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Pathways in Decentralised Collective Bargaining in Europe

2. Decentralised Bargaining and the Role of Law

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Abstract
Legal systems in European countries differ greatly, and so does the legal design of collective bargaining. These differences manifest in the importance of constitutional principles, the balance between legislation and collective bargaining, the degree of state influence or voluntarism, the degree of trade union organisation and collective bargaining coverage, and forms of employee representation. But what relationship exists between the law, existing structures, and the methods and mechanisms used in the context of decentralisation? The author finds that structures of collective bargaining are mainly determined by non-legal factors, but the legal form of collective bargaining can help to create and maintain a certain structure and can therefore determine how the process of decentralisation occurs and what instruments and mechanisms are used.

Keywords: legal framework, decentralisation, state influence, trade union strategies, voluntarism, conflict rules

Introduction

This book is a study of the status and development of decentralised bargaining in several European countries, which represent the different legal systems that exist within Europe. In general, decentralised bargaining means the development from (more) centrally conducted or controlled collective bargaining about employment conditions to bargaining at lower levels. Decentralised bargaining can refer to various developments. Firstly, decentralisation is referred to when the decision-making power in existing consultations or decision-making is spread over several actors and groups. In

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administrative law, this can include the transfer of powers from the state to the provinces or municipalities. In negotiations on employment conditions, it generally relates to a decline in the importance of collective bargaining due to a reduction in the scope of collective agreements, or a decrease in sectoral collective agreements and an increase in consultation at the company level (see e.g., Haipeter & Rosenbohm, 2022: 19 ff.). Related to but not the same as this form of decentralisation is a situation when existing national or sectoral agreements create more room for the specific needs of companies and employees in the form of deviation possibilities. Examples include different options or alternatives within collective agreements or so-called opt-out regulations, but also deviation possibilities and forms of coordination between different levels. This currently occurs in many European countries. Finally, decentralisation can refer to the involvement of works councils in the setting of employment conditions (Jansen & Tros, 2022: 21 ff.). In this case, the decision-making power is not necessarily distributed among actors, but consultations are held with stakeholders who are less centrally controlled. At its core, decentralisation always involves changes in the existing system that entail the reduction of central control or coordination in consultation. In countries where there is no central consultation structure, it is difficult to speak of decentralisation, because decentralised consultation in those countries is usually the existing consultation structure. Poland and Ireland are cases in point (Czarzasty, 2022; Paolucci, Roche, & Gormley, 2022).

It is true that the moment decentralisation appeared on the political agenda (and, indeed, whether decentralisation remains on the agenda) varies somewhat from country to country, but it also true that the motive for decentralisation is similar in different countries. That motive is, in the main, strongly economic in nature. In Sweden, the Netherlands, Germany, and France, it was (and still is) considered necessary, because of increased international competition. That is to say, it was needed to ensure that companies are able to adapt more easily to economic developments in order to remain sufficiently competitive. Decentralised bargaining can be helpful in this respect, at least that was (or still is) the idea (see e.g., Kahmann & Vincent, 2022). In countries such as Italy and Spain, the 2009 crisis seems to have been a key driver of decentralised bargaining (Armaroli & Tomassetti, 2022; see also Chapter 5; Muñoz Ruiz et al., 2023). Companies should be given more space to respond to economic changes that threaten their survival. Although the motive for decentralisation is relatively similar, the same cannot be said about the extent and manner in which decentralisation has been or is being pursued and who initiates it (employers, social partners, legislator, government). The decentralisation process differs widely from

country to country and the question is what role the national legal framework regarding collective bargaining plays in the decentralisation process (see also Chapter 7; Rönnmar et al., 2023). It is interesting, firstly, to explore which specific elements of the legal framework of collective bargaining actually influence or force the level at which collective bargaining is conducted and, secondly, which legal methods and mechanisms are used to shape decentralisation and what role the existing legal structures play in this process.

Legal systems differ greatly at the level of detail, and so does the legal design of collective bargaining (hereafter also referred to as collective bargaining law). As Rönnmar et al. (2023) point out, these differences manifest in the importance of constitutional principles, the balance between legislation and collective bargaining, the degree of state influence or voluntarism, the degree of trade union organisation and collective bargaining coverage, and forms of employee representation.

In this contribution, I explore whether there is (some kind of) a relationship between the law (legal framework) and the process of decentralisation (in terms of existing structures, outcomes and methods, and mechanisms used). In order to explore the role of law in the decentralisation process and to compare countries, I have selected four aspects of collective bargaining law that (may) influence the emergence of the existing consultation structure and therefore (may) also influence changes to that structure as a result of decentralisation. These four aspects are: i) the bargaining and contractual freedom of collective bargaining parties; ii) the possibility of declaring collective agreements generally binding; iii) the relationship between the sectoral collective agreement and the company collective agreement and the relationship between collective agreements and legislation; and iv) employee representation in collective bargaining. The choice of these topics is open to debate because other aspects of collective bargaining law may also affect the (existing) structures of collective bargaining. Nevertheless, these aspects form the core of collective bargaining law and a comparison between countries on these core elements therefore seems valuable to start with in any case.

I will begin by discussing above-mentioned aspects in more detail. In the subsequent section, I will analyse the decentralisation process. This is not about analysing outcomes, but rather it is about analysing the legal instruments or mechanisms that are used in the context of decentralisation. More specifically, I will discuss the role of the legislator in the decentralisation process and the use of different legislative instruments and the coordinating or non-coordinating role of social partners.

An analysis of the legal design of collective bargaining

Introduction

The right to collective bargaining is aimed at making a significant contribution to social justice by compensating for an inequality of powers. In addition, collective bargaining in the form of collective agreements offers the business community the opportunity to act in a self-regulatory way. This allows it to respond to market developments more quickly and with greater focus than if it had to wait for the legislature to act, which often occurs in a rather protracted and complicated political process. Legislation and regulations can remain limited, particularly by means of sectoral collective agreements that can be declared universally binding. Collective agreements also contribute to cost reductions for employers, reduce uncertainty about wage costs, and exclude competition on employment conditions so that employers can make better forecasts. In short, collective bargaining and collective agreements can be useful for positive socio-economic developments, labour peace, stable labour relations, and proper functioning of the labour market.[1] The collective agreement is an important outcome of collective bargaining. The law applicable to collective agreements varies greatly from country to country. While international and European treaties recognise the right to collective bargaining (Chapter 7; Rönnmar et al., 2023)[2] those treaties simultaneously take into account the national context of collective bargaining and collective bargaining law.[3]

1 On the benefits of collective bargaining, see: *Communication Concerning the Application of the Agreement on Social Policy Presented by the Commission to the Council and to the European Parliament* (Commission of the European Communities, COM(93) 600 final 14 December 1993), Brussels; HvJ EG 21 September 1999, case C-67/96 (Albany); International Labour Conference, 101st Session, ILC.101/III/1B, Giving globalization a human face (General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008), Report III (Part 1B)), pp. 17–18; and, more recently, *Proposal for a Directive of the European Parliament and of the Council on Adequate Minimum Wages in the European Union* {SEC(2020) 362 final}, pp. 2–3.

2 ILO Conventions nos. 87 and 98; article 11 Convention for the Protection of Human Rights and Fundamental Freedoms; article 28 EU Charter of Fundamental Rights.

3 See e.g., Article 4 ILO Convention 98: *Measures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers of employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements*; Article 28 EU Charter: *Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.*

There are major differences with regard to, for example, the importance of constitutional principles, the balance between legislation and collective bargaining, the degree of state influence or voluntarism, the degree of trade union organisation and collective bargaining coverage, and forms of employee representation. For this study, I analyse the different systems in terms of four aspects that (might) influence the formation of the existing structure in practice, and which are therefore also important when changing that structure as a result of or due to decentralisation. I also examine to what extent these structures affect the process of decentralisation. The four aspects in question are: i) the bargaining and contractual freedom of collective bargaining parties; ii) the possibility of declaring collective agreements generally binding; iii) the relationship between the sectoral collective agreement and the company collective agreement and the relationship between the collective agreement and the law; and iv) employee representation in the process of employment conditions formation.

Freedom of collective bargaining: Freedom to contract and negotiate

In many of the countries studied, there is no (basic) legal obligation for employers to enter into either collective bargaining or a collective agreement. These systems are based on voluntarism. Freedom of collective bargaining implies that social partners have the freedom to decide whether to negotiate a collective agreement, what to negotiate about, and whether to conclude a collective agreement. Whether a collective agreement is concluded depends, to some extent, on the willingness of employers and the power of trade unions. Employers have two possibilities in this matter: firstly, they have the freedom to conclude a collective agreement or not; and secondly, they have the freedom to join or not to join an employers' association that can conclude a collective agreement at the sector level. If employers do not join an employers' association they are not bound by its agreements, unless and in case the agreement has a generally binding effect. The extent to which employers have the freedom under the law to participate in collective bargaining (and at what level) does not appear to be a decisive factor in shaping collective industrial relations in a country. The emergence of a particular bargaining structure seems to depend more on historical, political, and cultural factors (as well as trade union power resources) and less on the extent to which an employer's freedom to bargain collectively has been limited by the legislature, i.e., that it has some obligation to bargain and it is not entirely voluntary. I will elaborate on this.

In Poland, the absence of consultation at the sectoral level seems to be largely related to reforms of the political system and the circumstance that employers do not see the benefit of sectoral negotiations (Czarzasty, 2022). In Ireland, there was a period when wages were negotiated at the central level, but the 2009 crisis put an end to that as employers stopped central-level consultation. After that period, however, consultations at company level became more coordinated. In this context, we can speak of pattern negotiations in Ireland (Paolucci et al., 2022). Poland and Ireland lack any constitutional right to collective bargaining by workers and some obligation to do so by employers.

Like Poland and Ireland, the Netherlands and Germany also lack a constitutional right to collective bargaining by workers and obligation to do so by employers. In the Netherlands and Germany, however, the sector model developed after World War II as a result of the circumstance that employers and employees tended to organise themselves on a sectoral basis.[4] As a result, collective agreements also came into being at the sectoral level, and, although the importance of sectoral collective agreement has declined in Germany in recent decades, sectoral consultation remains dominant in the Netherlands and Germany. It should be noted, however, that in the Netherlands and Germany there is a solid legal framework regulating collective bargaining agreements. In the Netherlands, the sector model has been an important foundation of the further design and development of the labour market and its regulation. The Dutch consultation model is known as the "polder model" in which social partners share responsibility for socio-economic policy. In Italy, the sector model is mostly the result of the idea, which has prevailed since the 1980s, that – similar to the Dutch polder model – employers and employees should play an important role in shaping labour market policies and social laws and regulations (Armaroli & Tomassetti, 2022: 8–10). This is also called "responsive regulation" and tripartite consultation and delegation of regulatory powers are important components of this concept in the Italian context. As a result, a consultative system of several layers of collective consultation has emerged in which central consultation and sector bargaining play an important role.

In France, the freedom of employers within the framework of collective bargaining is limited by law, in the sense that French employers are obliged to negotiate with unions on certain topics at the sector level. As a result, sectoral consultation also has a legal basis. In Sweden, employees have a

4 Sector bargaining emerged in the first decades of the 20th century as a way for individual employers not to have direct contact with trade unions (Tros et al., 2006).

strong right to enforce collective consultation and this has helped to create a strong national and sectoral consultation system. This is also undoubtedly the result of a strong trade union position.

As mentioned before, the emergence of a particular bargaining structure seems to depend mainly on historical, political, and cultural factors (as well as trade union power resources) and much less on the manner in which the right to collective bargaining is shaped in law. As a result, a fully liberal system, based on voluntarism, with a lot of freedom for social partners to conclude collective agreements, does not necessarily lead to the absence of a centrally (national and/or sectoral) driven consultation system and the lack of strongly embedded social partners. The legal design of collective bargaining can, however, contribute to the preservation of existing structures. From the country reports of the countries with a less liberal system, such as France, the limited freedom of employers to enter into a collective agreement or not, and with which unions and at what level, does seem to have a direct influence on the emergence of certain bargaining structures. In these countries, the limited freedom of employers seems to have led to highly institutionalised collective bargaining in which the sectoral collective agreement plays a more important role than the company collective agreement. The degree to which collective bargaining is centralised (nationally or sectorally) seems to be mainly determined by non-legal factors, while the legal form of collective bargaining can help to create and maintain a particular structure.

The declaration of collective agreements as generally binding

Many European countries have a system of declaring collective agreements to be generally binding. The declaration of the binding nature of collective agreements is often seen as an act of substantive legislation and means that the binding collective agreement applies to all employers and employees who fall within its scope. The declaration of the binding effect extends the scope of the collective agreement, but its significance for the collective bargaining process is broader than just the widening of the scope of the collective agreement. A numerical approach to the declaration, in the sense that the declaration ensures that the collective agreement applies to a larger percentage of workers, does not do the instrument justice. This is because the extension not only has direct consequences for the scope of regulation of current collective agreements, but also influences the conclusion of collective agreements and the form of collective bargaining. After all, the possibility of being declared binding appears to be an important incentive for

collective bargaining, because it excludes wage competition by unaffiliated employers. A major goal of declaring an agreement binding is therefore the stimulation (or maintenance) of collective bargaining. The possibility of binding agreements not only encourages collective bargaining in general, but also that collective bargaining is conducted particularly at the sectoral level, since, as a rule, only sectoral collective agreements are eligible for binding agreements. By declaring them binding, collective agreements can include agreements on, for example, wages, which can then apply to the entire sector. As a result, coordination at a central level means that legislation can be dispensed with, and, in that sense, the extension contributes to self-regulation of the social partners (Jansen, 2019).

The possibility of declaring collective agreements binding is not necessarily a guarantee of centrally directed consultation at the national and/or sectoral level. Polish collective bargaining law provides for the possibility of extending collective agreements, but this possibility is not used and sectoral consultation is almost non-existent in Poland (Czarzasty, 2022: 9). In this sense, the mere presence of the possibility of binding agreements does not say much about the extent to which collective bargaining is centrally controlled. This is confirmed by developments in Germany. German law includes the possibility of declaring collective agreements binding, and this possibility was frequently used. In recent years, the instrument has been used less, and this is mainly due to the declining degree of organisation on the employers' side. As a result, the instrument of the declaration of binding effect in German law has been adapted, in the sense that the criterion for declaring it binding has been relaxed. However, this change has not resulted in more collective agreements being declared binding. The importance of sectoral collective agreements is decreasing in Germany, while it has become easier to declare collective agreements generally binding (Haipeter & Rosenbohm, 2022: 19). In the Netherlands, too, it is possible to declare collective bargaining agreements generally binding, and although that legal system is almost a century old, until ten years ago hardly any changes were visible in the coverage ratio of sectoral collective bargaining agreements. In the last decade, there has been a decline in that coverage ratio. What is causing this decline is the subject of research.

Furthermore, the absence of the possibility of making an agreement generally binding does not seem to be decisive for the extent to which there is sectoral collective bargaining. Irish, Italian, and Swedish law do not allow for the possibility of generally binding agreements, and whereas in Ireland there is hardly any sectoral consultation, in Italy and Sweden sectoral consultation is an important pillar of the existing bargaining model.

The absence of the possibility of generally binding agreements seems to be compensated in Sweden by agreements at the national level.

Many European countries have the possibility of making collective agreements generally binding, but this possibility does not seem to be decisive for the design of collective bargaining and the extent to which there is central control through consultation at the national or sectoral level. After all, Polish law does provide for the possibility of declaring a collective agreement binding, but Polish collective bargaining is characterised by decentralised consultation at the company level. Swedish law, on the other hand, does not allow for the possibility of making generally binding agreements, but Swedish collective bargaining is centrally controlled and the sectoral collective agreement is an important pillar of collective bargaining. The possibility of declaring collective agreements generally binding can make an important contribution to centralised control of the negotiations. The system of declaring collective agreements binding can contribute to the self-regulation of social partners and is therefore a suitable instrument in systems that involve social partners in the formation of socio-economic policy and legislation, such as France and the Netherlands.

Conflict rules and deviation options

Discussions or issues inherent to the collective bargaining process are those related to the overlap of the scope of collective agreements, as a result of which two collective agreements may apply to an employment relationship. The applicability of two collective agreements often leads to problems, because the employment conditions agreed in both collective agreements may not correspond thus raising the question of which collective agreement or which collective agreement provision has priority. Rules in collective bargaining law that determine which collective bargaining agreement or which collective bargaining provision takes precedence in the event of concurrent and conflicting collective bargaining agreements can be referred to as "conflict rules." In countries where sectoral consultation is an important pillar of collective bargaining, most collective bargaining law contains rules that give precedence to the sectoral collective agreement in the event of clashing collective agreements. How these conflict rules are shaped, however, differs from one legal system to another.

In the Dutch and German systems, the consequence of declaring a collective agreement generally binding is that it becomes a form of public law that takes precedence over (purely) private collective agreements. The clash between two collective agreements that have both been declared

universally applicable is avoided as much as possible by not declaring one of the collective agreements universally applicable where there is an overlap in their scope (Jansen & Tros, 2022: 8–11). It is then up to the social partners to resolve the overlap in scope. If there is an overlap between two collective agreements, neither of which have been declared generally binding, the problem is, in principle, solved by the binding effect of collective agreement law. An employer has the power, via collective labour agreement law, to prevent his employment relationships from being governed by two different collective labour agreements (Jansen & Tros, 2022: 8–11). If a company in the Netherlands falls within the scope of a sectoral collective agreement that has been declared binding and it wishes to apply its own company collective agreement, this is only possible if: i) the sectoral collective agreement leaves room for this; ii) parties to the sectoral collective agreement grant permission; or iii) the minister asks for dispensation from the sectoral collective agreement.

Under Polish law, it is not possible to deviate from a sectoral collective agreement to the detriment of the employee through a lower regulation. Derogations in favour of the employee are therefore possible. Given the fact that Polish employers like to be as competitive as possible, the lack of deviation possibilities from the sector collective agreement could mean that the sector agreement is anything but popular in Poland. Polish employers appear to be afraid of competition from other employers who are not bound by a collective agreement and do not see the benefits of a level playing field with regard to employment conditions (Czarzasty, 2022: 9).

In France, until the major reforms of the 21st century, the principle of the most favourable provision also applied, i.e., that a sectoral collective agreement could be deviated from only to the benefit of employees (Kahmann & Vincent, 2022: 11). In the French system, sectoral collective agreements usually contain minimum regulations, which can therefore be deviated from in favour of employees in, for example, company collective agreements.[5]

In Sweden and Italy, collective agreements contain many delegation rules that thus ensure coordination between different layers of collective bargaining (Rönnmar & Iossa, 2022: 10 ff.; Armaroli & Tomassetti, 2022: 9). The collective agreements usually contain rules on how to deal with and/or clash with collective agreements. In Spain, the law stipulates the conditions under which a sectoral collective agreement can be deviated from (Muñoz Ruiz & Ramos Martín, 2022: 3).

5 Other countries, for example, the Netherlands, have a similar system (Jansen & Tros, 2022: 8–11).

Another doctrine of collective law that is also an important subject of collective bargaining concerns the possibilities of derogation from legislation. Such possibilities do not exist under either Polish or Irish, while the other systems examined do have statutory derogation options for the law. In many cases, these derogations are in the form of clauses, for example, in Spain, the Netherlands, Germany, and Sweden. The possibility to deviate from the law can be seen as an important incentive for collective bargaining and makes collective bargaining attractive for employers.

In summary, in systems where sectoral collective agreements play an important role and collective agreements are negotiated at different levels, the existence of conflict rules are indispensable. It is striking that in Polish law there is little room for deviations from sectoral collective agreements and that laws and regulations cannot be deviated from by collective agreement either, and, moreover, that in Poland the sectoral collective agreement is hardly important. There seems, therefore, to be a link between the presence of conflict rules and deviation possibilities from the law and a sectoral consultation structure, but it is not clear whether the sectoral consultation is (partly) the result of the existence of conflict rules (in other words: that the presence of conflict rules positively influences the sectoral consultation) or that the presence of conflict rules is mostly a result of a sectoral consultation created by other circumstances.

Employee representation

Trade union density has been in decline in Europe in almost all countries since 1980, but rates differ significantly across countries (Chapter 7; Rönnmar et al., 2023). While successful employee representation increases with the degree of workers' organisation (Schmalz & Dörre, 2014), it is not clear how employee representation relates to (the change of) existing bargaining structures (see also Chapter 7; Rönnmar et al., 2023).

Under Dutch law, collective agreements can be concluded by employee associations with full legal capacity (trade unions). Trade unions are not subject to any further requirements in collective bargaining law regarding, for example, independence or representativeness. Dutch law thus guarantees that any trade union can enter into collective agreements. In addition, from a legal point of view, every trade union has equal opportunities to enforce consultation and strengthen negotiations. This puts every trade union in the same starting position. Whether or not trade unions succeed in achieving their objectives depends on extra-legal factors in the industrial relations arena. Works councils can negotiate on employment conditions

in the Netherlands, but the results of these negotiations are not a collective agreement and are of lower legal order than the collective agreement, in the sense that a collective agreement in principle prevails in case of conflict. The possibilities to negotiate with works councils combined with the lack of a strong position of trade unions in the companies can undermine the position of trade unions when the negotiation of employment conditions shifts from sector to company. The German system is similar to this (Haipeter & Rosenbohm, 2022: 1–10).

In Poland, the works council is virtually non-existent. In Swedish law, all trade unions enjoy the same basic legal rights of freedom of association, general bargaining, collective bargaining, and collective action. Instead of establishing certain procedures or criteria for representativeness, Swedish law grants privileges to so-called established unions, i.e., unions that are currently or ordinarily bound by a collective agreement with the employer or the employer's organisation (Rönnmar & Iossa, 2022: 10). Established unions enjoy far-reaching rights to information, primary bargaining, and co-determination. The employer is obliged to negotiate primary employment conditions with the trade union before making decisions on major changes in the employer's business and operations, such as restructuring, layoffs, changes in work organisation, and appointments of new managers, or the employment conditions or employment relationship of a member of the trade union, such as transfers and changes in working hours. Such consultations take place first at the enterprise level and then at the sector level.

Italian law does not impose requirements on trade unions in the context of representativeness with regard to entering into collective agreements (Armaroli & Tomassetti: 2022: 12). Works councils can also enter into collective agreements under Italian law. This is comparable to Spanish law (Muñoz Ruiz & Ramos Martin, 2022: 6). In order to avoid undermining the position of representative trade unions, Italian law stipulates that further requirements are imposed on trade unions before a collective agreement can deviate from the law. This privilege therefore does not accrue to all trade unions, but only to the most representative trade union.

France has a system of trade union elections that determine which trade union has the authority to enter into collective agreements from time to time. If there is no trade union at the enterprise level, then negotiations can also be held at the enterprise level with an employee delegation. Depending on the size of the company's workforce, it will be determined how that employee representation and the collective agreement will be created (Kahmann & Vincent, 2022: 13).

In many European countries, collective bargaining took its dominant form in the second half of the 20th century. In that period, the degree of organisation of trade unions was generally still considerable, the number of trade unions was still manageable, and those unions were still mostly centrally controlled, and works councils were still relatively new. In most countries, this led to a consultative structure in which levels of consultation were attuned to one another and the sector collective bargaining agreement occupied an important place. The emergence of new, alternative trade unions, the decline in the membership of established trade unions, and the normalisation of the works council as a discussion partner within the company, have changed the playing field of collective bargaining. In some countries, this has led to legislation on collective bargaining and the authority to enter into collective agreements. This new legislation seems to have been motivated primarily by the goal of preserving existing structures, or at least to counteract the undermining of the position of established trade unions in the collective bargaining process. In countries where sectoral bargaining is an important pillar of employment negotiations, the decentralisation of employment negotiations has meant that established unions lose ground in collective bargaining, because in the existing structures the presence of established unions at the firm level is generally less evident.

Decentralised bargaining instruments and mechanisms

As stated in the introduction, decentralised bargaining can point to various developments in collective bargaining. For this contribution, I have distinguished three main forms. First, the decline in the importance of collective bargaining through a reduction in the scope of collective agreements or a decrease in sectoral collective agreements and an increase in bargaining at the firm level. Related to but not quite the same as this form of decentralisation is when the existing national or sectoral consultations, in the form of derogation options, create more room for the specific needs of companies (and employees working in them). This is the second main form. Finally, decentralisation can refer to the involvement of the works council (or other employee representation at the company level, other than trade unions, who are party to collective agreements) in shaping terms of employment: that is the third main form. In this section, I discuss what tools or mechanisms can be identified for each main form and how they are deployed or used to shape and streamline the decentralisation process.

Reduced scope of the collective agreement, fewer sectoral collective agreements, and more consultation at the enterprise level

In a few of the countries under discussion there has been a marked decline in the scope of collective bargaining or a decline in the number of sectoral collective agreements and simultaneous growth in the number of company collective agreements. In many of the countries surveyed, where the sectoral collective agreement is an important pillar of collective bargaining, that sectoral collective agreement seems to lead a fairly stable existence. Decreasing collective bargaining coverage is mostly limited to countries in which company level bargaining is dominant, like Ireland and Poland. The decentralisation of collective bargaining in the countries that are dominated by sector bargaining usually manifests itself in the second main form, whereby more room has been created at the sectoral level for consultation at the company level. It is worth noting that in the Netherlands and Germany there has been a decline in the coverage ratio of sectoral collective agreements, but this is not necessarily accompanied by an increase in the number of company collective agreements, while legislation does not seem to have played a role in this. In fact, new legislation in Germany, by which I mean the broadening of the possibility to declare a collective agreement binding, seems to be more in favour of the sectoral collective agreement and does not, as yet, result in an increase in the sector collective bargaining agreement coverage ratio. The result of the reduction of the sectoral collective agreement in Germany seems to be a decline in the degree of organisation on the employers' side and the introduction of the possibility for employers to be members of employers' organisations without being bound by a collective agreement. They simply leave the system of collective bargaining. Shifts in this first main form seem to be mainly the result of employer strategies. That also fits in with the existing consultations in Poland and Ireland in which employers still do not seem to feel like consulting at the sector level. As I discussed earlier, legislation seems to have only a modest effect on the genesis of the prevailing consultation structures. In particular, non-legal aspects have led to centralist consultation structures and although these structures do appear to be supported by legislation, non-legal aspects also appear to have led to the greatest changes.

Nevertheless, some mechanisms or instruments can be identified that may give rise to changes in the existing structure by making the sectoral collective agreement less attractive in a legal sense. In Spain, for example, the law was initially amended to give the company collective agreement priority over the sectoral collective agreement (see Chapter 5; Muñoz Ruis,

Ramos Martín, & Vincent, 2023). This intervened in the existing structure in Spain. After considerable criticism, particularly from trade unions, this change was reversed and the old structure seems to be maintained. In French legislation, a subdivision has been made in terms of the subjects of the employment conditions consultations that must be discussed at the sector level or company level, respectively. The shift of topics from the sector consultations to the decentralised consultations, could potentially have the effect of making the sector consultations less important. Because certain (important) subjects must still be discussed at the sector level, the effect of the legislation is rather that decentralised consultation has increased while retaining bargaining and consultation at the sector level (see Chapter 5; Muñoz Ruis, Ramos Martín, & Vincent, 2023). Finally, I would like to mention the tax legislation in Italy that stimulated consultation at the decentralised level. Because of the embedding of the sector collective agreement in the existing structure, the tax legislation has not had the effect of reducing the importance of the sector collective agreement, but rather it has increased the number of company collective agreements. The legislation has led to more intensive coordination between different levels of consultation.

More space for decentralised bargaining and works councils

In all countries with a certain sectoral bargaining structure, decentralised bargaining has been shaped mainly through the mechanism of giving more space for decentralised agreements within the structure of sectoral collective agreements. This has happened in a variety of ways.

In the first place, sectoral collective agreements have become more of a framework for further elaboration of all kinds of regulations at the decentralised level. This development is sometimes accompanied by a change in the content of consultation within the sector, as a result of a separation between subjects that are negotiated at the sector level and subjects that are left to decentralised consultation (Armaroli & Tomassetti, 2022). As already mentioned, French law even distinguishes between subjects that are negotiated at the sector level, on the one hand, and at the company level, on the other. Sometimes, the framework-setting nature of sectoral collective agreements becomes visible through the use of opening clauses in sectoral collective agreements. Such clauses entail that certain parts of the sectoral collective agreement can be deviated from (often conditionally) by company level bargaining. The use of opening clauses occurs in Germany, the Netherlands, Spain, and Italy, among other countries. Opening clauses in sectoral collective agreements allow unions at the sectoral level to maintain

control over the formation of employment conditions in the sector while offering opportunities to companies to better tailor some employment conditions to the wishes and needs of companies and workers. This is also called coordinated decentralisation. This coordination often relates not only to the content of the consultation, but also to the parties to the consultation. These may be trade unions operating at the company level and often under the central direction of a trade union federation, but also, for example, works councils under the control of trade unions. If a certain control or direction of sectoral unions over employee representatives at the local level is lacking, then sectoral unions are, as a rule, less inclined to leave subjects to decentralised consultation or to include opening clauses (see Chapter 6; Rosenbohm & Tros, 2023).

More room for decentralised consultation can also be created by making it possible by law or collective agreement to deviate from collective agreements. In Spain and Italy, it has been made possible by law for decentralised consultations to deviate from sectoral collective agreements. Such deviation possibilities allow decentralisation to take place in an uncontrolled manner often at the expense of sectoral consultation. In Italy, trade unions have responded to these legal derogation possibilities by making agreements in the sectoral collective agreement on how decentralised consultation will be involved. In Spain, the change in the law was reversed due to persistent criticism from trade unions. Uncoordinated decentralised consultation can also be an issue in systems in which there are few requirements for trade unions or in which works councils can consult on employment conditions. In addition, there is a great deal of freedom for employers to enter into collective bargaining with trade unions. Decentralised consultation (possibly even with works councils or "yellow" unions) can then be used to undermine sectoral bargaining.

In conclusion

It needs to be said that it is difficult to compare systems given the peculiarities of and within countries and the changes and adjustments in different systems over time. That makes it difficult to draw broad lines from the comparisons that are also "time" and "circumstance" sensitive. Drawing conclusions in this sense is perhaps going a bit too far and so I conclude by pointing out some trends.

Firstly, the emergence of a particular bargaining structure in European countries seems to depend mainly on historical, political, and cultural factors

and much less on the legal design of collective bargaining law. As a result, a fully liberal system with a lot of freedom for social partners to conclude collective agreements does not necessarily lead to the absence of a centrally (national and/or sectoral) driven consultation system and the lack of strongly embedded social partners. The legal design of collective bargaining can, however, contribute to the preservation of existing structures. In countries with a less liberal system, such as France and Sweden, the limited freedom of employers to enter into a collective agreement or not, and with which unions and at what level, does seem to have a direct influence on the emergence of certain bargaining structures. The degree to which collective bargaining is centralised (nationally or sectorally) seems to be mainly determined by non-legal factors, but the legal form of collective bargaining can help to create and maintain a certain structure.

Secondly, the possibility to make collective agreements generally binding does not seem to be decisive for the design of collective bargaining structures and the extent to which there is central control through bargaining at the national or sectoral level. After all, Polish law does provide for the possibility of declaring a collective agreement binding, but Polish collective bargaining is characterised by decentralised bargaining at the company level. Swedish law, on the other hand, does not allow for the possibility of generally binding, but Swedish collective bargaining is centrally controlled in which the sectoral collective agreement is an important pillar of collective bargaining. However, the possibility of declaring collective agreements generally binding can make an important contribution to centralised control of the negotiations.

Thirdly, in systems where the sectoral collective agreement plays an important role and collective agreements are negotiated at different levels, the existence of conflict rules are indispensable. There seems to be a certain link between the presence of conflict rules and deviation possibilities from the law and a sectoral consultation structure, but it is not clear whether the sectoral consultation is (partly) the result of the existence of conflict rules (in other words: that the presence of conflict rules positively influences the sectoral consultation) or that the presence of conflict rules is mostly a result of a sectoral consultation created by other circumstances.

Fourthly, decentralised bargaining can point to various developments in collective bargaining. In general, it is difficult to say that the importance of collective agreements in Europe has declined: significantly more collective agreements are concluded at the corporate level and the importance of the sectoral collective agreement is decreasing in some countries, but in many other countries the existing structures are quite stable, albeit the coverage

ratio does seem to be declining. However, in many countries, the trend of decentralisation has led to collective agreements becoming more of a framework for further elaboration at the decentralised level. The strategy of the trade unions seems to be aimed at creating more opportunities for employers and employees to arrive at a package of employment conditions that is more in line with the wishes of the company, while retaining control at central and company level. Legislation has been used to stimulate decentralised bargaining, for example the creation of possibilities for derogation in the law, a distribution of subjects over different layers of consultation in the law and tax advantages. The effect of this legislation is often that agreements on coordination are made during bargaining. Where decentralised bargaining takes place in a coordinated manner, social partners are generally more positive about decentralisation than when uncoordinated forms of decentralisation are involved.

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