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Eurofound

Derogation clauses on wages in sectoral collective agreements in seven European countries

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Research project: The functioning of sector-level wage bargaining systems and wage-setting mechanisms in adverse labour market conditions

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Introduction

This report discusses the issue of decentralisation of wage bargaining from the (inter)sectoral level to the company level through the use of derogation clauses. Sectoral and intersectoral-level collective bargaining play an important role in many European countries, particularly in most western European countries. Traditionally, (inter)sectoral bargaining has had the function of homogenising wages and working conditions for entire sectors or countries and taking them, to a large extent, out of competition. It also relieves company-level actors from engaging in time-consuming and sometimes complicated bargaining processes that require substantial expertise. In recent decades, however, the rationale for such homogenisation within national borders has been questioned, with reference, in particular, to the increasing globalisation of competition. Simultaneously, there have been increasing calls for more attention to company-specific conditions and for greater decentralisation and flexibility in the setting of wages and working conditions, in order to allow companies to address their specific competitive needs and problems. This has, to a different extent in different cases, resulted in a process of ‘organised decentralisation’ (Traxler, 1995), referring to increased company-level bargaining within the framework of rules and standards set by (inter)sectoral agreements. Here, the sectoral agreement determines, for example, the issues that can be bargained about at the company level or the margins within which company agreements can be concluded. Such decentralisation has often concerned working time issues but it is also affecting wage bargaining, especially where non-basic wage elements are concerned (Keune, 2006, 2008). In some countries, primarily Germany, decentralisation increasingly also seems disorganised as the binding power of sector agreements and their coverage rates are declining. It is sometimes argued that the current economic crisis is a further argument to speed up decentralisation of collective bargaining. Others, however, argue that the very instability of the crisis strengthens the importance of sectoral bargaining as it provides more stability.

A specific form of decentralisation is the opening up of possibilities for companies, through various kinds of derogation clauses (such as opening clauses, hardship clauses, opt-out clauses, inability-to-pay clauses), to deviate from pay norms set under intersectoral or sectoral agreements, including minimum wages, when they suffer from temporary economic hardship. The reasoning behind such deviations is that they are an instrument that may permit companies to overcome temporary economic difficulties without resorting to (mass) layoffs. This may help to prevent workers from becoming unemployed, avoid costly layoff procedures and preserve human capital for the company. These kinds of company-level deviations from (inter)sectoral wage agreements form the core subject of this study. They have received growing attention and interest in recent years in academic and policy debates in Europe, particularly since the present economic and financial crisis started to put many companies and jobs under pressure. However, it is also a controversial subject as such practices challenge some of the principles of collective labour law, the regulatory capacity of collective bargaining and the traditional structure and functioning of national collective bargaining systems in continental Europe. Furthermore, they may in principle lead to wage declines, increased insecurity for workers and an increase in low pay.

At the same time, there is hardly any systematic information and analysis available concerning:

- the various ways these deviations are legally regulated in different countries;
- the extent to which they are indeed included in intersectoral, sectoral and other agreements;
- what the conditions for their use are;
- the extent to which they are actually used in practice at company level.

The report aims to provide detailed information on the respective regulations and practices for seven EU countries: Austria, Belgium, France, Germany, Ireland, Italy and Spain. Moreover, it discusses the respective positions of

governments, social partners and the academic debate, as well as the (potential) impact of these deviations on collective bargaining and industrial relations systems.¹ In this way, the study provides an input to the academic and policy debate on labour law and industrial relations. More detailed studies of the individual countries can be found in the country reports that serve as a basis to this report.

The report begins by presenting the main features of the various bargaining systems in the seven countries. This is followed by a review of the laws that affect the possibility of using opening and other clauses concerning wages. The report goes on to discuss the actual use of such clauses in practice, followed by a review of the respective opinions of governments and social partners. The final section presents a number of conclusions.

Systems of collective wage bargaining

In all seven countries studied multi-employer bargaining (that is, sectoral or intersectoral bargaining) plays a major role, especially where wages are concerned. Intersectoral bargaining is of key importance in Belgium and Ireland², whereas in the other five countries, as well as Belgium, sectoral bargaining is important. Company agreements are also concluded in all of them, most often within the context of a higher-level agreement, with the exception of Austria where individual employers have no right to collective bargaining (with some minor exceptions). Especially in France, but also in Germany and Belgium, extensions of agreements to entire sectors (including the companies and workers not covered by the initial agreement) further expand the role of sectoral agreements. As a result, the seven countries have coverage rates above or close to the EU average of about 65%, with the exception of Ireland. Coverage rates in the seven countries range from some 44% in Ireland to 63% in Germany, to between 80% and 100% in Italy, Spain, Belgium, Austria and France. Coverage rates have been quite stable over time, with the exception of Ireland and Germany where declines of about 10% have taken place in the last 10 to 15 years. In Germany, collective bargaining is also clearly decentralising with the relative importance of company agreements rising and that of sectoral agreements and of extensions declining. Also, as will be discussed below, in most of the other countries there is some pressure to decentralise, sometimes formalised in government policy or social pacts. However, in practice the effects of these pressures seem limited where bargaining on basic wages is concerned. More decentralisation can be observed in bargaining over issues such as bonuses and performance pay, as well as that of working time.

Wage bargaining is limited in Belgium, France, Spain and Ireland by a statutory minimum wage that defines a wage floor for the entire labour market, sometimes with specific rates for younger people. In these four countries, sector agreements often set additional sectoral minimum wages. In Ireland, statutory Employment Regulation Orders (EROs) set minimum wages for certain low pay sectors. Whereas, in most cases, these sectoral minimum wages are above the statutory minimum wage, in France many of these agreements set minimum wages below the statutory minimum wage, making them irrelevant as an income protection instrument but having a limiting effect on the upward mobility of workers in salary scales. Where a statutory minimum wage exists, it cannot be undercut.

¹ It should be stressed here that there is hardly any data available on the impact at company level of the use of opening clauses, for example on the exact size of deviations or the extent to which they create new inequalities. This requires case studies that were not foreseen under this project.

² Ireland has a long history of national social pacts. However, the most recent central tripartite agreement collapsed in late 2009. The employers and trade unions subsequently adopted joint guidelines for the company-level negotiations that would take its place, in this way maintaining some form of central steering.

In Italy, Austria and Germany, minimum wages are not set by law, but by collective agreements. This results in substantial differences in minimum protection between sectors in these three countries. At the same time, in 2007 the biggest trade union and employer organisations in Austria, the Austrian Trade Union Federation (ÖGB) and the Austrian Federal Economic Chamber (WKÖ), signed a so-called ‘agreement in principle’, according to which there should be a national minimum wage of €1,000 a month for a full-time employee. The majority of collective agreements now fulfil this requirement. In Germany, in a limited number of sectors (for example, construction or care work) the state has extended collectively agreed minimum wages to the whole sector.

In Belgium, wage bargaining is further shaped by the 1996 Law on the promotion of employment and the preventive safeguarding of competitiveness which requires unions and employers to take account of a wage margin amounting to the average of the expected wage increases in the country’s main neighbours and trading partners (France, Germany and the Netherlands). Moreover, Belgium is one of the few countries in Europe which automatically indexes wages and social benefits to inflation (Mongourdin-Denoix and Wolf, 2010).

The legal context for derogations

A major division exists between the seven countries where derogations are explicitly foreseen by legislation and where they are not. In the former the law explicitly regulates certain aspects of derogations such as the conditions under which they are possible, or the issues that can be subject to derogations. In the latter, the law determines as a general principle that higher-level agreements trump lower-level agreements. However, the law in these countries does not explicitly exclude the possibility of derogation clauses either, making it possible, in principle, for employers and unions to incorporate such clauses in higher-level collective agreements.

In **Austria**, no derogations are foreseen by law. At company level there is the possibility to conclude works agreements between the works council and the management. However, according to the Labour Constitution Act (ArbVG, article 3, paragraph 1), such works agreements cannot annul or limit provisions laid down in the collective agreements. As far as wages and working conditions are concerned, they can only determine standards which are more favourable for the employees in comparison to the collective agreements. There are two potential exceptions here, starting from the idea that, in sectoral agreements, clauses can be included that specifically permit derogations. One variant is that collective agreements can include opening clauses which define a certain framework for a flexible adaptation at company level. The second is that sectoral agreements can include opening clauses which under certain conditions allow companies to undercut standards determined by the sectoral agreements. The latter, however, are very much disputed, as several Austrian labour lawyers argue that such clauses are not in accordance with the ArbVG, the legal basis of collective bargaining.

In **Belgium**, labour legislation does not explicitly provide for the possibility of company-level deviations from sectoral collective agreements that go below the sectoral standards. This does not mean, however, that they are not possible. The Law on Collective Agreements and Joint Committees of 5 December 1968 defines a strict hierarchy of legal sources, and determines that a norm set at a lower level can, in principle, not contradict norms set at a higher level. As a consequence of this hierarchy of legal sources, wages set at company level can in principle only be higher than those set at sectoral level. Company-level standards can only undercut sectorally-defined minimum or absolute standards when this possibility is explicitly foreseen in the sectoral agreement, for example in an opening clause allowing them to do so. However, whatever room the sectoral agreement provides for company deviations, in all cases the interprofessional minimum wage has to be respected.

Similarly, in **Germany**, the law does not regulate derogations to the detriment of employees. According to the ‘favourability principle’ (*Günstigkeitsprinzip*), company-level departures from sectoral agreements are usually possible

only when these favour employees. However, the bargaining parties may include opening clauses in sectoral collective agreements that allow, under certain conditions, a divergence from collectively agreed standards, even if this changes employment conditions for the worse. The opening clause then sets out the possible derogations and procedures.

In **Italy**, until recently, there were no specific regulations on opening clauses but in principle the possibility existed to include such clauses in sectoral collective agreements. However, in January 2009 a number of employer associations, including the General Confederation of Italian Industry (Confindustria), the major employer association, the Italian Confederation of Workers' Trade Unions (CISL) and the Union of Italian Workers (UIL) signed the Framework Agreement for the Reform of the Collective Bargaining System (FARCB). The government supported the negotiation of this agreement and also signed it itself as employer for the public sector. The General Italian Confederation of Workers (CGIL), the major trade union confederation, refused to sign the agreement. The FARCB contains, among other things, the contingency for opening clauses permitting company-level collective bargaining – or territorial-level bargaining concerning specific regions or cities in Italy – to change, for the worse, the rules of national sectoral collective agreements. This would be in cases of 'economic crisis, or to promote economic and employment growth'. To reach these goals it is possible for decentralised agreements to modify the contents of national sectoral agreements with regard to wages and other norms. However, the FARCB also leaves open broad possibilities for the sectoral social partners to control the specific conditions and procedures of such opening clauses.

In **France**, traditionally, there was no general mechanism providing for derogations on collectively agreed wages and the hierarchy of norms dictated that lower-level agreements could not deviate for the worse from higher-level agreements. This partially changed with the 2004 Fillon law, which changed the previous hierarchy of collectively agreed norms. Now, a lower-level agreement may deviate from the provisions of a higher-level agreement unless such derogation is expressly forbidden. Four major issues are exempted from any derogation at company level:

- minimum wages;
- job classifications;
- supplementary social protection measures;
- multi-company and cross-sector vocational training funds.

Thus, as regards minimum wages, and wages categories, the company-level agreements may differ from agreements signed at branch level only in favour of the employees. However, the exceptions do not concern additional wage elements such as performance-related pay, shift work, night work, allowances for marriage or childbirth, or seniority payments. The Fillon law also includes a series of measures to encourage company bargaining.

In **Spain**, before 1994, it was possible to deviate, at a lower level, from agreed wages set at a higher level if the higher-level agreement included a respective clause. Since 1994, the Workers' Statute contains a mandate to include an opt-out clause in collective agreements at sectoral or intersectoral level allowing companies to adopt lower wages than those agreed at higher level when they temporarily undergo economic difficulties. Collective agreements adopted above company level must now contain the conditions and procedures for the application of such opt-out clauses, which are considered to be part of the minimum content of the collective agreement at that level. In principle, this means that any sectoral collective agreement should regulate the conditions for using such opt-out clauses affecting wages. The lack of a provision regulating the use of this opt-out clause does not however render the agreement null and/or void because there is still the traditional 'subsidiary route', allowing a deviation from the agreed wages through an agreement between the parties at company level.

Most recently, the Royal Law Decree 10/2010 of 16 June, on urgent measures on the reform of the labour market, modifies the legal framework for the use of wage opt-out clauses aiming to make it easier to use them (however, the ratification of this Decree by the Spanish Senate is still pending at the time of finalising this report). According to the new law, following a consultation procedure, a company agreement between the employer and the employee representatives might depart from the wages fixed by a collective agreement negotiated at a higher level, when, as a result of the application of those wages, the economic situation and prospects of the company could be damaged and affect jobs. This agreement, which can only apply while the collective agreement at a higher level has not exceeded its term or, in any case, for a maximum period of three years, must clearly determine the new remuneration to be paid and a schedule of gradual convergence towards the previously applicable wages.

Finally, in **Ireland**, derogations from sectoral agreements are not foreseen in the law and should, in principle, be dealt with by the bargaining parties themselves. However, the National Minimum Wage Act includes an ‘inability-to-pay’ clause. When an employer cannot afford to pay the minimum wage due to financial difficulties, an application may be made to the Labour Court which can, following an inquiry, exempt the employer from paying the minimum rate for three to 12 months. The employer must be able to demonstrate that the proposed exemption would be needed to preserve jobs and has the consent of a majority of the employees, who must also agree to be bound by the Labour Court decision. The court determines, if applicable, the level of the wage to be paid by the employer during the period of the temporary exemption. Additionally, the court cannot exempt a company which has previously been exempted.

The use of derogation clauses in practice

Within the above context, a number of major questions need to be asked:

- To what extent are opening clauses and similar derogation clauses indeed included in (inter)sectoral agreements?
- To what extent are these clauses effectively applied at company level?
- What is the nature of these clauses?³

According to the case studies, it emerges that, particularly in Germany but also in Spain, there is a large number of sectoral agreements that allow for wage derogations at company level in times of serious economic difficulties (and, in the case of Germany, also in times of more general competitive problems). In Belgium, Austria, Italy and Ireland hardly any sectoral agreements include such clauses, while in France there are a number of sectoral agreements that explicitly stop company-level agreements from undercutting sectoral wage standards. In Germany, opening clauses are used frequently at company level, but in the other countries applying opening clauses at company level rarely occurs. These clauses mainly concern the non-implementation or alternative use of (part of) the sectorally agreed wage increases and of additional wage elements such as bonuses. Very rarely do they permit the undercutting of sectoral minimum wages or the implementation of wage cuts, although it is possible in Ireland with the inability-to-pay clauses and also in a number of German agreements. What is characteristic for almost all opening clauses is that derogations have to be based on collective agreements or agreements between the employer and works councils, providing workers’ representatives with a measure of control over the application of these clauses. In addition, in several cases higher-level controls exist such as the sectoral committees in Italy – which have to approve derogations – or the Labour Court in Ireland.

³ A further issue of importance here centres on the procedures for the use of these clauses. These will not be discussed in this report because of lack of space but are discussed in detail in the individual country reports.

In more detail, in **Austria**, an opening clause was included in the metalworking agreement in 1993 and in the electronics industry in 2009. The former concerned the idea of using the agreed increases in actual wages for the promotion of employment and was used by 3% of the companies in the sector, employing 13% of employees. The latter, in response to the economic crisis, decided that the agreed increase of actual wages of 2.2% could be reduced to 1.4% in those companies which had suffered reductions in turnover of at least 15% during the first quarter of 2009. It was applied in 60 companies employing some 16,000 employees. Both clauses were short-lived however and were not renewed in the next agreement.

Apart from these two clauses, some sectoral agreements allow for a flexible distribution of wage increases at company level. The most prominent example is the ‘distributive option’ (*Verteilungsoption*), according to which a part of the agreed increase of actual wages should be distributed not to all employees within the company but only to specific groups, including vulnerable groups – such as low-paid employees, younger workers and women – but also the more productive employees. Finally, in recent years some agreements – for example, in the metalworking sector – have introduced a profit-related lump sum, but have shielded companies with low profits from paying (part of) this payment.

In **Belgium**, in the period from 2005 until today, opening clauses dealing with wages appeared in sectoral agreements covering six (sub)sectors:

- engineering;
- metal manufacturing;
- food manufacturing;
- retail of food products;
- large retail stores;
- department stores.

These sectors together cover only a small part of the Belgium economy and labour market. Often, these clauses have been present in sectoral collective agreements since the 1990s, and are not a response to the recent economic challenges of the late 2000s. Moreover, they are hardly ever applied at company level and the total number of companies using these clauses is likely to be fewer than 10 a year. The opening clauses allow companies in economic difficulties not to implement the wage increases determined in the respective sectoral agreement (in some cases this includes the increases of the sectoral minimum wages), or deal with additional wage and labour cost elements such as premiums.

In **Italy**, an opening clause has existed only in the chemical-pharmaceutical industry where it was introduced in 2006 with the aim of:

- modernising the national collective labour agreement;
- enhancing company-level bargaining;
- supporting organisational change;
- strengthening the competitiveness of companies;
- increasing employment.

The derogations can concern all aspects of pay except the minimum wage of the sector, which cannot be undercut. However, the clause has never been applied in practice. Still, it remains to be seen if opening clauses will be used more in the future.

In **Germany**, all important sectoral agreements now contain some opening clauses. However, their content can vary widely. The wage issues they affect range from basic pay to bonuses but may also specify a list of issues on which derogations are possible. They can concern absolute reductions or rather derogations from agreed wage increases. Also, they sometimes involve postponement of the payment of the wage elements in question, a reduction or even a complete annulment – in the case of bonuses, for example. Sometimes the use of an opening clause is restricted to a situation when a company is in serious economic difficulties; in other cases it can be used for improving competitiveness. In exchange, employees may be offered enhanced job security, such as a commitment by employers not to resort to compulsory redundancies over a defined period of time. Where the use at company level is concerned, according to the Institute of Economic and Social Research (WSI) works council survey, in 2010:

- 16% of establishments used opening clauses to set lower pay rates for job starters;
- 14% reduced or suspended annual bonus payments;
- 13% deferred agreed pay increases;
- 9% cut basic pay.

In **France**, after the adoption of the Fillon law, some 15% of sector-level collective agreements include a clause prohibiting undertakings to derogate for the worse from working conditions (including wages) agreed at sectoral level (Combexelle, 2008). However, although systematic data are lacking, no noticeable increase can be observed in the use of company agreements and industrial relations actors rather continue to follow traditional bargaining practices, not undercutting sectoral wage agreements at company level.

In **Spain**, wage opt-out clauses were included in 51% of sectoral agreements, covering 74% of workers in 2009.⁴ However, from the (scarce) data available it emerges that there are not many companies using the opt-out clauses to achieve a reduction of wages or labour costs. A report from the Bank of Spain shows that when facing economic difficulties, only 4.6% of undertakings decide on using the opt-out clause to reduce wages, while 70% choose to dismiss workers.⁵

In **Ireland**, since 2003, the national social pacts have included an inability-to-pay clause, which also includes key conciliation and dispute-settling functions for the Labour Relations Commission (LRC) and the Labour Court. The clause concerns employers that can prove that they are in difficult financial circumstances in which full payment of nationally agreed wage increases would mean serious loss of competitiveness and employment. If their application is successful, they can refrain from paying all or some of the pay increases due in a wage agreement. There is no precise administration of all cases in which this clause was used but between the introduction of the ‘inability-to-pay’ clause in

⁴ Statistics Bulletin of the Ministry of Labour and immigration <http://www.mfin.es/estadisticas/cct/CCT09OctAv/cc1/index.htm>.

⁵ Report of the Bank of Spain of 2009 cited by Pose Vidal, 2009.

the national wage agreement and the end of 2008, 339 related cases have been notified to the LRC, and 175 or 52% completed by the Labour Court. The earlier-mentioned inability-to-pay clause of the National Minimum Wage Act, under which companies in economic difficulties can be exempted from paying the full statutory minimum wage for a period between three and 12 months, is used much less. In fact, there seems to have been only one application by an employer under this clause in the period 2000–2009, which was not complete and was not further pursued by the applicant.

The opinion of the social partners

The issue of wage derogation clauses is suggested first by employers. They often see such clauses as a means to getting wage flexibility in a competitive global economy, and particularly in times of economic hardship. Wage derogation clauses also fit the broader attempts by many employer organisations to promote a more generalised decentralisation of collective bargaining. At the same time, employer organisations seldom advocate a termination of (inter)sectoral bargaining practices and more often they advocate organised decentralisation – that is, increased company-level bargaining within the framework of rules and standards set by (inter)sectoral agreements. Additionally, in some countries like Belgium, Italy or Austria employer organisations hardly question the main features of existing bargaining systems with which they seem quite satisfied.

Moreover, in a number of cases the governments play an important role in the emergence of derogations. In Spain and France, legislative changes were made in recent years with the aim of facilitating lower company-level wage deviations from those agreed at higher level. In Austria, legal changes with the aim of decentralising collective bargaining were proposed by the government in the early 2000s but remained limited to working time issues. In Italy, in 2009, the government sponsored and signed an intersectoral agreement that facilitates derogations at company and territorial level. Also in Germany the various governments of the last decade, as well as the major political parties, have strongly supported the decentralisation of collective bargaining in general and the use of opening clauses in particular.

Trade unions are mostly against extensive decentralisation and derogations from higher-level wage agreements. They often see them as a threat to the systems of collective bargaining and to the homogenisation of wages throughout sectors. They also fear the weakening of worker protection, an increase of wage competition and a rise in the number of low-paid workers. Still, in the case of specific companies in serious economic difficulties, trade unions are often ready to negotiate on measures to overcome these difficulties and maintain employment, even if this includes a temporary undercutting of higher-level wage standards. However, they will always demand that such deviations are temporary and allow for some union control over their use. Trade unions in some countries are divided on these issues. For example, in Italy, the largest trade union CGIL opposed the FARCB reforms that were supported by other major unions.

In **Austria**, particularly during the present crisis, there are demands for a greater decentralisation of collective bargaining from the employer's side. Proposals range from limiting sectoral wage bargaining to minimum wages to completely replacing sectoral bargaining by company bargaining. For some years it seemed that even the Austrian government would support a greater decentralisation of collective bargaining. The 2000 coalition government of the populist Freedom Party and the conservative People's Party had included in its government programme the demand to shift collective bargaining from sectoral to company level. However, apart from the extension of flexible working time arrangements, no changes were made to the Austrian collective bargaining law. In general, both employers and trade unions strongly support the existing collective bargaining system, which has shown a high degree of stability. This is also the result of the exceptional legal and institutional framework which systematically promotes multi-employer bargaining and provides extraordinarily high collective bargaining coverage in Austria.

In **Belgium**, trade unions, employer organisations and the government are not seriously questioning the basic characteristics of the Belgian collective bargaining system and are not arguing for substantial modifications of this

system. Pressure for decentralisation of wage bargaining and the use of opening and related clauses largely comes from outside Belgium through the respective recommendations of international organisations like the Organisation for Economic Co-operation and Development (OECD). These recommendations do not find much resonance within Belgium however. The government, trade unions and employer organisations generally agree that the present wage bargaining system provides enough flexibility. What is important here is that, when companies suffer from serious economic difficulties, employers and trade unions often manage to agree on solutions within the framework of the existing sectoral agreement and without resorting to the use of opening clauses. This can include a minimalist interpretation at local level of the sectorally agreed wage increases and related elements. Also, there are a number of alternative adjustment mechanisms available to companies in economic difficulties that do not concern wages, such as state-sponsored programmes allowing for the temporary reduction of working time or partial unemployment, as well as early retirement.

In **Italy**, the government has for a long time supported the idea of a progressive slackening of national-sectoral bargaining, and in recent initiatives the government has favoured the decentralisation of industrial relations and collective bargaining. Still, despite their different positions, the social partners converge on the importance of maintaining the present bargaining structure and on the fact that decentralisation should be organised. Neither of the two proposes a one-tier system nor a process of disorganised decentralisation. The latter is considered a cause of unfair competition among companies, of inequalities among workers, and of conflict. Employer associations, in their documents, have always reaffirmed the validity and efficiency of the two-tier bargaining system. At the same time, they emphasise the need for more decentralisation, including in wage setting, in order to meet companies' competitive needs or to allow companies to overcome temporary economic difficulties. The possibility of company-level deviations from norms set under national-sectoral agreements is considered as a fundamental instrument permitting companies to cope with global competition and unstable markets.

Among the main trade unions, CISL and UIL agree with the government and the employer associations on the need for greater decentralisation of the collective bargaining structure. Instead, the largest union CGIL insists on the importance of the national-sectoral level, which guarantees minimum standards to all workers, and calls for a strengthening of this level as well as the territorial level. On the matter of derogations, trade unions agree that this instrument could be useful in some circumstances and in some socioeconomic contexts. But deviations have to be negotiated by all social partners, they can be accepted only for specific cases, have to be temporary, and cannot concern minimum rights like minimum wages. For the trade unions, and especially for CGIL, a looser regulation of the possibilities for such derogations risks destroying the structure of the collective bargaining system and the role of national collective agreements. The main consequences, particularly in the long run, would be an increasing diversity and inequality in working conditions and a weakening of trade unions, leading to a decline in solidarity and social cohesion.

In **Germany**, the driving forces behind the far-reaching decentralisation of German collective bargaining have been the employers, with strong support from the major political parties and the German government. The German employer associations have pressed the case for an across-the-board policy of collective bargaining decentralisation since the early 1990s, arguing that greater flexibility in sectoral agreements was needed to respond to the greater diversity of individual company circumstances. For some time, they also supported demands for a change in the legal framework to allow companies to diverge from sectoral agreements. Nonetheless, this position was abandoned more recently when the president of the Confederation of German Employers' Associations (BDA) acknowledged that the German bargaining system has now become so flexible using the existing legal framework that legal changes are no longer needed.

Where the German governments are concerned, for example, in 2003 the then German Chancellor, Gerhard Schröder, threatened the unions with the introduction of a statutory opening clause that would apply to all collective agreements. Other political parties have demanded that the ban on works councils' concluding proper collective agreements should be lifted.

Most German trade unions have long opposed collective bargaining decentralisation and the introduction of opening clauses that allowed the undercutting of agreed sectoral standards. An exception was the Mining, Chemicals and Energy Industrial Union (IG BCE), which believed that a process of ‘controlled decentralisation’ via opening clauses could help stabilise the entire bargaining system. In metalworking the acceptance of derogations at company level by the German Metalworkers’ Union (IG Metall) was initially a more defensive reaction aimed at safeguarding jobs or preventing a relocation of operations. But it was also pressured to accept opening clauses by political threats to increase decentralisation through legislative changes, as well as by declining union power. Given the seeming unavoidability and irreversibility of decentralisation, IG Metall has now shifted to a new strategy that aims to build organisational strength through a more assertive bargaining policy at company level.

In **France**, the Fillon law and other recent reforms underline state attempts to play a key role in increasing the importance of company-level bargaining compared with sectoral bargaining. The Fillon reform aroused strong criticism from the trade union side. The trade unions’ opposition to the new legislation was mainly focused on its challenge to the previously existing hierarchy of collectively agreed norms and the fact that such derogations had become the general rule with only a few exceptions. Trade unions have expressed their concern about the risk of ‘social dumping’ that derogations may produce. They are afraid that they undermine the importance of sectoral agreements as instruments of homogenisation of working conditions in general and of wages in particular. On the contrary, the Movement of French Enterprises (MEDEF) supported this legislation.

In **Spain**, the Spanish Confederation of Employers’ Organisations (CEOE) advocates increasing the possibilities of negotiated deviations from the standards, fixed by sector-level collective agreements, for companies undergoing an economic downturn. The unions are against this and want to preserve the use of opening clauses for companies that really cannot pay the sectoral wage increase but which, with a temporary exemption, can return to proper functioning. The government is reforming the Workers’ Statute, so that opt-out company agreements affecting wages can be used to avoid layoffs in times of crisis by providing temporary adjustments via wages. CEOE has stated that the employers are not completely satisfied with the labour market reform and has described it as not being ambitious enough to overcome all the problems that companies face during times of economic crisis. On the trade union side, the Trade Union Confederation of Workers’ Commissions (CCOO) and the General Workers’ Confederation (UGT) fervently oppose the reform. They fear it will lead to a fragmentation of the collective bargaining system and a greater individualisation of the employment relationships.

In **Ireland**, a major issue under debate concerns the sectors falling under by the Registered Employment Agreement (REA) and Employment Regulation Order (ERO) regimes.⁶ Many of the current EROs and REAs stipulate hourly rates in excess of the statutory minimum wage and also impose additional obligations, for example in relation to pension entitlements, overtime and sick pay. However, there is no inability-to-pay provision for exemption of employers who cannot afford the rate of pay set by an ERO or REA. Employer associations and individual employers had already called for reform in wage setting linked with EROs and REAs before the debate intensified under pressure of the economic crisis in 2009. The various Irish employer organisations argue that the EROs and REAs could be abolished altogether or should at least be reformed profoundly, including possibilities for companies in economic difficulty to pay below the minimum wage rates set by the EROs and REAs or a reduction of these rates. The government has, on several occasions, suggested extending the availability of inability-to-pay clauses concerning (minimum) wages to the sectors concerned and is preparing corresponding legal reforms.

⁶ REAs are collective agreements on pay and conditions of employment negotiated by employer and worker representatives from a particular sector or industry. EROs set statutory minimum rates of pay and conditions of employment in low-pay sectors. EROs are developed by Joint Labour Committees (JLCs), bodies established under the Industrial Relations Act 1946. Unlike REAs as agreements between social partners, EROs make up a form of government intervention to protect workers in vulnerable low-wage employment.

The unions however vigorously oppose these types of reforms. They underline the danger they pose for the lowest paid in these, often already low-wage sectors. Also, the unions argue that lowering wages is not a sound competitive strategy and is likely to lead to a downward spiral in wages. Moreover, they fear that reforms allowing undercutting or reduction of sectoral minimum wages are only the first step towards a reduction of the statutory minimum wage and in the direction of a generalised driving down of wages across the economy.

Conclusions

The inclusion of derogation clauses in higher-level agreements and the practical use of such clauses at company (or sometimes territorial) level is much debated in some of the seven countries studied here. It is striking though, that such clauses only have a strong effective influence in Germany where they appear in most major sectoral agreements and are widely used at company level. In Austria, Belgium and Italy they do not play any significant role. In France important legislative changes were made to allow for company agreements that undercut sectoral agreements, but in practice these possibilities are hardly used. Similarly, in Spain the majority of employees fall under a collective agreement that includes wage-related opening clauses, but these are rarely applied in practice. A less clear-cut case is Ireland where there are two intersectoral opening clauses, one in the national agreement and one in the statutory minimum wage legislation. The latter is not used at all. The former has been used in a substantial number of cases since 2003 but not at a level comparable to Germany. Hence, in five out of seven countries, opening clauses have hardly had any practical relevance. In one case they have some importance and in one case they play a major role.

It appears that in most of the countries covered in this study, opening clauses have not had a major effect on the collective bargaining systems which have been remarkably stable. Ireland is, to some extent, an exception as the practice of national agreements has recently broken down. This was, however, not related to the question of opening clauses or a drive for decentralisation. The major exception is Germany where 15 years of practice and experience with collectively agreed opening clauses have changed the basic structure of collective bargaining. They have triggered a process of decentralisation that has shifted an increasingly large part of bargaining responsibilities to the company level. This has led to a significant loss of regulatory power on the part of both employer associations and trade unions and once inviolable collectively agreed standards have become objects of re-negotiation at company level. As a consequence, unions have to engage much more directly with the needs and requirements of companies, and works councils have less scope to take refuge in the mandatory character of sectoral regulations when confronted by management calls for local concessions. The pressure from employers and the government for such decentralisation has been stronger than the power of the unions to resist it. This, together with the declining coverage of collective agreements, has reshaped German collective bargaining profoundly.

It seems, however, that in most other countries unions and employers are rather interested in maintaining stability in their collective bargaining systems and prefer to continue traditional practices with which they are in general satisfied, instead of thoroughly decentralising wage bargaining. Also, trade unions are often successful in neutralising any pressure from employers to increase the use of opening clauses. Unions in particular fear a fragmentation of the industrial relations system, increased diversity and inequality concerning working conditions, declining solidarity and downwards wage competition.

Moreover, both unions and employers generally prefer to use alternative mechanisms to overcome economic difficulties. These can be unilateral, like employers in Spain deciding not to renew temporary contracts. They can also be negotiated. For example, in Belgium many agreements are making use of state programmes opening up possibilities for short-time working arrangements and temporary unemployment. In this way they preserve jobs and most of the workers' income, while also temporarily reducing labour costs. Similar alternatives exist in Germany and Italy. The emergence of such negotiated, competition-enhancing and socially just solutions is greatly facilitated by state support. In addition, the

increase of working time flexibility is frequently used to adjust to economic difficulties. Wage adjustments are also often not considered the right cure for competitive problems, which are not necessarily related to wage costs but may derive from non-wage related factors such as the institutional framework, the economic situation, certain features of the production system, and lack of skills.

Resorting to such alternative solutions is sometimes also motivated by the fact that applying opening clauses can be a complex and time-consuming process which involves substantial paperwork as well as the disclosure of detailed information on a company's finances. In addition, resorting to opening clauses may result in complicated and conflict-ridden negotiations between inexperienced company-level actors.

Finally, it is pertinent to point out that there are some important issues that this report has not been able to cover. One concerns the procedural side of the application of opening clauses at the enterprise level, such as which actors are involved, what procedures are followed, as well as how cases of disagreement and conflict are resolved. The other concerns the actual impact of opening clauses. There are two areas of interest here. The first is the effect of opening clauses on the wages and working conditions of workers: what differences do they lead to in the short term in relation to the rest of the sector and if they have substantial longer-term effects. The second is the impact on the competitive position of the company: whether opening clauses allow companies to overcome temporary economic hardship; whether they are applied as a more general competitive instrument; or whether they are used mostly to temporarily halt a process of declining competitiveness. Further research on these questions would help to get a more complete picture of the role and impact of opening clauses in Europe today.

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