WHO IS AFRAID OF DEROGATORY AGREEMENTS AT COMPANY LEVEL?

by Antoine Jacobs[1]

Introduction

During his entire scientific career Bruno Veneziani has always been fascinated by the phenomenon of the social dialogue between employers and trade unions, both in a national and international perspective. So he must have had special interest in the FIAT-Pomigliano Agreement of 2010 and the Interconfederal Agreement of 28 June, 2011 and all developments surrounding them.

The FIAT Pomigliano Agreement 2010 brought for the workers in the FIAT-plant of Pomigliano some important deteriorations of their working conditions in respect to the national sectoral agreement (F. CARINCI (2010). Later the interconfederal agreement of June 28 2011 concluded between the largest employers confederation (Confindustria) and all three main trade union confederations (CGIL, CISL and UIL) recognized the democratic rule according to which if a company collective agreement is accepted by the majority of the trade unions or workers, it has a mandatory effect for all workers of that company (F. CARINCI, 2011).

An overview

The main motive for the FIAT-Pomigliano agreement was the need for the FIAT company to survive in a globalized market and to be competitive on a transnational level. It is clear that all Western European nations are faced by the challenge of globalisation, internationalisation and competition from countries with significantly lower wage levels. Notably manufacturing companies are moving their activities from high-cost to low-cost countries. As the rigidities on the labour markets have been blamed for the problems in the economy, this has, in all these nations, provoked a strong demand for deregulation of labour law and for more flexibility. As part of that endeavour in several EU Member States the relationship between the various levels of collective bargaining has come under discussion.

In most Western European countries after World War II the level of employment conditions of most workers has been predominantly determined by sector-level (= industry-wide) collective agreement, although traditionally there have also been single-employer agreements. Since a number of years already there has been increasing pressure to decentralize the fixation of employment conditions to the company level.

[1] Emeritus Professor Labour Law, Social Security Law and Social Policy at the University of Tilburg, The Netherlands.

Flexibility can be obtained by leaving the employers' association, through opening clauses in sector-level collective agreements and by exemptions from the extension of those agreements to all firms in the sector (extension *erga omnes*) (A. JACOBS, 2011). As many employers were not satisfied with the existing possibilities for derogation from the sector-level collective agreement at company level they have pushed for further possibilities in this field.

In **Germany** in the 1990s the idea of "Bündnisse für Arbeit" was born (T. BLANKE/E. ROSE (2005). These are agreements, largely about wages and working hours, which often deviate in a unfavourable way (*in peius)* from the sector-level collective agreement. Such deviations are in exchange for promises of the employer to maintain jobs (H. MASSA-WIRTH/H. SEIFERT (2005). These agreements are mostly negotiated by the employer with the works council. They are either fitting within the existing opening clauses in the sector-level collective agreements and/or they are subsequently ratified by the trade unions which have negotiated the sector-level collective agreement. On such bases the highest German Labour Court was prepared to accept them as legitimate.

In **France** in 2004 the law was changed. It is now provided that cross-sectoral, sector-level or company agreements may include provisions which depart wholly or partly from rules that apply under an agreement covering a broader geographic area or industrial field, unless such departures were expressly forbidden in an agreement at a higher level. However, this possibility of derogation *in peius* is not open on the most important item of all, the wages, as well on a few other items (art. L 2253, par. 1 and 3 of the Labour Code). In reality the main subject of the derogations are working hours (C. VIGNEAU/A. SOBCZAK (2005).

Even in **Denmark** were the system offered already substantial flexibility to cope with cases of severe economic problems of specific enterprises, in 2000 so-called Pilot Schemes were introduced which made it possible for company agreements to disregard also *in peius* several chapters (e.g. working hours) of the sector-level agreement. Since 2004 this may even take place without the requirement of the sector-level parties' control and endorsement (A. ILSOE (2010).

In **Great Britain** sector-level collective bargaining has all but disappeared from the private sector. Although employers are by statute obliged to recognize a union, this only applies if the union is backed by more than 50% of the workers concerned, which in the private sector rarely happens. The result is, that in Great Britain in most cases, management unilaterally determines and the employee agrees (B. BERCUSSON/B. RYAN (2005). This systems allows maximum flexibility for enterprises to adapt employment conditions to the specific needs of the company. This flexibility was already created during the reign of the Conservative government (1979-1997) which revoked many statutory rules on trade unions, collective bargaining and strikes, which severely weakened the position of the trade unions.

Only **The Netherlands** until now has stayed clear of this erosion of the binding force of the sector-level collective agreement. The government refuses to apply the much used tool of an extension erga omnes to unspecified decentralization clauses in the dominant sector-level collective agreements. By the end of the 1990s some companies or subsectors tried to escape the binding force of the extended collective agreements by concluding company of subsector collective agreements with week trade unions or even

with yellow unions and then to demanded to be exempted from the extension of the sector-level collective agreement. The Minister initially did so which has led to abuses and therefore since policy changes in the 2007 this way has practically been barred.

Analysis

We may conclude from this quick scan that the Italian developments around the Pomigliano-agreement are nothing particular in a Europe in which the economic push is for more decentralization in the collective agreements. All over Europe the sector-level collective agreement is losing its dominant character, albeit in various degrees. Most of all in Britain, the least of all in The Netherlands. Other countries are somewhere in between. Increasingly company agreements are deviating from the sector-level agreement *in peius*. So the trend goes all over Western Europe in the same direction, but different are the ways in which this trend may be realized or frustrated by existing national labour law systems.

On the one hand there is the example Denmark with its already traditionally well advanced degree of decentralization of the setting of working conditions at company level. On the other hand there is The Netherlands were decentralisation is underdeveloped. Both economies are prospering well, The Netherlands even with the lowest rate of unemployment in the EU!

On the one hand there is Germany where fifteen years of practice and experience with collectively agreed opening clauses have changed the basic structure of collective bargaining. The widespread introduction of these clauses has triggered a process of decentralization that has shifted an increasingly large part of bargaining responsibilities to the company level. On the other hand there is Britain where the almost complete effacing of the sector-level collective bargaining did not end up in a generalization of company bargaining, but in a largely individualized wage formation. Both economies are prospering, Germany even with a lower rate of unemployment than Britain!

So it cannot be deducted from actual developments in Europe that the more the setting of the essential working conditions is decentralised, the more this will contribute to a better employment situation.

Yet, there are other “laws” to learn from all these experiences. Apparently derogatory clauses are less risky for the dominance of the sector-level collective agreements, when these clauses are delimiting the deviations in narrow and very precisely indicated boundaries. Moreover derogatory clauses are less risky for this dominance if their binding force requires the consent of the parties that concluded the sector-level collective agreement. However, even then derogatory clauses bear the risk that they set up the local representatives of the employees against the national trade unions, but this risk seems to be smaller if the local negotiators are working inside a single channel system of workers’ representatives (shop-stewards belong to unions, like in Denmark) than inside a dualist system (works councilors besides trade unions, like in France and The Netherlands).

The remarkably outcome of the aforementioned "laws" is, that the less risky the derogatory clauses are for the collective interests of the workers at sector-level, the less attractive they are for management! But so it always is in collective labour relations.

Employers are normally seen as the driving force behind a far-reaching decentralisation of collective bargaining. However not all employers are of the same opinion about this. Whereas larger firms may push for decentralisation to increase the scope for local adjustments of the regulation (and thereby savings on operational costs), smaller firms prefer sector-level bargaining in order to save regulatory costs. They do not have the organisational back up for management (HRM departments) to institutionalise company level bargaining.

When the European economies were in a good shape in the 1960s of last century it were the trade unions that were often in favour of decentralised bargaining, but in the ailing economies of the last 30 years most trade unions in Europe have been highly skeptical about collective bargaining decentralisation. They most of the times opposed the introduction of opening clauses that allowed the undercutting of agreed sector-level standards. However, given the seemingly irreversibility of decentralisation many trade unions which do business with larger firms have now softened their attitude hoping that a process of 'controlled decentralisation' via opening clauses could help stabilise the entire bargaining system. They do not want to abandon the sector-level collective agreement altogether, notably because worker representation either by trade unions or by works councils is often weaker in small firms than in large firms. In Germany even the majority of works councilors still have a skeptical attitude. They doubt that decentralisation can help secure jobs and believe that the decentralisation leads to more conflicts at company. For them, the main winners of bargaining decentralisation are management (R. BISPINCK/T. SCHULTEN, 2011).

Evaluation

Traditionally sector-level collective agreements have been a sort of a bulwark against a race to the bottom in the field of labour law. This bulwark now seems to crumble. Many economists may applaud this development as a ripe fruit of the push for more flexibility. They preach that Europe must make its labour market regulations more flexible if it is to cope with global competition. A single sector collective agreement seldom can meet the diversity of demands for regulation, for instance among companies of different size, found within a whole sector.

However, can we really afford the sector-level bargaining to crumble? If there is a statutory floor of minimum employment conditions we are sure that there is a safety net against indecent employment conditions. However, not all EU Member States have a comprehensive safety net in place – for instance Germany and most Nordic countries do not have a statutory minimum wage. Moreover, a statutory floor of minimum rights is not much consolation for the numerous workers, who are accustomed to employment conditions substantially higher than those set by statutory minimum employment rights. Are not they all threatened if we allow the sector-level collective agreements on a massive scale to be eroded by company bargaining that may derogate *in peius* from sector-level collective agreements or even by individual bargaining?

Is there an alternative, for instance in the actual British way of wage formation in the private sector which is - after the US model – characterized by the phenomenon of benchmarking: employers feel the necessity to adhere to the "going rate" in order to obtain qualified labour. These 'benchmark' wage levels are made available through surveys carried out increasingly by specialized commercial services. The role of the British unions has shifted from collective bargaining to monitoring compliance with legal requirements regarding pay and other working conditions. However this "benchmarking"-method only brings forward decent working conditions in relatively tight labour markets. That does not seem the prospect for most EU countries in the years ahead!

Conclusion

Italy – a relative newcomer in this field of erosion of the sector-level collective bargaining – must produce its own proper balance between the invaluable worth of the sector-level collective agreement to provide a decent level of working conditions for the entire middleclass of working people (not only for the lowest-paid workers) and the need of companies to survive in hard economic times. Only if a certain amount of flexibility can be realized without giving up stability and security there is no ground to be afraid for derogatory clauses in sector-level collective agreements. The German example indicates that controlled paths to more flexibility inside collective bargaining presuppose a strong legalized and formal system (R. BISPINCK (2004). The very informal Danish example does not support that conclusion, but is characterised by a very unitary system (single channel workers' representation, no rival trade unions). The Italian system of industrial relations is characterized by informality but also often by antagonism between trade unions. Is a responsible use of derogatory agreements in Italy already secured or will the social dialogue in Italy need further formalization? It is submitted that the foremost Italian expert on social dialogue, Bruno Veneziani, is best qualified to give a convincing answer on this question.

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