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Wage formation in Europe:

Prospects of harmonizing the law and the politics of collective bargaining

– five theses and a basic assumption –

Basic assumption:

Social Europe needs a collective wage formation which is effectively coordinated on a transnational level. Particularly the central terms of employment – wages and working hours – must be exempted from lower-cost competition on the European market through transnational collective bargaining as much as possible. That is the only way to avoid a social downward spiral and to protect employees' participation in the development of European prosperity.

But such plans face numerous obstacles. There are at least two problems in the area of institutions and regulations of industrial relations:

- Comparing the *national systems* of industrial relations, a great variety of institutional arrangements hinders effective coordination. The most prominent problem is that the role of tripartism varies a lot so that national trade unions are bound by corporatist decision-making to a very different degree. Another problem is, for instance, that the legal binding effect of collective agreements is regulated completely different in each country. Consequently, according to national law, it would be much easier to circumvent cross-border agreements in some countries than in others.
- On the *European Union level*, there is no legal base for transnational collective agreements. But even if there was such a base, it would not be very helpful. The reason is that European umbrella organisations of employers and employees currently don't have any chance to gain a mandate for wage bargaining binding directly the union membership in all countries.

Solutions may occur “bottom up” through a spontaneous process of harmonization of the national systems initiated by market forces and cross-national learning (T1), or through Union-wide cooperation in collective bargaining practice (T2). Solutions may be found “top down” by developing European bargaining arrangements in the practice of the “social dialogue” (T3) or by creating an explicit legal base for collective agreements in European law (T4). It might be helpful to combine such “bottom up”- and “top down”-effects in a institutionalized process of open coordination (T5).

Thesis No. 1: Despite similar economic and societal challenges, national systems of collective wage formation in Europe show almost no tendency to converge.

The challenges of internationalization, decentralization, and individualization are imposed on the systems of collective wage formation in western Europe in similar ways. But the political protagonists of these national systems do not react with similar measures that may lead to an increasing uniformity of legal and institutional frameworks.

On the contrary, each nation is trying to develop the specific strengths of its own collective bargaining system. For instance, data from France indicate a constantly shrinking percentage

of union membership, but at the same time *state intervention* causes an increase in bargaining coverage up to over 90%. In the Netherlands, state intervention was legally diminished, but instead *tripartist institutions* control wage formation effectively by mere recommendations. In Sweden, a *very successful and centralized organisation of labour* (high level of trade union membership and union representatives acting on both levels: industry and company) allows sectoral wage agreements that are very flexible in favour of specific company regulations. Germany seems to find its specific strength in giving even more bargaining *rights to works councils* which had already outstanding legal competences before. Only Great Britain remains a special case where there is possibly no particular strength of the collective bargaining system at all.

Besides that, there are also similar tendencies across all countries. Decentralization of the bargaining level is visible everywhere. But the particular qualities of national systems still prevail.

Thesis No. 2: The existing transnational coordination of wage policies between trade unions of different countries fails constantly because of divergent interests.

Since the end of the 1990s, there are intensified efforts of European trade unions to coordinate bargaining policies including policies of wage formation across borders. But the success was very limited. European cooperation works best between peak organisations which do not have much influence on wage bargaining. On the sectoral level where wage bargaining takes place in most countries, there is only close cooperation in metal industries. It works, however, with some continuity only around Germany. Even there, there was no real wage coordination as agreed upon by trade unions in the wage formula: inflation + productivity = collectively agreed wage increase.

Maybe it is too early to call these efforts a failure. The reported problems, however, seem to be overwhelming. National trade unions are bound by numerous constraints on their bargaining options like the expectations of their members. Many are committed to social pacts or to national policies which aim at competitiveness of national economies. On the other hand, there are no sanctions to enforce the idea of European wage coordination. So the pressure produced by interests on the national level is clearly dominant.

Thesis No. 3: The “social dialogue” of Article 138, 139 ECT will not produce collective agreements on European level which have binding effects for single employment relationships. In the area of wage formation, this instrument is not appropriate at all.

Agreements of management and labour on Community level are explicitly foreseen in Article 139 ECT. But this provision is clearly not directed towards negotiations of wage agreements that are binding for single employment relationships. Instead, two implementation procedures are regulated in Article 139 ECT. Both do not have much to do with collective bargaining.

The first implementation procedure which was mostly used until now leads to a legally non-binding “joint request” of social partners to the Commission to propose a certain act of legislation. This happened several times successfully in the past. But trade unions on the European level have no power to put pressure on employers’ organisations. No potential to go on strike is available. Therefore, only in cases where the Commission announced that a certain issue will be subject to European legislation if management and labour do not make a proposal, employers’ associations were willing to agree on a “joint request” to avoid a more restrictive regulation through the European legislator. Accordingly, the legal standards of those EC directives that were result of a social partner agreement were quite low.

The second implementation procedure does not lead to real collective agreements either, but it may be used to achieve European framework agreements (like on teleworking) between

European umbrella organisations of social partners. Such agreements may oblige national associations to conclude certain collective agreements on the national level which have binding effect for single employment relationships. Although, there are no sanctions to force national associations to fulfil such an obligation. Even if they do, the binding effect will differ from country to country according to national law.

Particularly for wage agreements, the law of social dialogue is not appropriate. There will be no implementation of “joint requests” in that area by European legislation because the European Council has no competence to pass directives on wages (cf. Article 137 (5) ECT). For the same reason, the Commission cannot produce any pressure on social partners to agree on wages by announcing legislation. So initiative and power to achieve European wage agreements must come exclusively from European social partners themselves. This is far out of reach in a situation where even loose forms of wage coordination between national trade unions are almost impossible.

Therefore, the social dialogue is nothing else than an instrument of European tripartism in the making of social policy. It is not an instrument of European collective bargaining.

Thesis No. 4: The new Constitution for Europe will improve the legal base for collective bargaining on the European level.

According to Part II, the “Charter of Fundamental Rights”, of the final version of the Draft Treaty establishing a Constitution for Europe, collective bargaining will gain new legal protection. Article II-28 provides for the right of workers and employers, or their respective organisations, (in accordance with Union law and national laws and practices) to negotiate and conclude collective agreements at the appropriate levels and to take collective action, including strike action. This will be a legal base for collective agreements on European level. Although, to produce and clarify legal effects of European collective agreements in single countries, a specific legislative act of the European Union is needed.

So the first question is if the Union has the competence to pass such an act. A problem might be that according to Article II-51 of the Draft Treaty, the Part II “Charter of Fundamental Rights” does not establish any new power or task for the Union. But in the case of collective bargaining, no *new* power or task of the Union is needed. According to Article III-104 (1 f) of the Draft Treaty (= Article 137 (1 f) ECT), the Union is sufficiently vested with competence in the fields of representation and collective defence of the interests of workers and employers. Collective bargaining is part of that. The exceptions made in Art. III-104 (6) concern pay, the right of association, the right to strike or the right to impose lock-outs, but not the right to negotiate and to conclude collective agreements. So it is obvious that the Union *can make* precise regulations on collective bargaining, e.g. defining the legal effects of European collective agreements.

Secondly, the union will *have to make* such regulations as soon as there is collective bargaining on the Union level. As soon as social partners decide that collective bargaining on the European level is appropriate, it will be a violation of Article II-28 of the Draft Treaty if the Union refuses to establish the European law which is needed for the effectiveness of European collective agreements. It may be that a more restrictive interpretation of the “Charter” will become dominant. Therefore, Article 47 of the Draft Treaty should be mentioned, too. It says that the European Union recognizes and promotes the role of the social partners at Union level, taking into account the diversity of national systems. This is clearly a provision that orders additional activities. Although, it might be arguable whether or not “the role of the social partners” necessarily includes transnational collective bargaining.

Anyway, if the Draft Treaty becomes effective there will be no lack of legal grounds for Union activities creating a legal framework for European collective agreements. But still the problem will be that practical preconditions for European wage agreements will be missing.

The constellation of interests and institutional arrangements would still be too diverse between the countries.

Thesis No. 5: According to Article III-107 letter g of the European Conventions' Draft Treaty, the "open method of coordination" has to be applied to matters relating to the right of association and to collective bargaining. This procedure promises new prospects of harmonizing the systems of collective wage formation in Europe gradually.

Since the Extraordinary European Council on Employment which took place in Luxembourg 1997, the "open method of coordination" (OMC) is permanently used in the European Employment Strategy. During the European Council of Lisbon (2000), the OMC gained its name and further specifications. Now, the Draft Treaty establishing a Constitution for Europe provides for the OMC in seven fields of social policy (cf. Article III-107), among them "the right of association and collective bargaining" (cf. letter g). Explicitly, it is ordered in the second sentence of Article III-107 of the Draft Treaty that the Commission "shall act" in these fields of social policy. It does not say "may" like in other policy fields where OMC activities are mentioned in the Draft Treaty (cf. e.g. Article III-148 (2): "may take any useful initiative"). So the OMC will be compulsory for matters relating to (beside others) collective bargaining between employers and workers, as soon as this part of the draft version will become part of the final treaty. In detail, the Commission shall act "by making studies, delivering opinions and arranging consultations ..., in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation."

Consequently, the national systems of collective bargaining will soon face a new challenge. In a process of defining guidelines, indicators, or benchmarks, it has to be clarified what the benefits of collective bargaining are, and how the performance of collective bargaining systems can be judged. European standardization of the law or the politics of collective bargaining are not intended by the OMC. But all countries have to negotiate on what the aims of collective bargaining are and on how to distinguish good practises from bad practises. This would be an important first step of later efforts aiming at coordination or harmonization of bargaining systems. A long-lasting process of monitoring and evaluation may add results to the question of how useful single differences between national collective bargaining systems are.

Where the OMC is already applied much dispute occurred on the question how effective the method is. Since it is soft-law, no sanctions are available but the pressure of systematic information and public opinion are at the heart of the method. In the area of collective bargaining, the process of determining guidelines and indicators alone would be an important progress. Moreover, the problem of an effective European wage coordination will become a central part of the OMC. In the "Report of the high-level group on industrial relations and change in the European Union", indicators of benchmarking industrial relations were already proposed. There, "fair and decent terms and conditions of employment" are mentioned at least in second place. In comparison with wage coordination efforts of European trade unions, the coordinated evaluation of collective wage formation in the OMC will have much higher relevance in the political and public sphere.

So, the process offers significant chances to counteract against lower-wage competition between European countries. All "bottom up"- and "top down"-effects mentioned in the theses 1-4 may come together in a institutionalized process of open coordination. However, it also includes the relevant risk that policies to achieve fair wages will be set aside in favour of strategies to increase employment.