their

national application does exist, although it is by no means free of difficulties needing to be addressed. From the study carried out it emerges that the national singularities in the regulation of the legal effects which are conferred to a company agreement need to be integrated as part of the European initiative to be adopted.

- The study has explored varying options, all with advantages and drawbacks, for meeting the huge challenge of overcoming the existing diversity between the legislations and practices of different member states in order to grant legal effects to a transnational company agreement. The options put forward in the report intend to clear the path and give hints as to lines of action, rather than to propose solutions, which would necessarily be highly complex, from the point of view of legal technique. Certainly some of them seem to be more advisable than others, though they clearly also depend on the political will of the member states and, markedly, on the social partners, both at national as well as European level, as these are the autonomous protagonists of the transnational company agreements.

Background

Transnational company agreements represent a reality in the progress of transnational industrial relations. Their importance within the EU is on the rise, both in quantitative as well as qualitative terms. In terms of quantity, due to the constant signing of new agreements and the renewal and enlargement of existing ones, which has called for the creation of a European Commission database which registers and classifies existing agreements, as well as helping to disseminate and lend transparency to their content. As for quality, because more and more transnational company agreements are now making the leap from setting out declarations of intent to regulating specific aspects of labour relations and conditions on a transnational scale, which constitutes the embryo of real transnational collective bargaining at company level.

Transnational company agreements symbolize the parties' free and autonomous will to reach bilateral agreements of mutual interest. It is as such that they are the expression of a private contract that is binding only to the signatories themselves, the context and efficacy of which has slowly taken form in practice through the endeavours of multinational undertakings whose headquarters or nerve centres are not always located within the EU. The implementation of these agreements is generally based on the parties' responsible commitment to apply the content of the agreement to each undertaking in the group concerned, to every workplace and in every country.

The fact that in general we do not witness serious conflict regarding implementation in transnational company agreements practice should not blind us to the fact that these agreements operate in a certain legal vacuum in terms of their level of enforceability in cases where individual or collective disputes do arise. This concerns how and with what authority the individual claim of a national worker of a member State should be made, or the resolution of differences among signatory parties in the interpretation of a text. The growing complexity of the subjects agreed on in the transnational sphere, or the possibility that these may, in certain cases, come into conflict with aspects that are regulated by collective agreements entered into at national level, urges us to reflect on the legal effects that transnational company agreements may come to enjoy. This is the leitmotif of this study, the main features of which we will now outline.

In analysing the possibility of conferring legal effects on transnational company agreements in each affected member State wherever there are workplaces and workers included within the sphere of the multinational undertaking or group of undertakings which has entered into a transnational company agreement, we set out by undertaking an in-depth analysis of the

national legal systems which frame company agreements and, in particular, the requisites which are established in order for them to enjoy legal effects.

The study was targeted at:

- European Commission
- European Institutions and particularly the European Parliament
- EU social partners and employers organizations and trade unions at national level
- Group of experts on transnational company agreements

Aims of the study

The study was aimed at:

- To carry out an in-depth update of the legal schemes for company agreements at national level, with an exhaustive analysis of the requirements included by the different schemes to provide legal effects.
- To analyse the diversity of obstacles to be overcome to provide legal effects to TCA in the Member States, regardless of the option chosen at European level. In accordance with the technical specifications, the main objective of this study is to assess whether it is possible to provide legal effect to transnational company agreements in the EU Member states where a multinational company and its subsidiaries are located and if so in which ways and under which conditions. Therefore, our proposals have been suggested after analysing the feasibility of three essential options or possibilities:

  1) To give uniform legal effect to transnational company agreement throughout the Member states;

  2) To give legal effect of transnational company agreement vary according to the will of the parties;

  3) To give the same legal effect for transnational company agreement in MS as company agreements concluded at national level.

Key findings

In order to give transnational company agreements legal effect, these are the most relevant

a) The most far reaching option is to provide uniform legal effect in all member states by an intervention of the EU. By this it can be assured that transnational company agreements *uniformly* will be applied in all EU Member states. By uniform legal effect is meant that the transnational company agreement or at least the various provisions of the transnational company agreements, will and have to be applied uniformly in the singular cases regardless the member state where subsidiaries of the multinational company are located. As the study of the characteristics of collective agreements between management and labour, on sectoral and on company level, has shown, the systems of collective agreements, including company agreements, of the various member states are differing as to the legal effects of the collective agreements. To make a uniform application over all the member states possible an intervention by the EU seems to be indispensable in order to achieve the objective best.

Ruling by a Directive providing for a legal framework several options are thinkable. The first is a Directive providing direct legal effect to transnational company agreements so that the transnational company agreement will be applied uniformly in all member states that are involved in the scope of the transnational company agreements. Still there are two models possible:

- a Directive providing for a legal framework ruling to be implemented in all Member states assuring the objective of providing legal effect to the transnational company agreement in all member states.
- an optional EU framework, i.e. the acceptance of a binding transnational company agreement is optional but when opted for that, the framework ruling is applicable. That implies if the parties have accepted the ruling by a binding transnational company agreements, they are bound by that: the transnational company agreement will have legal effect in both meanings.

There is a clear advantage of opting for an optional Directive that puts the obligation to all member states generally to guarantee legally the uniform application of a transnational company agreement. The national legislation has to provide for it. To opt for an optional ruling has the advantage of being more acceptable and less interference in the national systems of collective bargaining and collective agreements. The parties themselves opt for a transnational company agreement to regulate topics that are common to the multinational company as such, so including the subsidiaries in so far they are affected. It is based on a voluntary approach.

b) Providing uniform legal effects by framing the legal systems of company agreements in member states. This option is aiming at the achievement of the uniform applicability of transnational company agreement provisions in the subsidiaries of a multinational company in any of the EU Member states by framing the legal systems of collective agreements of the member states resulting in the uniform application of the provisions. It is clear that this option is more severe than the first one, severe from the point of view of interfering in the national legal systems of the member states.

The advantage of this option is that the peculiarities of the own legal system of collective agreements of the member states will be acknowledged and left unaffected in its essential elements. The interference by EU law is aiming only at giving legal effect to the transnational company agreements. A disadvantage could be that several issues of the national legal systems have to be amended.

c) The other possibility to grant legal effect to the transnational company agreement is a less severe and far-reaching than the first option - legal effects varying according to the will of the parties - but less secure as to the effect it will and can have. The EU interference will be restricted to the establishment of a framework ruling in a procedural way. These are two options: either it can be a mandatory ruling implying that the framework ruling covers every transnational company agreement when concluded and signed, or it has an optional nature meaning that if the parties want to conclude and use a transnational company agreement as a regulating instrument for the multinational company and its subsidiaries the framework ruling will be applicable. The procedural framework ruling has to be implemented in the national laws of the member states.

Since this option gives way to the will of the parties to provide for its legal effect, the EU framework ruling does not go into the scope and the content in relation to the legal effect it will have. The EU framework ruling will only deal with formal or procedural issues, such as which are the parties competent to conclude and sign a transnational company agreement. In this respect the representativity issue will be the most important.

d) Like the mandate or representation, adhesion is a figure widely known in European legal systems, being used by legal operators in the vast and complex world of private contracting. Moreover, adhesion is a practice that has transcended the universe of individual private contracting to be also established in many European labour legislations, namely in that of collective bargaining.

In its first and essential conception, adhesion constitutes a manifestation of the will by which a subject, who initially was not a signatory in a certain legal contract, becomes so with full effects, and thus becomes subject to the discipline of rights and obligations established in the contract to which he adheres. Transferred to the domain of collective bargaining, adhesion is the technique by which a collective subject, with the relevant negotiation capacity, decides to adhere to a company agreement which he did not participate in at the time of its signing and entry into force. Of course, there are variations on the legislation on adhesion that will some of them shortly be expounded. What is important to highlight is that the implicit effect of adhesion – namely, to turn someone who initially was not a party to a collective agreement into someone who is – provides this technique with the necessary and sufficient capacity to achieve the objective under discussion.

Put otherwise, adhesion could be the necessary pathway for recognition to transnational company agreements of the legal effects applicable in every member state to national company agreements. , the legal policy option of attributing to transnational company agreements the same legal effects recognised in every member state to collective agreements made nationally can only be articulated through adhesion.

The main advantage of adhesion is probably the simplicity of its application: an advantage which surely extends to the aforementioned legal policy option. To some extent, this third option is already taking shape in certain member states with certain transnational company agreements: it is the objective of the "ratification" or endorsement of some transnational company agreements in some member states by the national parties.

Focussing on the technique and not on the objective achieved by the technique, the adhesion agreement, in a good and healthy negotiation practice, does not require the start of a new company collective negotiation process. In addition to its objective ease, adhesion is a technique that is quickly implemented, with a short period of time mediating between the signing of the transnational company agreement and the adhesion agreement. In addition, the implementation of the adhesion technique would not require complex or ample regulatory measures of MS. It would be even be recommendable that some formal requirements, such as the communication of the opening of the negotiation process, be simplified.

However, adhesion is not without applicability problems, which, if activated, might endanger fulfilment of the objective that the adhesion is meant to serve. More specifically, there are two main problems arising or which might arise from the application of the aforementioned adhesion technique. The first problem concerns the very existence of the adhesion agreement, whereas the second one pertains to its legal regularity. The national parties that must sign the adhesion agreement are those organisations that, within every national legal system, have a recognised negotiating capacity. In this context, two scenarios can arise whose common effect would be to paralyse the validity of the adhesion agreement. These scenarios are, respectively, i) the lack of legitimate representatives for negotiation in the subsidiary of the multinational signing the transnational company agreement and ii) the refusal by the social representatives qualified for negotiation to sign the pact of adhesion.

The former of the aforementioned scenarios for the paralysation of the adhesion agreement can be reasonably settled by means of the provision included in the European optional framework on transnational company agreements by which, in such situations, national legislation must foresee the constitution of an *ad hoc* - elective or trade union - negotiating body. Unlike what has just been described, the second case in which the adhesion agreement might be blocked– the refusal to negotiate or sign -would have no solution other than the application of the procedures envisaged within every national legal system for these scenarios, such as mediation or arbitration, if applicable.

The second set of problems is found in a scenario in which the signing and later validity of the transnational company agreement adhesion agreement might contradict domestic law. Probably, the only case that might fall within this hypothesis would arise from the incompatibility of some clause in the normative or contractual content of the transnational company agreement (and thus in the adhesion agreement which provides its legal effects) with respect to the national mandatory law (*ius cogens*). Even though this case should not dismissed, it does not seem too farfetched to claim that it is an exceptional one, and thus its presence should not become a determining element in the choice of the various legal policy options. Among other reasons, due to the simplest of them all: namely, that this is a problem which might always arise, whatever the means used for the attribution of legal effects to the transnational company agreements.

Implications for stakeholders

Social partners, academics and research institutes will benefit from the benchmarking exercise made at national level as well as the methodological tools used to carry out the study, and which we consider of interest for future research. The exhaustive analysis included in the final report regarding the different national schemes for company agreements is of great interest from a legal perspective. The detailed summary tables included for each country are rich in information on this topic, especially as regards the newest EU Member States. Beyond this, the overall results of the study and the information collected are a valuable contribution to the future development of transnational labour relations.

EU institutions and policy makers have got views and suggestions to what action might be taken and at which level to overcome any practical or legal obstacles and allow for transnational company agreements to have effects comparable to the ones of company agreements concluded at national level. The study has identified arguments in favour and against such actions, analysing the difficulties that may arise in their implementation.

Recommendations

In this study we have explored a range of different options bound up in a legally complex field, which goes to the heart of national industrial relations. And which also represents a challenge for the European legislative initiative, as it points directly to the foundations of the raising up of European-level industrial relations, through one of its key players: transnational collective bargaining. In any case, it is to be advised that the proposals which are undertaken take into account, and on board, national realities, not just from the point of view of the legal possibilities offered for granting transnational company agreements legal effects, but also on a practical level. In other words, in terms of their acceptance by the social partners who autonomously enter into company agreements, whether national or transnational.