

# Wage-setting in Belgium: Collective Autonomy under the Shadow of the Law

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1. Wages and the Individual Employment Contract. 2. Rationales for Restrictions of Individual Autonomy. 3. Wages and the Collective Labour Agreement. 4. Rationales for Restrictions on Collective Autonomy. 5. Wage Moderation in Belgian Law: Quousque tandem? 6. Assessment. 7. Conclusions.

## Abstract

In this contribution, a brief outline of wage-setting in Belgium will be given. Wages will be contextualized as constituting an essential element of the employment relation. The setting of these wages is the result of a combined exercise of individual and collective autonomy. In cases of conflict, collective autonomy will prevail. The contribution addresses the limits of both individual and collective autonomy and identifies the underlying rationales. Since collective autonomy has now for decades been exercised under the shadow of the law, the question is warranted whether this structural system of wage moderation is still compatible with the principles of free collective bargaining.

**Keywords:** Wage-setting, Employment Contract, Collective Bargaining, Statutory Law, Hierarchy.

## 1. Wages and the Individual Employment Contract.

Wages are at the heart of the employment contract<sup>1</sup>. The Belgian law of 3 July 1978 on employment contracts refers to the co-existence of two separate contracts based on an outdated distinction between blue collar and white-collar workers<sup>2</sup>. Both legislative definitions adopt an identical approach to wages. They define the contract of employment primarily from the perspective of the worker who takes up an obligation to execute work under the authority of the employer. Although the definition is mute on the obligation of the employer to provide employment, the obligation to pay a remuneration is mentioned as the

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<sup>1</sup> This paper provides a brief outline of wage-setting in Belgium. For a nuanced and more in-depth analysis of wage-setting in Belgium see Clesse J., Kéfer, F., *Le contrôle des normes relatives à la modération des rémunérations au regard du droit de négociation collective*, in *Revue droit social*, 2017, 1-2, 89-112. For a comprehensive monography: Vanthournout J., Humblet P., *Loonmatiging en de loonnorm 2011-2012*, Story Publisher, Gent, 2011.

<sup>2</sup> See Articles 2 and 3 of the Loi du 3 juillet 1978 relative aux contrats de travail.

counterpart of the obligation to work. Thus, the employment contract is a *species* of the *genus* of a contract based upon mutual obligations (*contrat synallagmatic*).

The obligation to pay wages is an *essential* element of an employment contract as well as a legal consequence of its conclusion. For this reason, this obligation is also reiterated together with the obligation to provide employment as an employer's obligation<sup>3</sup>. Since it is an essential element, the contract needs to specify how the level of the wages can be determined. Article 20 of the Law on the employment contracts urges the parties to determine the periodicity and the place of payment. Despite the quintessential character of wages, the Law of 3 July 1978 does not contain a definition of wages. Other legislative instruments define wages for the purposes of these instruments and within the ambit *ratione personae* of these instruments. The objectives of these instruments are related to the issue of the protection of wages, to the issue of the safeguard of the system of social security or of public finances (tax law). These definitions cannot be extrapolated *linea recta*. Hence, the best way to define wages is to adopt a civil law perspective<sup>4</sup>. Wages constitute what is being paid as the counterpart of the obligation to work.

The “synallagmatical” logic inherent to civil law implies that no wages need to be paid if the contractually defined work has not been performed. Article 27 of the Law of 3 July 1978 contains a number of exceptions to this harsh logic which tend to ensure a right to remuneration in cases where a worker is unable to work or to continue to work, despite a (successful or unsuccessful) attempt to reach his work in a normal manner<sup>5</sup>. These provisions cannot be used to ensure a right to remuneration for a person who was willing to work, has reached the workplace, but is unable to work due to an internal strike affecting the enterprise of his employer<sup>6</sup>. These provisions also protect the worker who is unable to work because he wants to cast a vote during the political elections<sup>7</sup>.

The quintessential character of wages is also stressed in case law relating to the alteration of the wages *pendent contractu*. Thus, article 25 of the Law of 3 July 1978 prohibits clauses which would allow an employer to change unilaterally the conditions of the contract of employment. Although the *Cour de Cassation* has reduced the scope of this provision to *essential* working conditions<sup>8</sup>, it has been ruled that wages are part of this essence<sup>9</sup>. In absence of a clause, the unilateral change of working conditions by an employer can be qualified as an implicit dismissal, provided that these changes affect essential working conditions in a substantial manner, such as wages<sup>10</sup>.

The Law of 3 July 1978 has integrated provisions of pre-existing separate laws dealing with the contract of employment of blue-collar workers (1900) and another statute dealing with the contract of employment of white-collar workers (1922). The latter statute did provide an interesting provision stating that contracts of employment stipulating a remuneration which was inferior to half of the *habitual* remuneration were null and void<sup>11</sup>.

<sup>3</sup> See Article 20, 1° and 3° Loi du 3 juillet 1978 relative aux contrats de travail.

<sup>4</sup> See De Vos M., *Loon naar Belgisch arbeidsovereenkomstenrecht. rechtspositie – recht op loon*, 2001, 39-79.

<sup>5</sup> See Article 27, 1° Loi du 3 juillet 1978 relative aux contrats de travail.

<sup>6</sup> See Article 27, 2° Loi du 3 juillet 1978 relative aux contrats de travail.

<sup>7</sup> See Article 27, 3° Loi du 3 juillet 1978 relative aux contrats de travail.

<sup>8</sup> Cass. 14 October 1991, in *R.W.*, 1991-92, 809.

<sup>9</sup> *Arbrb.* Brussel, 2 May 2000, *Soc. Kron.* 2002, 51.

<sup>10</sup> Cass. 23 December 1996, in *Journal de Tribunaux du Travail*, 1997, 145.

<sup>11</sup> See Article 6 Loi sur les contrats d'employés.

This provision recognizes that a certain imbalance could generate nullity. The provision was necessary since Article 1118 of the Civil Code of 1804 provides that an imbalance (*lésion*) in any contract can only generate such a nullity, if it was specifically provided for by the law. This provision was not recapitulated in The Law of 3 July 1978, since at that time wages were universally determined by means of a collective agreement.

The absence of an obligation to pay wages as the counterpart of work will inevitably prevent a person performing work from falling within the ambit of the Law of 3 July 1978<sup>12</sup>. A typical example is an employment relation *sui generis* of a volunteer working for an altruistic organization (*un objectif désintéressé*) which does not intend to distribute benefits between its members or administrators. A specific statutory instrument of 3 July 2005 provides that voluntary workers who are not obliged to work can be reimbursed instead of being paid. The reimbursement seeks to cover their genuine costs. However, costs for an amount inferior to 24, 79 euro a day or 991, 57 euro a month do not need to be proven<sup>13</sup>.

## 2. Rationales for Restrictions of Individual Autonomy.

As a general principle, the determination of wages is the result of the exercise of individual autonomy between an isolated worker and his future employer. This individual autonomy is not unlimited. Two major rationales can be mentioned in order to restrict individual autonomy in the field of wage determination. Both rationales are intertwined with the safeguard of two fundamental rights: the right to fair and just remuneration and the freedom of collective bargaining. The unrestricted exercise of individual autonomy was unable to ensure that the remuneration of work was fair and just. Hence, individual autonomy is not a sufficient guarantee to ensure the right to a fair and just remuneration. This idea has been expressed as early as 1891 in a papal encyclical *Rerum novarum* as followed:

“Let the working man and the employer make free agreements, and in particular let them agree freely as to the wages; nevertheless, there underlies a dictate of natural justice more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage-earner. If through necessity or fear of a worse evil the workman accepts harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice.”

The Encyclical provided a unique solution to rebalance this imbalance inherent to individual autonomy, clearly rejecting the creed of the exegetic school that everything which was contractual was necessarily “just”. The Encyclical rejected State intervention through the setting of a statutory minimum wage but favored the development of collective agreements setting wages between trade unions and employers. The Pope pleaded in favour of a still inexistent statutory framework for collective bargaining in the following words:

“In these [read: wages] and similar questions, however - such as, for example, the hours of labor in different trades, the sanitary precautions to be observed in factories and workshops, etc. - in order to supersede undue interference on the part of the State, especially as circumstances, times, and localities differ so widely, it is advisable that recourse be had to

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<sup>12</sup> See M. De Vos, (4) 80-81.

<sup>13</sup> Article 10 Loi relative aux droits des volontaires.

societies or boards such as We shall mention presently, or to some other mode of safeguarding the interests of the wage-earners; the State being appealed to, should circumstances require, for its sanction and protection”.

Ever since 1968, the Belgian Law on collective agreements establishes a clear-cut hierarchy between the expression of collective autonomy through collective agreement above the expression of individual autonomy through the conclusion of an individual employment contract<sup>14</sup>. This hierarchy is sanctioned by establishing that provisions of an individual employment contract which are contrary to an applicable collective agreement binding for an employer are null and void<sup>15</sup>. Furthermore, collective agreements setting minimum wages at intersectoral and sectoral level will function as default rules for those employers who are not bound by them due to the fact that they are not affiliated in any direct or indirect way to the sectoral or intersectoral employers’ organisations<sup>16</sup>.

In Belgium minimum wages at intersectoral level are set by an interprofessional collective agreement. Thus, CCT n. 43 sets minimum wages at 1.562,59; 1.604,06; 1622,48 Euro in function of a troublesome distinction based upon age.

The supremacy of collective autonomy above individual autonomy is also in line with a proper understanding of the freedom of collective bargaining as interpreted by the Freedom of Association Committee<sup>17</sup>.

Another rationale which justifies restrictions of individual (as well as in a number of cases of collective autonomy) is the wish of the Belgian legislator to combat discrimination based upon a wide range of criteria, broader than those protected on the basis of EU law. Due to the fact that this rationale covers both dimensions of autonomy, it will be treated in a transversal way underneath.

### 3. Wages and the Collective Labour Agreement.

In Belgian law there is no expression similar to the powerful notion of *Tarifverträge*. However, the wage setting through collective agreements enjoys a much more vast coverage than under German Law. Thus, in Belgium collective agreements enjoy a broad coverage due to a double mechanism. The first mechanism, the so-called *extension automatique*, dissociates the binding of a collective agreement at enterprise, sectoral or intersectoral level from the membership of any trade union<sup>18</sup>. Any worker can invoke the normative provisions dealing *inter alia* with wages against his employer, once the employer is bound by a collective agreement due to the fact that he is a signatory party or a member of a signatory organisation. A second mechanism, which is able to extend the binding of sectoral and intersectoral agreements, is the extension by means of an *ad hoc* royal decree<sup>19</sup>. This mechanism is solely dependent upon the request of a single signatory party and the discretionary exercise of the governmental power. In case of a demand to extend a sectoral collective agreement, no veto

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<sup>14</sup> Article 51 Loi sur les conventions collectives et les commissions paritaires.

<sup>15</sup> Article 11 Loi sur les conventions collectives et les commissions paritaires.

<sup>16</sup> Article 26 Loi sur les conventions collectives et les commissions paritaires.

<sup>17</sup> International Labour Office, *Freedom of association*, 2018, nr. 1511.

<sup>18</sup> Article 19, 4<sup>o</sup> Loi sur les conventions collectives et les commissions paritaires.

<sup>19</sup> Article 28 Loi sur les conventions collectives et les commissions paritaires.

can be exercised by the intersectoral confederations. As a result of such operations, the individual and collective normative provisions of the collective agreements will cease to be mere default rules for non-affiliated employers. They will be as mandatory for them as for the affiliated employers.

#### 4. Rationales for Restrictions on Collective Autonomy.

The question has arisen whether a State can intervene in order to restrict the precepts of collective autonomy in the field of wage-setting. Such an intervention can hardly be warranted on the basis of the rationales which are mobilized to justify restrictions of individual autonomy. The rationales which tend to be invoked are different. As indicated by the Title of a Belgian statutory act, the official objective of wage moderation is linked to a wish of the Belgian legislator to safeguard the competitiveness of the Belgian economy. The prime mobile is not an issue of public budgetary policy, but an issue of the impact of the lack of competitiveness on the employment situation in Belgium. Thus, the level of wages, the competitiveness as well as employment are considered to be interwoven. This mantra is so deeply rooted that it is being applied to any salary, to any worker, to any branch of the private sector. In sum, the statutory intervention is not driven by a labour law paradigm based upon fundamental rights but based upon employment policy.

Another rationale to restrict collective autonomy as well as individual autonomy is much more driven by an objective to uphold human rights. Belgian anti-discrimination provisions tend to combat discrimination based upon sex, race, ethnic origin, age, sexual orientation, civil status (*état civil*), birth, fortune, religious, philosophical, trade union convictions, language, current or future state of health, handicap, a physic characteristic or social origin<sup>20</sup>.

Other legislative provisions tend to combat discrimination between part time workers and full-time workers as well as discrimination between workers with a fixed term and indefinite term contract<sup>21</sup>.

As a general principle, these provisions do not allow to combat unequal treatment between workers employed by different employers. In this respect, the provisions dealing with unequal treatment between temporary agency workers and workers of the user undertaking constitute progress<sup>22</sup>. They allow a comparison between workers employed by different employees.

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<sup>20</sup> La Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes; La Loi du 22 avril 2012 visant à lutter contre l'écart salarial entre hommes et femmes, La Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination and La Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie.

<sup>21</sup> Loi du 5 mars 2002 relative au principe de non-discrimination en faveur des travailleurs à temps partiel and Loi du 5 juin 2002 sur le principe de non-discrimination en faveur des travailleurs avec un contrat de travail à durée déterminée.

<sup>22</sup> Article 10 La Loi du 24 Juillet 1987 sur le travail temporaire (Article 10).

## 5. Wage Moderation in Belgian Law: Quousque Tandem?

Measures of wage moderation undoubtedly constitute the most important restriction of collective autonomy under Belgian law. The introduction of a policy of wage moderation is at odds with a more Fordistic paradigm of industrial relations which has prevailed during the so called “Trente Glorieuses” (1944-1975). Fordism was based upon a trade-off between unfettered collective autonomy on the one hand and an attempt to raise productivity and enhance social peace on the other hand. The idea was to guarantee that workers had a fair share of the benefits stemming from the rise of the productivity<sup>23</sup>. As indicated *supra* wage moderation is based upon another philosophy. The presumption was that wage increase would hamper competitiveness of the Belgian economy. It was also argued that wage moderation as such would create jobs or prevent job losses. The argument of productivity was reversed. Instead of arguing that a rise in productivity should be reflected in a rise of wages, it was argued that wage increases could only be warranted if there was a prospect of a rise in productivity. Ever since 1976, the period of unfettered collective autonomy and free wage bargaining has been abandoned. During the economic crisis (1976-1989), the Belgian government used heteronomous measures of *ad hoc* wage moderation based upon so-called *arrêtés-lois*. These instruments were based upon the transfer of legislative powers to the governments for a short duration<sup>24</sup>. In 1989 a general statutory framework for governmental intervention was adopted for an indefinite period. The *Loi de sauvegarde de la compétitivité du pays* of 6 January 1989 provided for a role of the *Conseil central de l’Economie* to assess *post factum* on an annual basis the decrease of the competitiveness of the Belgian economy in relation to the 7 most important commercial partners. In case of degradation, the social partners or the legislator could intervene to moderate wages. In case of *exceptional circumstances* and a brutal degradation, the Government could intervene as well outside this “Belgian semester”. In 1996, the previous statute was partially repealed and replaced by the *Loi relative à la promotion de l’emploi et à la sauvegarde préventive de la compétitivité*<sup>25</sup>. The title of the law suggests a firm believe that wage moderation, increase of competitiveness and employment creation are intertwined. The perimeter of competitiveness was reduced to three neighbouring countries (France, Germany, Netherlands). The *post factum* assessment was replaced by a preventive assessment –of the expected evolution of the wages for the next two years. The social partners were invited to conclude an agreement on Wage moderation and Job Creation taking into account these expected developments and preventing an increase of wages which would exceed the wage increases in these neighbouring countries. Indexation of salaries would remain unaffected. If no agreement could be reached, the Government would intervene and freeze wage increases, with the exception of the nominal increases based upon mere indexation.

<sup>23</sup> See *inter alia*: Cassiers I., Denayer L., *Concertation sociale et transformations socio-économiques depuis 1944*, in Etienne Arcq E., Capron E., Leonard E., Reman P. (eds.), *Dynamiques de la concertation sociale*, CRISP, Bruxelles, 2010, pp. 75-92; Meynen A., *Omtrent de fordistische ideologie. Proeve van een lectuur van het Ontwerp van overeenkomst tot sociale solidariteit*, in Luyten D., Vanthemsche G. (eds.), *Het Sociaal Pact van 1944*, VUBPress, Brussel, 1995, 55-88.

<sup>24</sup> See especially: Rigaux M., *Arbeidsrecht doorheen de bijzondere machtenbesluiten*, in Verboven X. (ed.), *Actuele Problemen van het arbeidsrecht*, 1984, 450-499.

<sup>25</sup> Loi du 26 juillet 1996 relative à la promotion de l’emploi et à la sauvegarde préventive de la compétitivité.

In sum the bargaining is taking place under a depressing shadow of the law. Furthermore, any dispute among social partners about the expected increase of wages in neighboring countries can hardly be qualified as a conflict of interests. It should rather be qualified as a scientific dispute, or a conflict in the field of futurology.

Despite nearly three decades of direct State intervention or of wage bargaining under the depressing shadow of the law in an effort of safeguarding what was called competitiveness, the Council of the European Union did not fail to express some criticism on the system of wage setting in Belgium from the very start of the so-called European semester<sup>26</sup>. In 2011 and 2012 the Council urged the Belgian government “to take steps to reform, in consultation with the social partners and in accordance with national practice, the system of wage bargaining and wage indexation, to ensure that wage growth better reflects developments in labour productivity and competitiveness”<sup>27</sup>.

Thus, the Council made it abundantly clear that it was above all obsessed with the idea of competitiveness even to the detriment of the purchasing power of the working class. The 2012 recommendation also urged the government to ensure “the implementation of ex post correction mechanisms foreseen in the ‘wage norm’”, as if the preventive nature was not enough. Furthermore, it suggested to facilitate “the use of opt-out clauses from sectoral collective agreements to better align wage growth and labour productivity developments at local level”. Such a recommendation is remarkable insofar as no statutory provision actually prevents sectoral social partners to insert opt-out clauses in sectoral collective agreements. These clauses would not as such formally violate the statutory hierarchy between sectoral collective agreements and collective agreements at enterprise level. In 2013 the Council recommended that the wage setting system, including wage indexation had to be reformed “in particular by taking structural measures, in consultation with the social partners and in accordance with national practice, to ensure that wage setting is responsive to productivity developments, reflects sub-regional and local differences in productivity and labour-market conditions, and provides automatic corrections when wage evolution undermines cost-competitiveness”. This recommendation was reiterated in 2014<sup>28</sup>. Such a recommendation is in my view at odds with a clear-cut constitutional option to construe labour law as an issue of federal labour law, rather than as an issue of the federate entities. Although the European Union might have played a major role in organizing social dumping at EU level, there is no reason to impose an obligation upon Member States to organize social dumping within the boundaries of their national labour market.

From 2015 onwards, recommendations tend to be less critical or fleshed out. In 2016 the Council in fact saluted the intended review of the Law of 1996 on the promotion of

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<sup>26</sup> For a comprehensive in-depth study, see Pecinovsky P., *EU Economic Governance en het recht op collectief onderhandelen*, die Keure, Brugge, 2019.

<sup>27</sup> Recommendation for a Council Recommendation on the National Reform Programme 2011 of Belgium and delivering a Council opinion on the updated Stability Programme of Belgium 2011-2014, SEC/2011/0802 final ; Recommendation for a Council Recommendation on Belgium’s 2012 national reform programme and delivering a Council opinion on Belgium’s stability programme for 2012-2015; COM/2012/0314 final; Recommendation for a Council Recommendation on Belgium’s 2013 national reform programme and delivering a Council opinion on Belgium’s stability programme for 2012-2016; COM/2013/0351 final.

<sup>28</sup> Recommendation for a Council Recommendation on Belgium’s 2014 national reform programme and delivering a Council opinion on Belgium’s 2014 stability programme, /\* COM/2014/0402 final.

employment and the safeguarding of competitiveness. The 2017, 2018 and 2019 recommendation do not contain recommendations regarding wages. The silence of the Council can be interpreted in two ways. It could be regarded as an expression of its wish to be more reserved on the issue of wage-setting or rather as an expression of its satisfaction with the reforms introduced by the government of Prime Minister Louis Michel. The Michel administration has implemented a number of measures which were part of its initial *Accord du gouvernement*. Thus, a formally temporary reform of the indexation mechanism took place. A statutory instrument of 23 April 2015 provided that wages could not be indexed starting from 1 April 2015 until a non indexed inflation of 2 percent had been reached<sup>29</sup>. A judicial attack at the Constitutional Court on this statutory law based upon a set of important constitutional principles such as the right to “fair and just remuneration”, “collective bargaining”, “equality” property did not turn out to be successful. In 2017 the Law of 1996 was amended<sup>30</sup> in order to allow Belgium to introduce *ex post* corrections if calculations proved to be wrong and in order to overcome the historic gap in wage competitiveness predating the situation prior to 1996. Furthermore, the reform indicated that in case of an agreement between social partners, such an agreement had to be enshrined in a formal intersectoral agreement concluded within the *Conseil national du travail*. This modification corroborates the legal nature of the so-called “*accord interprofessionnel*”<sup>31</sup>.

## 6. Assessment.

The systematic legislative and governmental intervention over a period of at least 30 years is problematic in the light of the principle of the freedom of collective bargaining. Both the ILO Freedom of Association Committee as well as the European Committee on Social Rights have given guidance on the boundaries of measures of wage moderation entering into conflict with the freedom of collective bargaining.

In the Belgian scenario these restrictions can be characterised as putting a cap on negotiating wage increases which go beyond the level of the increase in the cost of living. These measures are structural, embedded in successive statutory instruments all of them concluded for an indefinite term. If given a closer look, the only dimension which at first side seems fairly unfettered is the *status quo* of an indexation. However, if given a closer look, this status quo is not as stable as it might seem and definitely not that respectful of the principle of collective autonomy. Thus, social partners are confronted with governmental intervention in fixing the base reference for indexation, which has ceased to be a grid autonomously defined<sup>32</sup>. Some of the governmental interventions can only be qualified as an intervention setting aside existing collective agreement. Such an assessment is in fact inevitable since some collective agreements tend to be concluded for an indefinite period.

<sup>29</sup> La Loi du 23 avril 2015 concernant la promotion de l'emploi (M.B. 27 avril 2015).

<sup>30</sup> La Loi du 19 mars 2017, MB 29 mars 2017.

<sup>31</sup> On the issue of the legal nature of the Accord interprofessionnel prior to the legislative modification, Ficher I., *L'accord interprofessionnel a-t-il une place parmi les sources de droit du travail?*, in Cartuyvels, Y., Dumont, H., Gerard, P., Hachez, I., Ost, F., Van De Kerchove, M. (eds.), *Les sources du droit revisitées. Vol.2: Normes internes infraconstitutionnelles*, Presses de l'Université Saint-Louis, Brussels, 2019, 407- 442.

<sup>32</sup> See Arrêté royal du 24 décembre 1993 portant exécution de la loi du 6 janvier 1989 de sauvegarde de la compétitivité du pays.



The Laws of 1989 neither the law of 1996 contain any compensatory measures able to appease the situation of vulnerable workers confronted with wage moderation.

These particular characteristics of wage moderation under Belgian Labour law taken as a whole over a period which can be said to have started from 1976 can hardly be said to be compatible with the "jurisprudence" developed by the two monitoring bodies, *id est* the FAC and the ECSR. In this respect, it is astonishing to observe that neither the CEACR neither the ECSR has ever censured the Belgian reports in the light of the principle of collective bargaining they have built.

In this respect, it is worthwhile to quote the following maxima of the Compilation on the Freedom of Association (FAC)<sup>33</sup>:

"The impossibility of negotiating wage increases on an ongoing basis is contrary to the principle of free voluntary collective bargaining enshrined in Convention No. 98 (no. 1462).

Legislative provisions prohibiting the negotiation of wage increases beyond the level of the increase in the cost of living are contrary to the principle of voluntary collective bargaining embodied in Convention No. 98; such a limitation would be admissible only if it remained within the context of an economic stabilization policy, and even then only as an exceptional measure and only to the extent necessary, without exceeding a reasonable period of time (no. 1463).

In a case where government measures had fixed the base reference for the indexation of wages, whereas the parties had fixed another indexation system, the Committee recalled that the intervention of a government in areas which traditionally have always been negotiated freely by the parties could call into question the principle of free collective bargaining recognized by Article 4 of Convention No. 98, if it is not accompanied by certain guarantees and in particular if its period of application is not limited in time (no. 1463)".

The systematic legislative and governmental intervention over a period of at least 30 years might be problematic in the light of Article 6 § 2 ESC as well<sup>34</sup>. The ESC is critical about interventions which are at odds with existing agreements<sup>35</sup>, although it is more lenient on wage freezes which are subsequent to a failure to reach an agreement about wage moderation among social partners<sup>36</sup>. Although, it could be argued that under Belgian law the State intervention always had a subsidiary character and that quite often the moderation was based upon agreements, genuine Free collective bargaining in Belgium has ceased to exist. Ever since 1989 it takes place under the statutory anchored shadow of the past or future evolution of wages in a number of identified Member States and it precludes an autonomous definition of indexation mechanism.

The intervention of the Belgian State has ceased to have an exceptional character, neither does it operate within a reasonable period of time. The Belgian State has also intervened in a structural manner (exclusion of *inter alia*: alcohol, tobacco, fuel) and an *ad hoc* manner to supervise the system of indexation. There are no obvious compensating measures.

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<sup>33</sup> See International Labour Office, *Freedom of association. Compilation of decisions of the Committee on Freedom of Association*, 2018, 346.

<sup>34</sup> For an overview on Article 6: Dorssemont F., *The right to bargain collectively*, in Bruun N., Loercher K., Schömann I. and Clauwaert S. (eds.), *The European Social Charter ad the employment relation*, Hart Publishing, Oxford, 2017, 249-288.

<sup>35</sup> ECSR, Conclusions, XX-3, Spain.

<sup>36</sup> ECSR, Conclusions, XX-3, Belgium.

Despite this clear-cut case of violations over a long period, judicial or quasi-judicial remedies have not proven to be successful. Thus, the ECSR in its analysis of the conformity with regard to reference period 2009-2013 took into account the particularities of this system of bargaining under the shadow of the law but refused to issue a negative conclusion.

The ILO Freedom of Association Committee has only been requested to assess the governmental intervention once, right at the start of the process. The Freedom of Association Committee in Case nr 1182 (1983), issued a warning, without formally stating that the principles of freedom of association had indeed been violated. It stated:

“The Committee notes that the measures which gave rise to the complaint were adopted on the basis of a law of 1982 which attributes certain special powers to the King within the framework of a policy of economic and financial recovery, the reduction of public expenditure and the creation of jobs.

With regard to the measures taken under Royal Order No. 180, the Committee notes the assurances given by the Government that the prohibition of increases in remuneration above indexation will be lifted as of 31 December 1984. The Committee recalls that the intervention of a government in areas which traditionally have always been negotiated freely by the parties could call into question the principle of free collective bargaining recognised by article 4 of Convention No. 98 if it is not accompanied by certain guarantees and, in particular, if its period of application is not limited in time

The Committee expresses the hope that all these measures thus adopted will be applied on an exceptional basis and that they, will be lifted within a short period of time”<sup>37</sup> -

Neither did the CACR ever reacted, despite a formal critical observation of the CGSLB in 2011.

As mentioned, the *ad hoc* statutory intervention suspending the indexation mechanism (until workers had lost 2 percent of their purchasing power) has been challenged unsuccessfully at the Constitutional Court<sup>38</sup>. It ruled that the objective to safeguard “*compétitivité*” and to decrease state expenses is legitimate and proportionate. The Court stated that the restriction was limited in time and only related to wages. This observation clearly fails to see that wage setting is at the heart of collective autonomy and that a “*saut d’index*” will never be recuperated.

The governmental intervention of 2013 to prohibit any genuine wage increase (“*marge maximale pour l’évolution du coût salarial*” is 0 percent) has unsuccessfully been attacked at the Conseil d’Etat<sup>39</sup>.

## 7. Conclusions.

This state of play clearly indicates that international standards on freedom of collective bargaining have not been sufficiently understood at national level and that supervisory bodies at European and international level have failed to live up to the standards they have been

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<sup>37</sup> For further information please visit the International Labour Organization at the following link: [https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002\\_COMPLAINT\\_TEXT\\_ID:2900951](https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2900951)

<sup>38</sup> Cour constitutionnelle, 13 October 2016, 130/2016.

<sup>39</sup> Conseil d’état, 27 September 2013, nr 224.863.

setting themselves in monitoring the Belgian case. If collective autonomy is not able to ensure a fair share due to legislative frameworks at odds with international and European human rights standards and if these violations cannot be successfully challenged in judicial and quasi-judicial procedures, there is a risk that conditions are created for recourse to less peaceful collective actions. Where did I recently hear, that the best way to prevent violence, is the promotion of social justice?

### Bibliography

- Cassiers I., Denayer L., *Concertation sociale et transformations socio-économiques depuis 1944*, in Etienne Arcq E., Capron E., Leonard E., Reman P. (eds.), *Dynamiques de la concertation sociale*, CRISP, Bruxelles, 2010, pp. 75-92.
- Clesse J., Kéfer. F., *Le contrôle des normes relatives à la modération des rémunérations au regard du droit de négociation collective*, in *Revue droit social*, 2017, 1-2, 89-112.
- De Vos M., *Loon naar Belgisch arbeidsovereenkomstenrecht: rechtspositie – recht op loon*, 2001, 39-79.
- Dorssemont F., The right to bargain collectively, in Bruun N., Loercher K., Schömann I. and Clauwaert S. (eds.), *The European Social Charter and the employment relation*, Hart Publishing, Oxford, 2017, 249-288.
- Ficher I., *L'accord interprofessionnel a-t-il une place parmi les sources de droit du travail?*, in Cartuyvels, Y., Dumont, H., Gerard, P., Hachez, I., Ost, F., Van De Kerchove, M. (eds.), *Les sources du droit revisitées. Vol.2: Normes internes infraconstitutionnelles*, Presses de l'Université Saint-Louis, Brussels, 2019, 407- 442.
- International Labour Office, *Freedom of association. Compilation of decisions of the Committee on Freedom of Association*, 2018, 346.
- Meynen A., *Omtrent de fordistische ideologie. Proeve van een lectuur van het Ontwerp van overeenkomst tot sociale solidariteit*, in Luyten D., Vanthemsche G. (eds.), *Het Sociaal Pact van 1944*, VUBPress, Brussel, 1995, 55-88.
- Pecinovsky P., *EU Economic Governance en het recht op collectief onderhandelen*, die Keure, Brugge, 2019.
- Rigaux M., *Arbeidsrecht doorheen de bijzondere machtenbesluiten*, in Verboven X. (ed.), *Actuele Problemen van het arbeidsrecht*, 1984, 450-499.
- Vanhournout J., Humblet P., *Loonmatiging en de loonnorm 2011-2012*, Story Publisher, Gent, 2011.

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