Extension of collective agreements in the light of EU law

WSI  Tarifpolitische Tagung 2011
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Introduction

• Art. 153 (5) TFEU:

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  “The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”

• But: **Posted Workers Directive** (96/71/EC) – according to the ECJ ‘s decisions in *Laval* etc.: might restrict MS’s room for discretion
Extended Collective Agreements in the PWD

• Art. 3 (1): MS obligation to include posted workers into the application of extended collective agreements („agreements which have been declared universally applicable“)
Extended Collective Agreements in the PWD

• Art. 3 (1): MS obligation to include posted workers into the application of extended collective agreements ("agreements which have been declared universally applicable")

• Art. 3 (8) defines:
  "agreements which must be observed by all undertakings in the geographical area and in the profession and industry concerned"
Extended Collective Agreements in the PWD (2)

- First Issue in the *Laval-*Case:
  - How to transpose the Directive where there is no system for declaring collective agreements to be of universal application?
Extended Collective Agreements in the PWD (2)

• First Issue in the *Laval* Case:
  – How to transpose the Directive where there is no system for declaring collective agreements to be of universal application?

• National Responses to *Laval*:
  – SVE (2010): extension of collective agreements to posting employers by law; exclusion of collective action
Extended Collective Agreements in the PWD (2)

• First Issue in the *Laval* Case:
  – How to transpose the Directive where there is no system for declaring collective agreements to be of universal application?

• National Responses to *Laval*:
  – SVE (2010): extension of collective agreements to posting employers by law; exclusion of collective action
  
  – DK (2008): explicit autorisation for trade unions to take collective action against posting employers for qualified collective agreements
Extended Collective Agreements in the PWD (3)

• Second Issue in the *Laval*-Case:
  – PWD provides the standard for a *maximum* level of protection
Extended Collective Agreements in the PWD (3)

- Second Issue in the *Laval*-Case:
  - PWD provides the standard for a *maximum* level of protection

- Central follow-up question:
  - Art. 3 (1) says: MS ensure that undertakings guarantee the terms and conditions of employment covering the following matters: c) „minimum rates of pay“
Extended Collective Agreements in the PWD (3)

• Second Issue in the *Laval*-Case:
  – PWD provides the standard for a *maximum* level of protection

• Central follow-up question:
  – Art. 3 (1) says: MS ensure that undertakings guarantee the terms and conditions of employment covering the following matters: c) „minimum rates of pay“

  – *Restriction of practices of extending collective agreements, if applied to posted workers?*
„Minimum Rates of Pay“?

• What is covered by „minimum rates of pay“?
  - Minimum wages above poverty level?
„Minimum Rates of Pay“?

• What is covered by „minimum rates of pay“?
  
  – Minimum wages above poverty level?
  
  – Differentiation acc. to professions, industries, sectors?
„Minimum Rates of Pay“?

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  – Differentiation acc. to (sub-national) regions?
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- What is covered by „minimum rates of pay“?
  - Minimum wages above poverty level?
  - Differentiation acc. to professions, industries, sectors?
  - Differentiation acc. to (sub-national) regions?
  - Differentiation acc. to qualification, tasks, experience?
„Minimum Rates of Pay“? (2)

• Minimum wages above poverty level?
„Minimum Rates of Pay“? (2)

• Minimum wages above poverty level?

• YES, because:
  Art. 3 (1) refer to extended collective agreements in the construction sector with even the lowest wage level usually above poverty level
„Minimum Rates of Pay“? (2)

• Minimum wages above poverty level?

• YES, because:
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  ESA decision of 15 July 2009, Case 63734
„Minimum Rates of Pay“? (3)

• Differentiation acc. to professions, industries, sectors?
„Minimum Rates of Pay“? (3)

- Differentiation acc. to professions, industries, sectors?
- YES, because:
  - Art. 3 (10) 2nd hyphen presupposes and respects it („shall not preclude the application of terms and conditions laid down in c.a. concerning activities other than construction“), at least if it results from different collective agreements
„Minimum Rates of Pay“? (3)

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  - Art. 3 (10) 2nd hyphen presupposes and respects it („shall not preclude the application of terms and conditions laid down in c.a. concerning activities other than construction“), at least if it results from different collective agreements
  - legislator may differentiate accordingly
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  – social partners may differentiate in one and the same agreement
„Minimum Rates of Pay“? (4)

• Differentiation acc. to (sub-national) regions?
„Minimum Rates of Pay“? (4)

• Differentiation acc. to (sub-national) regions?
• YES, because:
  – Art. 3 (8) (2) 1st hyphen presupposes and respects it („applicable to all similar undertakings in the geographical area“), at least if it results from different collective agreements
„Minimum Rates of Pay“? (4)

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„Minimum Rates of Pay“? (5)

• Differentiation acc. to qualification, tasks, experience?
„Minimum Rates of Pay“? (5)

• Differentiation acc. to qualification, tasks, experience?

• YES or NO?
Differentiation acc. to qualification?

- No clue from the wording of Art. 3 (1) (c)
Differentiation acc. to qualification?

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• No argument from the ending of Art. 3 (1): „the concept of minimum pay rates is defined by the national law and/or practice“ of the host state (refers to piecework or time rate; in- or exclusion of sick pay or financial participation schemes etc.)
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• But: Why should it be considered unfair, given that sectoral differentiation is considered to be fair?
Differentiation acc. to qualification etc.? (2)

- Commission Documents
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- Commission Documents
  - Comparative Study by van Hoek & Houwerzijl (2009)
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  – Comparative Study by van Hoek & Houwerzijl (2009)

• ESA decision of 15 July 2009, Case 63734
Differentiation acc. to qualification etc.? (3)

• ECJ in *Laval* (C-341/05)
  - "It should be recalled that Article 3(1) relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation to comply with rates of pay such as those which the trade unions seek in this case, which do not constitute minimum wages." (para. 70)
Differentiation acc. to qualification etc.? (3)

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  – "*It should be recalled that Article 3(1) relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation to comply with rates of pay such as those which the trade unions seek in this case, which do not constitute minimum wages.*“ (para. 70)

  – But:
    Due to Swedish particularities, the wage claims in *Laval* did indeed not refer to a pre-set level of minimum wages.
Differentiation acc. to qualification etc.? (4)

• ECJ in *Rüffert* (C-346/06):
  
  - The provision on social clauses in public procurement in *Rüffert* referred to collective agreements in construction which did differentiate according to qualification etc.
Differentiation acc. to qualification etc.? (4)

• ECJ in *Rüffert* (C-346/06):

  - The provision on social clauses in public procurement in *Rüffert* referred to collective agreements in construction which did differentiate according to qualification etc.

  - No word on this issue from the ECJ.
Differentiation acc. to qualification etc.? (5)

• ECJ in Commission vs. Luxembourg (C-316/09)?
  “The requirement in the Law [of L.] concerning the automatic adjustment of rates of pay other than the minimum wage to the cost of living does not fall within the matters referred to in the first subparagraph of Article 3(1).” (para. 47)
Differentiation acc. to qualification etc.? (5)

• ECJ in *Commission vs. Luxembourg* (C-316/09)?
  
  – “The requirement in the Law [of L.] concerning the automatic adjustment of rates of pay other than the minimum wage to the cost of living does not fall within the matters referred to in the first subparagraph of Article 3(1).” (para. 47)

  – But:
    The submission by the Commission that automatic adjustment applied also to non-minimum wages was not contested by L.; i.e. no implication for the directive’s concept of minimum wage
Differentiation acc. to qualification etc.? (6)

• YES
Differentiation acc. to qualification etc.? (6)

• YES

• Conclusion:
  PWD contains no restriction to national practices to extend collective agreements including posted workers
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