



EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

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CONGRESS OF EALCJ

Oslo Military Academy 29th and 30th June 2007

“Collective Agreements – a hindrance or a support for social protection?”

FINAL REPORT

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REPORT

1. Introduction

The Eleventh Congress of the EALCJ took place on Friday 29th and Saturday 30th June 2007, hosted by the Norwegian Labour Court in the city of Oslo in the historic surroundings of the Oslo Military Academy.

The object of the Congress was to take a fresh look at the role of collective agreements and the social partners in a modern Europe. The Programme is attached as Appendix I.

The Congress was attended by delegates from 16 countries of the European Union and the EEA. All of the delegates are practising judges at the national level. All of these countries have free, independent trade unions, but their experience of the role of collective agreements in providing protection to employees is very different.

This Report is primarily based on the National Reports presented by delegates (Appendix II) and the contributions made by delegates at the Congress. It is not, therefore, a research-based document, though it has been circulated to the national delegates for their approval. Thus, while its advantage may be that the delegates have specific knowledge of the practice, as well as the law, of individual countries, its limitation is that it is not founded on a wide basis of comparative law research.

2. The Nature and Enforceability of Collective Agreements.

(1) As a contract

The role of Collective Agreements is inextricably connected with the rise of independent trade unions, which began, from a British perspective, with the Tolpuddle Martyrs in 1834. From the workers' point of view, the primary purpose of trade unions was to use solidarity and the threat of strikes to force employers to reach agreements with the workforce as a whole, rather than to agree terms of employment individually. However, from the employers' perspective collective agreements offer certainty and consistency. For the duration of the agreement industrial peace is more or less guaranteed. Such agreements may also benefit employers by eliminating upward competition on wages between employers where the agreement is for a whole sector or industry. As such they are always likely to come into conflict with EU free market concepts such as freedom of establishment and freedom to provide services.

Collective agreements represent an approximate balance of power between the collective solidarity of the work-force and the economic power of the employer. It was the realisation that, if the work-force show solidarity they can stand up to unreasonable demands by their employers which led to the emergence of unions and the vigorous attempts by employers to destroy them. The tension continues between the idea of struggle and the aim of partnership.

The power of the unions and the extent to which they are entrenched within the governance of the state varies greatly between the countries of the European Union. The concept of the social partners (with the State representing the central player in a tri-partite relationship) also varies greatly in importance. This is an important divergence from many of the concepts we have considered, such as unjustified dismissal and anti-discrimination laws, where the aims of all EU countries are broadly similar. It is much more difficult to identify a common aim and a common thread through all the different countries with their different traditions of labour relations.

Collective agreements exist at many levels – individual site, whole enterprise, region, industry, sector. The parties may consist on the one hand of an individual union, a group of unions or a national Association of Unions. On the other hand, the employer may be an individual company or an employers' association.

Collective agreements have never sat easily with traditional contract law. On the face of it a collective agreement is simply a contract entered into between a Trade Union and an employer, though the parties may be extended to groupings of unions and employers. As a contract it is binding between the contracting parties (except in the UK where, for reasons which are now largely historical, collective agreements have no binding force). However, a contractual analysis does not sufficient as a theoretical basis for collective agreements, since their impact goes beyond the contracting parties themselves to affect people who are not directly parties.

(2) Normative effect

Where a collective agreement is intended to govern the wages and working conditions of a number of workers, whose interests may differ or conflict, the purely contractual construct creates difficulties. Instead of a contract between two parties, it becomes, in effect a local law, applicable to everyone affected. This concept is known as the “normative effect”.

(3) The Nordic Model

Prof Stein Evju addressed the Congress on the Nordic Model of Labour Courts and Collective Agreements. Although the five Nordic countries of Norway, Sweden, Denmark, Finland and Iceland have a common tradition, he

made it clear that, in many ways, they have tended to move apart from each other in recent years.

The Nordic model is based, not on legislation, but on collective agreements. However, these collective agreements differ from normal contracts in that they are enforceable in Labour Courts which are separate from the normal courts. This is fundamentally different from civil law countries, such as France, Spain and Italy, where the civil courts have Social Chambers which deal with labour law as part of the normal law (the Conseils des Prud'hommes are intended for individual labour disputes). They also differ from Germany where the labour courts are a separate division of the civil courts. Former communist countries such as Hungary, Czech Republic and Slovenia have labour courts which, while separate from the normal courts, deal principally with individual employment disputes between employer and employee. The same applies to the United Kingdom while Ireland illustrates the distinction by having both a labour court to deal with collective disputes and an employment appeals tribunal to deal with individual employment issues.

The key to the Nordic labour courts is that the disputes to be resolved are between unions and employers. They may involve matters which relate only to an individual employee, but it is the union brings the claim. As such they emanate from the arbitration systems of the 1890's. While these arbitration systems have become institutionalised in the Nordic countries, they still exist as private arbitrations in less developed systems such as the United States of America. In China the tension between the National Arbitration Committees and the civil courts is leading to much dispute and new laws.

The Nordic Labour Courts have proved an essential part of the development of peaceful collective bargaining which has proved to be at the centre of the "Nordic model". The existence of the Labour Courts as a separate institution, largely separate from the civil courts, has helped them to gain and retain the confidence of both side of industry. This is one of the keys to the comparatively peaceful relationship between unions and management which has existed in the Nordic countries for over 100 years. It also places a heavy burden on the Labour Court to retain the confidence of both sides of industry.

However, since the formation of the Nordic Labour Courts, it has become apparent that there are many employment disputes which do not fit easily into this structure. What of a simple case where an individual employee is dismissed? He or she may think it unfair. The Union may disagree. We have seen¹ that nearly all countries allow individuals to bring such claims. Only Denmark has no such law for industrial employees, because, in that country, it is perceived that most employees can obtain justice through the intervention of the union. In Finland, there is an individual right, but, initially, it can only be enforced in the labour court in a case instigated by the union. There is, however, a subsidiary right of action whereby the individual can pursue the case in person if the union refuses to act on his behalf.

¹ "Termination of Employment at the Initiative of the Employer: the Challenge for Corporate Social Responsibility" EALCJ Report 2004.

“At an institutional level the Courts are an intrinsic and indispensable part of the industrial relations system. The Nordic systems though the 1970’s – 90’s have shown a remarkable resilience, even if there have been internal changes. Collective agreements play a key role. The basic view is premised on the social exchange relationship.

The premise at the heart of the system is a fundamental consensus. To arrive at that was a long and organic process. It has grown over the years, amid conflicts and set-backs, in the realisation that, if we go together and join forces, we could all have a bit more to eat.

As to whether this could be incorporated into a European Union system, my answer would be to try to look at the institutional side of things and ask how can we achieve the institutional mechanisms? In Norway there is a sense of equality and cultural values that you cannot create just like that”²

“The Norwegian system is not so much a question of legislation as culture and history. It is to do with the degree of mutual confidence between the parties. The Labour Court in Norway has 30 to 40 new cases before it. There are thousands of smaller disputes, but the collective agreements have a reputation as a means of resolving such disputes at different levels enabling 90% of disputes to be resolved before they ever reach the Labour Court.”³

3. Collective Agreements and the Individual

The system of collective agreements cannot survive if it is treated as a mass of individual contracts between the individual employer and the individual employee. The theoretical concept in the United Kingdom is that a collective agreement is only enforceable by an individual employee against an individual employer if it is impliedly incorporated into the individual contract of employment. But some employers are not members of the Employers’ Association and refuse to be bound by it. Some employees are not union members and do not accept what has been agreed. There is an absolute need for the collective agreement to be respected and to give rise to individual rights.

This is the reason for the concepts of normative effect and *erga omnes* (“in relation to everyone”). Within the particular sector or enterprise, the rules set out in the collective agreement act as a kind of local law applying to all, just as the rules of football apply to all footballers; it is not open to one footballer to challenge a particular rule on the ground that he never agreed to it.

² per Prof Stein Evju

³ Tor Mehl, President of Norwegian Labour Court.

The National Reports and the discussions at the Congress demonstrate a lack of unanimity in the countries of the European Union and the EEA about the extent of normative effect.

- only organised workers can benefit - Norway, Sweden and Netherlands
- all workers and employers in the sector are bound Belgium.
- the collective agreement is treated as a minimum even where the employer is not party to it - Italy.
- agreements are only binding on the parties unless there is a declaration of general application – Germany
- collective agreements can be enforced if they are, by implication incorporated into the contract – United Kingdom.

Quite apart from the position of employees who are not members of a union, there are many people who are not employees at all. There are people working for Temporary Work Agencies. There are self-employed people and sub-contractors who may be dependent for their livelihood on a small number of clients or even a single client. There are employees of sub-contractors, who are economically dependent on the main enterprise, but have no direct contractual relationship with the enterprise itself.

Throughout Europe monolithic enterprises are being replaced by enterprises with a small core work-force, who contract out subsidiary functions or even central production, which may well be carried out in a different country. Outside the core work-force there are a myriad of small enterprises. The concept of the collective agreement is even harder to enforce for the benefit of people working in this way.

This problem has considerable importance for the viability of the current European Commission strategy of seeking to develop labour law at a European level by the use of Framework Agreements. The object of European Law is to provide a fair basis for competition between EU countries and to provide a minimum level of protection for individual employees i.e. the principle is partly commercial and partly social. If this is to be achieved by Framework Agreements, the resulting collective agreements have to have universal effect. If any individual employer (or even any individual employee) can opt out, then it will fail to protect the very individual who is most likely to suffer.

This issue will be specifically addressed in relation to the Framework Directive on Participation (2002/14), but it is of even greater importance in relation to the autonomous Framework Agreement on Harassment of 26th April 2007 (which will be the subject of our next Congress) and the draft Directive on Agency Workers.

4. Social dialogue and the social partners.

The twin concepts of social dialogue and of the social partners are a development of collective bargaining. Collective bargaining was born of

deprivation and has developed through conflict. It is often a raw cage fight where both fighters may end up injured.

Social dialogue, by contrast assumes the level of mutual respect that is at the centre of the Nordic model. Employers and employees have a mutual interest in a successful business with well-motivated workers. Any dispute should be like a squabble within the family, but experience shows that even family squabbles can have disastrous consequences if they get out of hand they.

The concept of the Social Partners is a development of Social Dialogue. Its essential feature is the entry of the State into the equation. The interest of employers and employees in successful negotiations and industrial peace is also the interest of the State. When things go wrong the government is tempted to intervene to prevent serious damage to the public weal.

Social Partnership, however, is far less ubiquitous than collective agreements. The question that we considered was whether the concept of Social Partnership means anything in the modern world. Generally the State is stepping back from intervention in industrial disputes. Meanwhile the European Commission is intent on using Framework Agreements, made between Europe-wide associations of employers and unions (without the Member States being parties to the Agreements) as a means to attaining social ends.

There was a strong feeling in the Congress that this approach is really a sign of weakness and that the Commission is substituting real action to reduce injustices with a pretence at action which is really no more than words. We cannot rely on social dialogue to solve all employment related problems. There is, of course, a balance to be struck between the role of national states and of the EU in dealing with injustices, but if the Commission sees such action as within its sphere of competence, then it should act decisively to deal with injustices. European Social Dialogue institutions are simply not strong enough or well enough funded to deliver action of social injustices.

5. The Impact of International Mobility of Labour on Collective Agreements

The Freedom of Movement for Workers has been a central tenet of the European Union from the start. It is now enshrined in Article 39 of the European Treaty. There is an understandable fear among employees in the wealthier countries of the EU that workers from the poorer countries will come in as migrant workers, taking advantage of the right of Freedom of Movement, and take work at lower pay levels and on less favourable terms and conditions than apply to native workers, thereby forcing native workers either into unemployment or obliging them to accept a lower standard of living.

Equally Freedom of Establishment (Article 43) and Freedom to Provide Services (Article 49) can have a similar impact on existing national businesses whether or not the external operator employs native or immigrant labour.

These concepts, therefore, are likely to come into conflict with the freedom of workers to take collective action to protect their employment. This conflict has been reflected in two cases before the European Court of Justice, both involving Nordic countries.

Our Congress took place while these two important cases, *C-438/05 Viking* and *C- 341/05 Laval* were before the European Court of Justice. At the time the Advocate-General's Opinion had been issued, but the Court had not given its judgment.

The Judgments of the ECJ in the two cases were given on 11th and 18th December 2007 (after the Congress). Both cases reversed the opinion of the Advocates-General. The discussion at the Congress, however, clearly set out the issues, which have since been resolved, and the problems which will not go away simply because the ECJ has ruled.

In *Viking*, the Finnish unions took industrial action to prevent the owners of a ferry travelling between Finland and Estonia from re-flagging it to Estonia and staffing it with cheaper, Estonian crews. Such industrial action harked back to the early days of the trade union movement, when employers in England imported Irish labour to defeat industrial action by English employees. Therefore, it demonstrated starkly the conflict between two fundamental principles, the right of establishment, i.e. the right to conduct your business where you like in the European Union, and the right to strike and take industrial action. Where two fundamental principles collide, which should prevail?

Viking decided that the right of establishment enshrined in Articles 43 and 49 of the European Treaty has horizontal effect, enabling an employer to take action against a trade union which seeks to prevent it from exercising its right of establishment. This could be seen as an important advance of the concept of free trade.

Also, and for the first time, the European Court of Justice affirmed the right of collective action previously accepted by the European Court of Human Rights.⁴ This right has frequently been put forward as a fundamental right, but it is not contained in any of the principal instruments and has never previously been expressly decided at European Community level.

By accepting these two conflicting rights, the case does not go so far as to say that the actions of the Union were automatically illegal. The Court set out the general principle, where fundamental rights conflict, that national courts should strike a balance. However, that balance which starts with the principle

⁴ *National Unions of Belgian Police v. Belgium* (App No 4464/70) and *Wilson, National Union of Journalists v. United Kingdom* [2002] IRLR 568

of freedom of establishment and only allows this to be overridden in particular and restricted circumstances.

“That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective⁵.”

Thus, though the final decision is to be taken by the national Court, the ECJ has provided clear guidance which the national courts have to follow.

A similar approach was taken in *Laval* to the right to provide services. Bringing in foreign workers, in this case from Latvia, in the building sector in Sweden resulted in industrial action. The Court accepted that “social dumping” could constitute an overriding reason of public interest which would justify industrial action against the exercise of the general freedom, but not in that case, because there is no minimum wage in Sweden and, therefore, the Latvian workers were not being paid below the Swedish minimum, even though they were paid less than workers working under the Swedish collective agreements. It gives, therefore, a restrictive definition of “social dumping” limiting it to payments below the minimum wage, rather than below the industry norm in that country.

Our session, led by two Finnish Judges, expressed concern about the limitation on trade union freedoms. It is clear that these two cases do represent considerable restrictions under European Law on the freedom of action of national trade unions. To some extent this aspect moved outside the main subject of the Congress, which was Collective Agreements, into collective action and the freedom of action of trade unions.

However, the Congress acknowledged that the right to take industrial action is at the heart of the origin of collective agreements and that collective agreements are an essential part of the social protection in all EU countries.

It seems clear that the cases will have a substantial and long-term impact on the freedom of unions to protect collective agreements. A collective agreement which sought to limit the freedoms enshrined in Articles 43 and 49 would have to be objectively justified as being in the public interest. “Public interest” in this regard would not be limited to the interests of any one Member State.

6. Employee Participation

The Framework Directive 2002/14/EC aims to extend the existing obligations of employers to consult their employees. The existing obligations are limited to collective redundancies and transfers of undertakings. The 2002 Directives

⁵ Judgment of ECJ at para 90

is aimed initially at large and medium-sized companies and is based on the wide-spread, but not universal, existence of Works Councils, which allow employee participation in business outside the separate role of trade unions.

The outcome of the discussions seemed to be that, to date, the Directive had made little practical difference. In countries where there were existing Works Councils there was no need for significant changes in order to comply. In other countries there had been little enthusiasm for energetic implementation.

This was a surprising outcome, which requires further investigation. It seems clear from the responses to the Questionnaire that the Directive has been implemented by legislation in all participating countries except Belgium, where it has given rise to a substantial political row.

If the United Kingdom experience is anything to go by, the defect in the legislation is that it does not require employers to set up representative councils. Instead it empowers the employees, or a proportion of them, to require the employer to set them up. The effect is that, where unions have successfully recruited they will go for full recognition and where there are no unions the work-force do not have the organisation or impetus to insist on representation.

7. Conclusions

It is not easy to reach clear and simple conclusions from our deliberations. This is not an area where all EU countries have a similar experience and, as judges, we do not want to address political issues. Our conclusions, therefore, are tentative.

(1) Strong unions – In countries which have strong unions or a strong tradition of collective agreements, the structure provides a continuing and significant protection for the majority of employees. The strength of unions in particular sectors mean that even employers who do not recognise the unions have to accept the terms and conditions which have been negotiated.

In such countries, therefore, potential problems relate to people who are outside the protection of collective agreements. These remain the weakest workers, who are also the workers with most need of protection. From a judicial point of view, these may also be the employees least likely to embark on litigation.

This is the area where a strong Inspectorate can be important, but also where cheap and easy access to justice may help. This operates in areas such as the minimum wage, health and safety legislation or protection from unfair dismissal.

In this area the existence of strong collective agreements can cover up the problems. However, although this is theoretically the case, there seems little resentment of the strength of union sectors coming from countries such as the

Nordic countries. It seems, rather, that the civilised conditions enjoyed by the more privileged workers cascade down to provide some protection to the weaker workers.

(2) Weak unions - In countries where unions are weak, the concentration seems to be on hard rights, such as the right to recover pay, the right not to be unfairly dismissed and the right to health and safety. The appetite for information and participation seems far less.

Perhaps people would like to leave the employers to worry about how they run the business and concentrate, themselves, on doing their jobs and taking home their wages.

In short, despite the risk of people falling outside the safety net, **collective agreements are still an important support for social protection, but not a substitute for it.**

At our next Congress we will look at how an autonomous Framework Agreement on harassment and bullying can add to the protection of individual employees, whether union members or not.

Colin Sara,
Secretary-General

31st July 2008

APPENDIX I



EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

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Collective Agreements – a hindrance or a support for social protection?

PROGRAMME

Thursday 28th June 2007

Arrival of delegates at **Finlandia Karl Johan Hotel**, Karl Johan Gate
20.00 Informal dinner at **Statholder Gaarden Krostven**

Friday 29th June 2007

At Oslo Military Academy

9.00 Registration

9.30 Opening Ceremony –

Jan-Erik Støstad, The State Secretary, Ministry of Labour and Social
Inclusion will welcomed the delegates.

Taco van Peijpe, outgoing President responds and hands over to Tør
Mehl, President of the European Association of Labour Court Judges
and President of the Labour Court of Norway.

- 10.30 “Labour Courts and Collective Agreement – The Nordic Model” – Prof Stein Evju, former President of the Norwegian Labour Court
- 11.30 First Technical Session – The ability of the individual employee to benefit from collective agreements – introduced by Taco van Peijpe
- 14.00 Keynote Address – The Role of Collective Agreements in developing Social Dialogue – Prof Alan Neal
- 14.45 Second technical session – The impact of international mobility of labour on Collective Agreements – introduced by Jorma Saloheimo
- 16.45 *Close of session*

Saturday 30th June 2007

- 9.30 Third Technical Session – “Employee Participation under the Framework Directive 2002/14/EC Is it Working? Will it work?” introduced by Colin Sara
- 11.30 Plenary session – synthesis and conclusions

APPENDIX II – NATIONAL REPORTS

1. Austrian Report

Dr. Herbert Hopf

Supreme Court of Austria
2007

Vienna, May 31st

Re: Questionnaire EALCJ, Oslo 2007

A U S T R I A

1. Definition of collective agreements:

1.1 How is a collective agreement defined in your country?

Collective agreements ('Kollektivvertraege') are written and published agreements concluded between employers' associations and employees' associations, which possess the capacity to conclude collective agreements, for the purpose of regulating working conditions. Those bodies automatically invested with the capacity to conclude agreements are the representative bodies established by statute law for which membership is obligatory in Austria, i.e. on the employers' side the various Economic Chambers ('Wirtschaftskammern') and their sectoral subunits, and on the employees' side the Chambers of Labour ('Arbeiterkammern'). On the other hand, trade unions and employers' organizations, for which membership is voluntary, possess such capacity only if they are independent on the opposing side and if the Federal Conciliation Board ('Bundeseinigungsamt') has granted them recognition as possessing it by virtue of their extensive occupational and territorial coverage and major economic importance (e.g. The Austrian Trade Union Federation ['Oesterreichischer Gewerkschaftsbund']). A collective agreement has two parts: one consisting in provisions regulating the legal

relationship between the collective parties to the agreement, and the other in provisions regulating the rights and obligations of individual employers and employees arising from the contract of employment.

1.2 At which level are collective agreements concluded: company, industry, national, other?

As a rule, collective agreements are concluded at industry or trade level. Collective agreements are the result of collective bargaining across entire industries or trades.

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements?

In Austria, terms and conditions of employment are regulated by collective agreements for about 70% of all employees. However, since almost the whole of the public sector is excluded from the right to bargain collectively, if the public employees concerned are subtracted from the total number of employees the resultant coverage amounts to about 98%, with only a few minor areas of employment in the service sector excluded. This coverage, which is extremely high by international standards, is due to the legal framework governing industrial relations in Austria. First, in accordance with the Labour Constitution Act ('Arbeitsverfassungsgesetz') even those employees who are not members of the signatory union to an agreement are covered by its provisions ('non-member effect' ['Aussenseiterwirkung']). Second, on the employers' side almost all agreements are concluded by the Economic Chambers.

2.2 What proportion of employees are members of trade unions?

The union density is about 45%.

3. Enforcement of collective agreements

3.1 Are collective agreements legally binding?

Yes, collective agreements are legally binding. The binding provisions can neither be revoked nor restricted by an individual employment contract ('Einzelarbeitsvertrag') or a works agreement ('Betriebsvereinbarung') for the benefit of the employer. The employer may grant to the employee conditions which are more favourable than those provided for in the collective agreement.

3.2 If so, who is bound by a collective agreement?

A collective agreement is binding on all employers who were members of the signatory party on the employers' side when it was signed or who become members later, and on all employees working in establishments where the employer is bound by the agreement. This applies whether they are union members or not ('non-member effect').

3.3 Can collective agreements be enforced in the courts?

- **by unions**
- **by individuals**

Yes, collective agreements can be enforced by both, unions and individuals.

3.4 Which court has jurisdiction?

A separate Court for Labour and Social Matters in first instance is established only in Vienna. In the rest of Austria the Regional Courts also sit as Courts for Labour and Social Matters in first instance. In second instance decide the Courts of Appeal in Vienna, Linz, Graz and Innsbruck. The third and highest instance in Labour and Social Matters is the Supreme Court in Vienna.

4. Effect on individual contracts of employment

4.1 Are collective agreements incorporated into individual contracts of employment?

The provisions relating to the individual contract of employment form what is called the 'normative part' ('normativer Teil') of the agreement. These provisions have direct mandatory effect ('Normwirkung') and operate on the employment relationship from outside, as if laid down by statute.

4.2 Does this apply only to companies which are bound by the collective agreement?

Yes, as a rule, but on application of an employers' association or an employees' association, the Federal Arbitration Board has to declare that a specific collective agreement shall constitute a 'statute' ('Satzung'). This means that the scope of the collective agreement will be extended to cover also employments which are similar to those governed by the collective agreement.

4.3 Do the provisions of collective agreements apply to unorganised workers?

Yes. A collective agreement is binding on all employers who were members of the signatory party on the employers' side when it was signed or who become members later, and on all employees working in establishments where the employer is bound by the agreement. This applies whether they are union members or not ('non-member effect').

4.4 Do the provisions of collective agreements have automatic "erga omnes effect" that is, are unorganised employers obliged to apply those provisions?

No, there is no 'erga omnes effect'. A collective agreement is only binding on employers who were members of the signatory party on the employers' side when it was signed or who become members later. In addition, the Federal Conciliation Board can declare a specific collective agreement a 'statute' ('Satzung'). See 4.2.

4.5 Can "erga omnes effect" be attributed to a collective agreement by a public authority? (declaration of general applicability)

No, there is no 'declaration of general applicability' available. See 4.2 and 4.4 ('Satzung').

4.6 if so, which provisions can be declared generally applicable?

See 4.5.

4.7 Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

Only 'employees', i.e. persons who undertake to perform work for an amount of time which may be specified or not for another person (an employer) in a relationship of subordination ('persoenlicher Abhaengigkeit'), are protected by collective agreements. Agency workers ('Leiharbeitnehmer') are protected by a special collective agreement for temporary works agencies. Persons who are treated by law similar to employees ('arbeitnehmeraehnliche Personen') (e.g. an insurance salesman who is not in a relationship of subordination but in a position of economic dependence) are not protected by collective agreements.

4.8 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?

Yes, the provisions of the collective agreement are merely minimum norms. The employer may grant to the employee conditions which are more favourable than those provided for in the collective agreement. By way of exception, the parties to a collective agreement may also agree on clauses which are mandatory in both directions (i.e. absolute), such as maximums terms and conditions of employment, although the unions have scarcely ever exercised this right.

4.9 To what extent are deviations and derogation from the provisions of collective agreements allowed?

As a rule, individually agreed contradictory arrangements are valid only if they are more favourable to the employee, in accordance with the so-called 'favourability principle' ('Guenstigkeitsprinzip'). See also 4.8.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

5.1 Has this Directive been implemented in your country?

There was no special implementation of the Directive 2002/14/EC, but the Austrian Labour Constitution Act includes a wide set of legal provisions to

regulate workforce representative bodies at establishment or company level and their information, consultation and co-determination rights ('Mitbestimmungsrechte') in social, staff and economic matters (the so-called 'works constitution' ['Betriebsverfassung']).

5.2 Does it apply to all undertakings, or only to those employing at least 100 or at least 50 employees?

If a business permanently employs at least five employees older than 18, a works council ('Betriebsrat') may be established. Members of the management as well as executives do not qualify as employees in this context.

5.3 Has the Directive been implemented by legislation or by collective agreements?

See 5.1.

5.4 What impact has this Directive had on the process of consultation

-

- **in businesses where there are collective agreements and/or works councils?**

See 5.1.

- **in businesses where there is no collective agreement or works council?**

See 5.1.

5.5 Is it possible for an employee who is not a member of a union to benefit from this directive?

To be or to be not a member of a union is due to the mentioned 'non-member effect' non crucial to benefit from this directive. See 4.3.

5.6 If so, what can be done and by whom to enforce this?

See 5.5.

6. Transnational impact

6.1 Has the Posting of Workers Directive 96/71/EC been implemented in your country?

Yes. The implementation was mainly done by the Act to Adapt Employment Contract Law
(‘Arbeitsvertragsrechtsanpassungsgesetz [AVRAG]’)

6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

Yes.

6.3 Has this created any problems or led to litigation?

No further problems.

6.4 How has this Directive related to collective agreements, where the terms of the collective agreement are more favourable than those to which the worker is entitled under the Directive?

According to the AVRAG (see 6.1) a worker posted across a border is, at the least, entitled to receive the remuneration due to workers of comparable status payable by comparable employers at the place of posting and as provided by law, government regulation or collective agreement.

Selected literature:

- *Eichinger/Kreil/Sacherer*, Basiswissen Arbeits- und Sozialrecht² (2007)
- *Foster*, Austrian Legal System and Laws (2003)
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2. Belgian Report

“Collective agreements – a hindrance or a support for social protection ?”

BELGIUM

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1. Definition of collective agreements

1.1. How is a collective agreement defined in your country?

The term “collective industrial agreement” means an agreement concluded between one or more workers’ organizations and one or more employers’ organizations or one or more employers, stipulating the individual and collective relations between employers and workers in undertakings or in a branch of activity, and regulating the rights and obligations of the contracting parties (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 5).

1.2. At which level are collective agreements concluded: company, industry, national other?

The agreement may be made, within a joint body, by one or more workers’ organizations and one or more employers’ organizations and, outside a joint body, by one or more worker’s organizations and one or more employers’ organizations or one or more employers (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 6).

In this act, “the joint body” means the National Labour Council, the joint committees and the joint subcommittees (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 1).

So collective bargaining is structured with three interlinked levels:

- a central level at the top, covering the entire economy ;
- an intermediate level covering specific industrial sectors;
- a company level negotiations at the base level.

At central level, at the top covering the entire economy of Belgium, the negotiations can result in inter-professional collective agreements, in

the National Labour Council, which are extended to all branches of the relevant activity and throughout the country.

On the outside of this official bipartite organization, there are also cross-sector agreements, which cover all companies in the private sector and constitute political and moral commitments.

At sector level, the collective agreements are concluded within the joint committees or the joint subcommittees by all the organizations that are represented by them.

There are about 100 joint committees and 75 joint subcommittees.

The sector collective agreement applies to all the employers and employees covered by the joint committees or subcommittees concerned.

Negotiations on this level implement the framework of the national cross-sector level.

At company level a collective agreement can be concluded by one or more organizations representing employees by union delegates and by one or more employers' organizations or by one or more employers.

The company collective agreement applies to all an employer's workers bound by an agreement, irrespective of whether they are members of a signatory workers' organization.

2. Impact of collective agreements

2.1. What proportion of employees overall are covered by collective agreements?

The proportion of employees covered by collective bargaining in Belgium fluctuates at around 96%.

The high level of collective bargaining coverage reflect the legal framework in which collective bargaining takes place with legal structures which ensure that collective agreements have a wide coverage.

This coverage is also high because agreements signed at industry level automatically extend to all those employed in that industry and there are links between different levels of bargaining.

2.2. What proportion of employees are members of trade unions?

In general, it is assumed that the Belgian degree of unionisation is stable and fluctuates at around 55% .

3. Enforcement of collective agreements

3.1. Are collective agreements legally binding?

3.2. If so, who is bound by a collective agreement?

The agreement shall be binding on:

- the organizations which concluded it and the employers who are members of such organizations which have considered the agreement, as from the date of its coming into force;
- the organizations and employers subsequently acceding to the agreement, and the employers' members of such organizations, as from the date of their accession;
- employers who become affiliated to an organization bound by the agreement, as from the date of their affiliation;
- all the workers in the service of an employer bound by the agreement (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 19).

The clauses of an agreement concluded in a joint body which deal with individual relations between employers and workers shall bind all employers and workers other than those referred to in article 19, who are covered by the joint body, in so far as they fall within the scope of the agreement, unless the individual contract of employment contains a written clause to the contrary (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 26, 1°).

An agreement concluded in a joint body may be declared generally binding by the Crown at the request of the joint body or an organization represented on the same (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 28).

The Royal Order declaring an agreement to be generally binding shall come into force as of the date of coming into force of the agreement itself: Provided that it may not have retroactive effect for more than one year preceding the date of its publication (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 32).

3.3. Can collective agreements be enforced in the courts?

- **by unions**
- **by individuals**

The organizations shall have the capacity to sue and be sued in all litigation arising out of the application of the Act respecting collective industrial agreements and joint committees, Dated 5 december 1968,

and to defend their members' rights arising out of the agreements concluded by them. This representation by the organizations shall not affect the right of the members to bring an action individually on their own behalf, to join in the action or to intervene therein at any stage. Provided that damages for non-performance of the obligations arising out of an agreement may be claimed from organizations only in so far as the agreement expressly provides for this. Unless their rules contain a stipulation to the contrary, the organizations shall be represented in legal proceedings by the person responsible for the day-to-day management (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 4).

3.4. Which court has jurisdiction?

Collective agreement contains a normative part with norms which are intended to regulate the individual employment relationship and collective labour relations between the employer and employees covered by it.

Individually normative provisions regulate the individual employment relationship proper, by establishing norms relating to terms and conditions of employment which could also be "incorporated" into the individual employment contract.

Collectively normative provisions regulate collective labour relations, they neither generate obligations or rights for the contracting parties nor apply to the individual contract of employment .

In addition to the normative part, a collective agreement also includes an obligational part which creates obligations and rights that apply solely between the parties to the agreement.

The Belgian Council of State has recognized the regulatory nature of collective agreements concluded within a joint body.

The Belgian Court of Cassation considers as law, in the material sense, regulatory provisions of a collective agreement whose binding force has been extended by royal decree, with the consequence that a violation may be invoked by a means of appeal.

Labour courts have jurisdiction, in case of litigation between employer and employee about individually normative provisions of collective agreements.

4. Effect on individual contracts of employment

4.1. Are collective agreements incorporated into individual contracts of employment?

Individually normative provisions of collective agreements regulate the individual employment relationship proper, by establishing norms relating to terms and conditions of employment which could also be "incorporated" into the individual employment contract.

The clauses of a contract of employment and the provisions of work rules which are contrary to those of a collective industrial agreement binding the employers and workers concerned shall be null and void (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 11).

An individual contract of employment modified implicitly by a collective agreement shall remain unchanged if the agreement ceases to be in force, unless there is a stipulation to the contrary in the agreement itself. (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 23).

4.2. Does this applies only to companies which are bound by the collective agreement?

The clauses of an agreement concluded in a joint body which deal with individual relations between employers and workers shall bind all employers and workers other than those referred to in article 19, who are covered by the joint body, in so far as they fall within the scope of the agreement, unless the individual contract of employment contains a written clause to the contrary (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 26, 1°).

4.3. Do the provisions of collective agreements apply to unorganised workers?

The agreement shall be binding on all the workers in the service of an employer bound by the agreement (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 19).

4.4. Do the provisions of collective agreements have automatic “erga omnes” effect” that is are unorganised employers obliged to apply those provisions?

The clauses of an agreement concluded in a joint body which deal with individual relations between employers and workers shall bind all employers and workers other than those referred to in article 19, who are covered by the joint body, in so far as they fall within the scope of the agreement, unless the individual contract of employment contains a written clause to the contrary (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 26, 1°).

An employer whose affiliation to an organization bound by the agreement comes to an end shall remain bound by the said agreement unless and untill the temrs of the said agreement are so amended as to bring about a considerable modification of the obligations arising out of the agreement (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 21).

4.5. Can “erga omnes effect” be attributed to a collective agreement by a public authority? (declaration of general applicability)

An agreement concluded in a joint body may be declared generally binding by the Crown at the request of the joint body or an organization represented on the same (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 28).

An agreement rendered generally binding shall bind all the employers and workers falling within the jurisdiction of the joint body, in so far as they fall within the scope stipulated in the agreement (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 31).

4.6. If so, which provisions can be declared generally applicable?

As we have seen, the agreements concluded within a bipartite structure at the intersectoral and sectoral levels, bind the employers and their workers, who are not members of signatory organizations, but who are covered by the joint committee within which the agreement was concluded, in a suppletive way.

This is to say that these agreements bind employers who are not members of signatory organizations, except if the individual employee contracts of employment include clauses which negate these agreements.

As we have seen, the obligatory nature of an agreement concluded within a bipartite structure may also be extended by royal decree, such that the agreement binds, in an imperative way, all employers, and their employees who are covered by the bipartite structure, within which the agreement has been concluded.

This measure ensures that the employers cannot escape their obligations under the agreements by setting up individual contracts of employment. This procedure is initiated upon request by the joint committee or by an organisation represented on it.

This procedure for extension of collective agreements is used quite often.

It should be noted that the extension mechanism affect the entirety of the content of these agreements and therefore have the consequence of harmonising conditions for the entire workforce concerned.

Intersectoral agreements, concluded outside of the National Labour Council, do not have the force of law. They constitute a political and moral commitment and their implementation implies the intervention of

the legislator or the National Labour Council in order to give it a valid legal framework, such as law, royal decree or collective agreement.

It should be noted that for inter-professional collective agreements, an advice of deposit is published in the Belgian Monitor, which implies that, 15 days after publication, the principal provisions, in particular those concerning all the remuneration and working conditions, bind all the employers who arose at the joint committee concerned and in so far as these employers arose with the field of application of the collective agreement. An exemption of individual nature is possible by the means of an agreement written between the employer and the worker.

In addition, the National Labour Council or the joint committee or the organization represented can ask that the Crown makes the collective agreement obligatory.

When the Minister gives his assent on this request, convention is published completely in the Belgian Monitor, in appendix with the royal decree.

A collective agreement made compulsory tolerates any more any individual exemption neither for an employer nor for a worker, except if, for example, the collective agreement allows an exemption in favour of the worker. The non-observance of such a collective agreement can be sanctioned penally.

The operative part of the agreement rendered generally binding shall be published in the Belgian Monitor, annexed to the Royal Order declaring it to be generally binding (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 30).

4.7. Can people who are not direct employees (eg agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

For the purpose of the act respecting collective industrial agreements and joint committees, Dated 5 december 1968, the following shall be considered as a worker : a person who, other than by virtue of a contract of employment performs work under the authority of another person (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 2).

The Act applies to employers and employees and their representative organizations in the private sector; it does not apply to employees of central government, the provincial and municipal authorities, the public agencies controlled by them and the public services. However, the government, acting through Ministerial Decree, can extend its application in whole or in part to these employees or certain categories of them (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 2).

4.8. Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?

4.9. To what extent are deviations and derogation from the provisions of collective agreements allowed?

The sources of the obligations arising out of the employment relation between employers and workers shall be as follows, in descending order of precedence:

1. the law in its peremptory provisions;
2. collective industrial agreements declared to be generally binding, in the following order:

- a. agreements concluded in the National Labour Council;
- b. agreements concluded in a joint committee;
- c. agreements concluded in a joint subcommittee;

3. collective industrial agreements which have not been declared to be generally binding, where the employer is a signatory thereto or is affiliated to an organization signatory to such agreement, in the following order :

- a. agreements concluded in the National Labour Council;
- b. agreements concluded in a joint committee;
- c. agreements concluded in a joint subcommittee;
- d. agreements concluded outside a joint body;

4. an individual agreement in writing;

5. a collective industrial agreement concluded in a joint body but not declared generally binding, where the employer, although not a signatory thereto or not affiliated to an organization signatory thereto, is within the jurisdiction of the joint body in which the agreement was concluded;

6. work rules;

7. the supplementary provisions of the law;

8. a verbal supplementary agreement;

9. custom. (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 51).

The provisions of an agreement which are contrary to the peremptory provisions of Acts and other statutory instruments, treaties and international agreements which have binding force in Belgium shall be null and void (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 9).

The provisions of an agreement concluded in a joint committee which are contrary to an agreement concluded in the National Labour Council, the provisions of an agreement concluded in a joint subcommittee which are contrary to an agreement concluded in the National Labour Council or in the joint committees of which is a subcommittee and the provisions of an agreement concluded outside a joint body which are contrary to an agreement concluded in the National Labour Council or a joint committee or joint subcommittee which is competent for the undertakings concerned shall be null and void (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 10).

The clauses of a contract of employment and the provisions of work rules which are contrary to those of a collective industrial agreement binding the employers and workers concerned shall be null and void (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 11).

The clauses of an agreement concluded in a joint body which deal with individual relations between employers and workers shall bind all employers and workers other than those referred to in article 19, who are covered by the joint body, in so far as they fall within the scope of the agreement, unless the individual contract of employment contains a written clause to the contrary (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 26, 1°).

In theory a norm cannot be regarded as opposite to a higher norm if it ensures the protected part a higher protection.

So the interpretation of this hierarchy may be applied as follows : a lower norm cannot deviate from a higher norm unless it is not contradictory to the latter and this means that, if a higher norm sets out a minimum rule, the lower norm may establish more than this minimum, if a higher norm sets out a maximum rule, the lower norm may establish less than this maximum, and if a higher norm sets out a fixed rule, the lower norm must conform to this norm.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

5.1. Has this Directive been implemented in your country?

In 2002, the European Parliament and Council of Ministers adopted EU Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

According to the directive, all undertakings with at least 50 employees or establishments with at least 20 employees must inform and consult employee representatives about business developments, employment

trends and changes in work organization, with the Member States determining the method for calculating the thresholds for the numbers employed.

Member States were granted three years from the publication date to comply with the requirements of the directive.

Accordingly, by 23 March 2005, the directive should have been transposed into national legislation by each EU Member State.

However, two years after the official deadline, Belgium has not yet implemented the requirements of the directive. Some progress has been made and several propositions for new legislation have been considered in parliament.

Disagreement between the social partners is the main cause of the delay in transposing the EU directive into Belgian law.

Belgian legislation still stipulates a threshold of 100 workers in order for companies to be obliged to set up a works council, which is consulted about the company's financial and employment trends. Companies employing more than 50 but fewer than 100 employees are legally obliged to establish a Committee for Prevention and Protection in the Workplace, which is consulted on health and safety matters.

The Confederation of Christian Trade Unions (CSC) filed an official complaint on 20 April 2006 with the European Commission order to bring Belgium before the European Court of Justice for not implementing the Directive.

On 29 March 2007, the European Court of Justice declare that, by not adopting, and in any event by not notifying to the Commission, the laws, regulations and administrative provisions necessary to comply with Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, Belgium has failed to fulfil its obligations under Article 11 of that directive.

The current Minister of Employment, proposed to establish a works council in SMEs with more than 50 employees, but without increasing the number of worker representatives. The members of Committee for Prevention and Protection in the Workplace would simply extend their responsibilities to financial and economic information. In relation to companies employing between 20 and 50 employees, the minister plans to establish a Committee for Prevention and Protection in the Workplace in those companies in which industrial accidents exceed average levels.

Nevertheless, both social partners have refused to back down on their demands, thus preventing the transposition of the directive.

5.2. Does it apply to all undertakings or only to those employing at least 100 or at least 50 employees?

Not applicable.

5.3. Has the Directive been implemented by legislation or by collective agreements?

Not applicable.

5.4. What impact has this Directive had on the process of consultation

in business where there are collective agreements and/or works councils?

in businesses where there is no collective agreement or works council?

Not applicable.

5.5. Is it possible for an employee who is not member of a union to benefit from this directive?

Not applicable.

5.6. If so, what can be done and by whom to enforce this?

Not applicable.

6. Transnational impact

6.1. Has the Posting of Workers Directive 96/71/EC been implemented in your country?

The Belgian Act of 5 March 2002 transposes Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, and introduces a simplified system for the maintenance of social records by undertakings that post workers to Belgium.

6.2. Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

The employer who occupies workers detached in Belgium is held to respect, for the services of work who are carried out there, the employment and remunerations, working conditions of which are

envisaged by legal provisions, lawful or conventional penally sanctioned. Thus formulated, the object of the law is broader than the directive. Indeed, the law aims:

- all collective agreements made compulsory by royal decree and not only those concerning the sector of construction;
- matters aimed by the hard core of the directive but also of other matters of law and order.

The Belgian law cannot cause to deprive the worker during his detachment of the employment and remunerations, working conditions of more favorable which rise from the application of the law of the country on the territory of which the worker usually works or territory of which it was committed.

6.3. Has this created any problems or led to litigation?

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6.4. How has this Directive related to collective agreements, where the terms of the collective agreement are more favorable than those to which the worker is entitled under the Directive?

In theory a norm cannot be regarded as opposite to a higher norm if it ensures the protected part a higher protection.

In the contrary case, the provisions of an agreement which are contrary to the peremptory provisions of Acts and other statutory instruments, treaties and international agreements which have binding force in Belgium shall be null and void (Act respecting collective industrial agreements and joint committees, Dated 5 december 1968, article 10).

3. Czech National Report

Collective Agreements in the Czech republic

The general legal regulation of collective agreements is included in the new Labor Code – Act No. 262/2006 Coll., which took effect on 1 January 2007.

The right to enter into a collective agreement on behalf of employees belongs only to trade unions. A collective agreement in particular may regulate wage or salary rights and other rights in employment relations, as well as rights and obligations of parties to such agreement. A collective agreement cannot impose duties on individual employees.

The parties to a collective agreement are one employer or more employers or one or more employer organizations and one or more trade unions.

A collective agreement is

- a) a plant agreement, if it is concluded between one employer or more employers and one or more trade unions operating at such plant,
- b) a higher level agreement, if it is concluded between an organization or organizations of employers and the competent trade union or trade unions.

The relationship between plant agreements and higher level agreements is dealt with by law so that entitlements of individual employees are directly created by higher level agreements as well, where a plant agreement would be void in that part of the agreement regulating such entitlement to a lesser extent than the relevant higher level agreement. In practice, however, higher level collective agreements are not concluded in all branches of industry and their content must take into account also the economic situation of the weakest companies. Such collective agreements thus only rarely establish above-standard labor entitlements of employees. It may be stated that the Czech practice places an emphasis on conclusion of plant collective agreements, while higher level (branch) collective agreements have not acquired the significance anticipated in early 1990s.

Trade unions conclude collective agreements also on behalf of employees who are not members of the relevant trade union.

If there are two or more trade unions within one undertaking, the employer negotiates a collective agreement with all trade unions; these trade unions act jointly and in mutual agreement with legal consequences for all employees, unless they and the employer agree otherwise. Where the trade unions fail to agree on the course of action, the employer is entitled to conclude the collective agreement with the trade union or more trade unions with largest membership among the employees employed by this employer.

A collective agreement is binding on the parties thereto. A collective agreement is also binding on

- a) the employers who are members of the employers' organization which has concluded a higher level collective agreement and on those employers who left the employers' organization while the collective agreement was in effect,
- b) the employees on whose behalf the collective agreement has been concluded by a trade union or trade unions,
- c) such trade unions on whose behalf a superior trade union has concluded a higher level collective agreement.

Employees are entitled to present initiatives for negotiations on a collective agreement and be informed of the course of the negotiations.

The rights having arisen from a collective agreement to individual employees are claimed and satisfied as the employees' other rights.

A collective agreement may be concluded for a fixed term or for an indefinite term with a period of notice of 6 months which starts to run as of the first day of the

month following the month when the written notice was served on the party to the collective agreement. Notice of termination may first be given after the expiry of 6 months from the day the collective agreement came into effect. Where the termination of the period under the first sentence is made dependent on fulfillment of a certain condition, the collective agreement must also include the latest date on which the agreement may still be in effect.

A collective agreement takes effect on the first day of the period from which it has been concluded and terminates on the expiry of the said period, unless a different period of effect for certain rights or duties has been agreed in such collective agreement.

A collective agreement must be concluded in writing and signed by the parties on the same instrument, otherwise it is void.

The procedure of negotiating a collective agreement, including settlement of disputes among the parties thereto, is regulated by a special act, namely the Collective Bargaining Act (No. 2/1991 Coll.), which also regulates the procedure of resolving collective disputes concerning negotiation or performance of a collective agreement. Such disputes may be resolved in proceedings brought before a mediator and then before an arbitrator, the ultimate means of settlement of disputes being a strike (which is, however, not applicable to disputes concerning performance of a collective agreement) and a lockout (which is basically a work stoppage in which an employer prevents employees from working – in practice, however, there has never been any lockout).

The total coverage of employees by collective agreements in the Czech Republic is not statistically investigated, however it is estimated to be at a rate of approximately 30 %. That is relatively – in comparison with the so-called old EU member countries – very little. This percentage was not significantly increased by extending the binding effect of higher level collective agreements to employers who are not members of the employers' organization which concluded such agreement. This extension of higher level collective agreements had been carried out until 2003, by when the said agreements had been extended to approximately 3,000 employers. However, these included mainly small companies. In June 2003 the Constitutional Court repealed the relevant provision of the Collective Bargaining Act which allowed such extension and a new legal regulation is has token effect. These agreements can be extended under certain conditions stated by law generally to whole branches of industry. However, it is necessary to draw attention to a considerable opposition of a part of the political representation to such measures, and also to a negative approach of a number of employers and a great deal of the Czech public to forcible obtrusion of rules which the parties to employment relations have not undertaken voluntarily.

In general, it may be summarized that it is beneficial for employers if certain employment terms and conditions of employees may be regulated by a collective agreement. Since collective agreements may be concluded exclusively by trade unions, it should be also beneficial for employers to have trade unions operating within their undertakings. A collective agreement is endowed by law with greater options, for example in comparison with employer's internal instructions. This concerns, for example, more specific regulation of irregular distribution of working hours or monitoring the allowed extent of overtime work. If an employer does not have these matters covered by a collective agreement, he has to negotiate them with individual employees. Similarly, collective agreements allow broader regulation of salaries in comparison with individual contracts or internal salary guidelines.

Right of Employees to Information and Consultation

This right of employees was incorporated in the Labor Code as late as in 2001 within the implementation of directives of the European Union, in particular Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, Council Directive 75/129/EEC on the approximation of laws of the Member States relating to collective redundancies and Council Directive 92/56/EEC amending the previously mentioned directive; the new Labor Code included also Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community. The legal regulation imposes on an employer an obligation to provide employees with information and consult with them about specified matters either directly, if there is no competent trade union, council of employees or representatives for safety and health protection at work, or through the said representatives of employees. If such representatives operate within the employer's undertaking, they are bound by law to use appropriate methods in order to inform employees at all workplaces of their activities and content and conclusions of information and negotiations with the employer.

It is a collective right of employees, which should not be confused with the obligation of employers to inform individual employees of certain employment measures or conditions which concern them. For example allocation of work tasks and giving instructions related to safety and health protection at work or information about individual employment terms and conditions which must be provided to an employee in writing in relation to the creation of employment.

Rights of Trade Unions in Employment Relations

The legal position of trade unions in relation to employers is much stronger than the position of councils and representatives for safety and health protection at work. Trade unions, as representatives of all employees of an employer – including those who are not members of trade unions – are entitled to use – as the ultimate measure – the right to strike. However, law (Act No. 2/1991 Coll., on collective bargaining) regulates the right to strike specifically and in detail only in the event of disputes concerning conclusion of collective agreements. Conditions of strikes called for other reasons are not defined by law, notwithstanding the said constitutional instrument contemplates it – nevertheless jurisprudence believes that such right belongs to employees even without specified conditions. However, the strikes must be called to protect economic and social interests of employees. For completeness: the Collective Bargaining Act also regulates employers' right to lockout, i.e. preventing employees from working – however not for operational reasons, but as a protection against trade unions' requirements in collective bargaining. This right has never been used though and its regular use is not even too realistic (employees would have to be paid salary compensation amounting to half of the average salary). It may be stated that Czech trade unions use the right to strike only very exceptionally, since it is usual to seek a compromise settlement of disputes. Not even employees themselves are too willing to take part in strike actions.

Unfortunately, the institute of elected representatives of employees has not yet become sufficiently established in the Czech Republic. There have even been cases where employers suggested their employees to elect their representatives,

and the employees were not interested. This applies both to the councils and the representatives for safety and health protection at work (the needfulness of which is particularly topical). In the Czech Republic, there are no official or unofficial records of the number of the said representative bodies. However, it is estimated that the number of councils elected according to law does not exceed ten. There are analogous councils in some companies, however these have not been established pursuant to the procedure defined by the Labor Code, but by some other method defined by the employer himself – for example by delegating representatives of individual organizational divisions of the employer. Such bodies, however, do not possess the legitimacy given by law and therefore operate outside the law.

4. Danish National Report

1. Definition of collective agreements:

1.1. How is a collective agreement defined in your country?

The term “collective agreement” is not defined by statute law in Denmark.

A common definition of “collective agreement” applied in Danish legal theory is, however, that the term covers “an agreement concluded between on the one side a trade union and on the other side an employer or employer’s association concerning both the terms and conditions of salary and employment to be applied in the relationship between the individual employee and employer, and the relationship between employer and employee in addition to this, including the relationship between the associations of the employer and the employee respectively.”

1.2. At which level are collective agreements concluded: company, industry, national, other?

A collective agreement is mainly concluded at the national level between a trade union and an employer’s organisation applying to one or more specific professions or industries. In addition, so-called local agreements are concluded at the company level with the view to supplement the collective agreements.

2. Impact of collective agreements

2.1. What proportion of employees overall are covered by collective agreements?

Approximately 90 %.

2.2. What proportion of employees are members of trade unions?

Approximately 80 %.

3. Enforcement of collective agreements

3.1. Are collective agreements legally binding?

3.2. If so, who is bound by a collective agreement?

It is provided by the Danish Labour Court Act that a collective agreement is legally binding both on the labour market organisations that are signatories to the agreement and the Members of the respective organisations.

3.3. Can collective agreements be enforced in the courts?

3.4. Which court has jurisdiction?

It follows from the Danish Labour Court Act that the jurisdiction of the Labour Court encompasses cases concerning violation of collective agreements. Jurisdiction in relation to disputes concerning interpretation of collective agreements lies with the labour arbitration tribunals.

Only employers' organisations, unaffiliated employers and trade unions bound by a collective agreement can be parties to and dispose of cases before the Danish Labour Court or a labour arbitration tribunal.

An individual employee can file a lawsuit against his employer regarding a claim deriving from an alleged violation of a collective agreement by the employer only with the ordinary courts and only on the condition that the employee is able to substantiate that the trade union, to which he is member, has renounced its right to conduct the case with the labour dispute resolution system.

Both decisions made by or settlements arrived at with the Labour Court or a labour arbitration tribunal can be enforced in the courts.

4. Effect on individual contracts of employment

4.1. Are collective agreements incorporated into individual contracts of employment?

4.2. Does this apply only to companies which are bound by the collective agreements?

Collective agreements are not incorporated as such into individual contracts of employment. However, individual contracts in general often make reference to the collective agreements that apply between the employer and employee in order to describe specific terms of the individual contract. In addition hereto, it could be added that according to the Employment Certificate Act implementing the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship in the few areas in which the directive is not implemented by means of collective agreement an employer must provide the employee with a written document containing among others information on the collective agreements that apply to the employment agreement.

Further, individual employment contracts concluded by companies, which are not bound by collective agreements, sometimes stipulate that specific conditions of a certain collective agreement apply to the employment by making a reference to the relevant provisions of the collective agreement.

4.3. Do the provisions of collective agreements apply to unorganised workers?

In principle, an unorganised worker does neither receive rights nor obligations from a collective agreement. The employer, however, who is bound by a collective agreement, is towards the trade union, which is party to the collective agreement, normally obliged to observe the minimum conditions for employment and wages also in relation to unorganised workers within the field of application of the agreement. Furthermore, an unorganised worker will very often be engaged on the condition that the collective agreement applies.

4.4. Do the provisions of collective agreements have automatic “erga omnes effect” that is, are unorganised employers obliged to apply those provisions?

As a point of departure, collective agreements do not have “erga omnes effect”. Thus, an employer is not bound by conditions set out in collective agreements, to which he is not party.

There are a few exceptions, however. As an example, pursuant to the Danish law implementing the Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work employers and employees, which are not covered by collective agreements implementing the directive, are bound to follow the rules following from the agreement on part-time work entered into by the Confederation of Danish Employers and the Danish Confederation of Trade Unions.

4.5. Can “erga omnes effect” be attributed to a collective agreement by a public authority? (declaration on general applicability)

4.6. If so, which provisions can be declared generally applicable?

Extension of collective agreements by a public authority to have “erga omnes effect” must be considered as an alien concept and in principle contrary to Danish labour law.

4.7. Can people who are not direct employees (e.g. agent workers, or economically dependent workers) be protected by collective agreements in their workplace?

If and to which extent agent workers ect., who are not direct employees, are protected by the collective agreements relating to the industry within which the employer is organised does not appear as fully clarified in Danish Labour law. From a strictly theoretical point of view, the collective agreement that the user company is affiliated to does – as a point of departure - not embrace an agent worker, who is not a direct employee. In practice, collective agreements within many areas contain guidelines to resolve this issue. Thus, in some cases a employer by virtue of the collective agreement(s) relating to his industry is obliged to ensure that the agent worker working with him enjoys the rights stemming from the collective agreement.

Regarding enforcement of collective agreements see para. 3.3.

4.8. Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreements?

Yes. Provisions of the collective agreement are typically considered as minimum norms which can be extended both by local agreements and individual contracts.

4.9. To what extent are deviations and derogation from the provisions of collective agreements allowed?

The extent, to which deviation and derogation from the provisions of collective agreements can take place, is regulated by the various collective agreements. As indicated above, para 4.8., a derogation, which provides an employee with an inferior legal position compared to the position that follows from the collective agreement, must be directly founded on the collective agreement, whereas extensions in favour of an employee compared to the position that follows from the collective agreement can be made without direct foundation in the collective agreement.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

5.1 Has this Directive been implemented in your country?

5.2. Does it apply to all undertakings, or only to those employing at least 100 or at least 50 employees?

5.3. Has the directive been implemented by legislation or by collective agreements?

The Directive has been implemented in Denmark, which has been done both through legislation and collective agreement. Thus, it follows from the Danish Act on informing and consulting employees that in the event that a collective agreement contains provisions on informing and consulting employees these should be applied on the condition that the obligation for the employer for informing and consulting

employees provided by the collective agreement as a minimum corresponds to the obligations following from the Directive.

The Act on informing and consulting employees applies to all undertakings having at least 35 employees.

5.4. What impact has this directive had on the process of consultation –
In businesses where there are collective agreements and/or works councils?
In businesses where there is no collective agreement or works council?

According to estimates by the Ministry of Employment the Directive has probably not had a noticeable impact in businesses where there are collective agreements and/or works councils, whereas the Directive has presumably had quite some impact in businesses where there is no collective agreement or works council.

5.5. Is it possible for an employee who is not a member of a union to benefit from this Directive?

Yes.

5.6. If so, what can be done and by whom to enforce this?

According to the Danish Act on informing and consulting employees an undertaking, which is not living up to its legislative obligation to inform and consult the employees, could be fined.

6. Transnational Impact.

6.1. Has the Posting of Workers Directive 96/71/EC been implemented in your country?

6.2. Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

The Directive has been implemented in Denmark. The Danish Act on posting of workers covers all sectors.

6.3. Has this created any problems or led to litigation?

No.

6.4. How has this Directive related to collective agreements, where the terms of the collective agreement are more favourable than those to which the worker is entitled under the Directive?

As mentioned in para. 3.2. due to Danish law a collective agreement is only binding on the labour market organisations that are signatories to the agreement and the Members of the respective organisations as well as parties who have agreed to be bound by or observe the agreement.

According to the Danish Act on posting of workers it is only the terms and conditions covering the relevant matters (minimum work and rest periods, minimum pay etc.) stipulated by law that workers posted in Denmark are guaranteed. Thus, Denmark has not chosen to make collective agreements applicable in relation to undertakings with workers posted in Denmark.

In Denmark there is no legislation with regard to minimum pay. Instead, minimum pay is to a large extent guaranteed by collective agreements. Against this background, it has been widely debated if application of collective agreements with regard to minimum pay should be introduced in relation to undertakings with workers posted in Denmark. The Danish legislature has, however, abstained from adopting legislation to this end as so now.

5. Finnish Report

CONGRESS OF EALCJ

**Oslo Military Academy
29th and 30th June 2007**

Collective Agreements – a hindrance or a support for social protection?

*Finnish Report
by Jorma Saloheimo*

1. Definition of collective agreements:

1.1 How is a collective agreement defined in your country?

The legal definition of a collective agreement is in Sec. 1 of the Collective Agreements Act (1946). Under the provision, a collective agreement is an agreement regulating conditions to be observed in employment contracts or otherwise in employment relations. The agreement must be concluded by one or more employers or employers' associations on one side, and one or more trade unions on the other side.

1.2 At which level are collective agreements concluded: company, industry, national, other?

Collective agreements are concluded at all levels mentioned above. At the top of the system there are also general agreements, concluded by central labour market organizations, which are not intended to become binding as such. They are implemented by making them part of federation-level agreements. An example is the General Agreement on Job Protection.

It is common in industry-wide collective agreements to refer certain matters to be agreed upon locally, or to allow derogations to be made by means of local agreement.

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements?

Altogether, about 90 per cent of the Finnish work force is covered by collective agreements. Some 5 per cent of the coverage follows from generally binding collective agreements.

2.2 What proportion of employees are members of trade unions?

The union density is around 90 per cent, but if retired people and other groups not paying union fees are excluded, we arrive at 72 to 75 per cent.

3 Enforcement of collective agreements

3.1 Are collective agreements legally binding? - Yes.

3.2 If so, who is bound by a collective agreement?

A collective agreement is binding upon the parties to the agreement, i.e. an employer or an employers' association or a trade union. In addition, the member associations and the member employers and employees are bound by the agreement. An individual employer or employee will remain within the scope of the agreement until the end of the agreement period even if his or her membership to an association, which is a party to the agreement, ceases.

An employer bound by a collective agreement shall apply its terms to non-unionized employees performing work covered by the agreement.

3.3 Can collective agreements be enforced in the courts?

- by unions
- by individuals

As regards unions and employers bound by a collective agreement, all claims based on the agreement are handled by the Labour Court. The party to the agreement acts as the plaintiff. For instance, if the claim is based on an agreement made between federations, it is the regularly the federation that appears as a party to the lawsuit on behalf of its member.

An individual member employee or employer may present a claim only upon the consent of the party to the agreement, or if the party has refused to institute proceedings. An individual employee who is not bound by the

agreement, but performs work covered by the agreement, may invoke the agreement before a regular court of law.

3.4 Which court has jurisdiction?

The Labour Court, with two exceptions:

- claims presented by a non-union employee, as explained above, and
- all claims based on generally binding collective agreements; in these cases the defendant is an unorganized employer.

4. Effect on individual contracts of employment

4.1 Are collective agreements incorporated into individual contracts of employment?

According to the general view, most collectively agreed terms and conditions of employment gain the effects of a contract of employment also (the double effect theory). This is to say, in practice, that after the end of the collective agreement period and before a new agreement has been reached, the terms and conditions of the previous agreement continue to be followed as part of the individual contracts.

4.2 Does this apply only to companies which are bound by the collective agreement?

Yes, as regards normally binding collective agreements.

4.3 Do the provisions of collective agreements apply to unorganised workers?

Normally yes, if the employee performs work regulated in the agreement. This effect of the agreement may, however, be excluded by the contracting parties.

4.4 Do the provisions of collective agreements have automatic “erga omnes effect” that is, are unorganised employers obliged to apply those provisions? - No.

4.5 Can “erga omnes effect” be attributed to a collective agreement by a public authority? (declaration of general applicability)

Such a system of generally applicable collective agreements is in place in Finland. The procedure for declaring a collective agreement to be generally applicable is regulated in a specific Act passed in connection with the Employment Contracts Act (2001). A special tripartite board makes the decision, which can then be challenged in the Labour Court. Under the Employment Contracts Act, the general applicability of collective agreements

presupposes that the agreement is nation-wide and can be deemed as representative in the field in question.

4.6 if so, which provisions can be declared generally applicable?

The declaration covers the agreement in question as a whole, not its individual provisions. All terms and conditions of employment, set out in the agreement, will then be generally applicable.

4.7 Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

Not without special regulation. Such a special rule, concerning agency workers, is included in the Employment Contracts Act. The rule guarantees an agency worker the minimum protection of a collective agreement, concluded by a nation-wide trade union and applicable to the employees of the user firm. The protection applies, however, only if the worker's own employer, for example a temporary agency, is not bound by a collective agreement concluded by a nation-wide trade union.

4.8 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement? - Yes, unless otherwise agreed, which is exceptional.

4.9 To what extent are deviations and derogations from the provisions of collective agreements allowed? - This is possible, on condition that the agreement specifically allows for such derogations.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

5.1 Has this Directive been implemented in your country? - Yes.

5.2 Does it apply to all undertakings, or only to those employing at least 100 or at least 50 employees?

The implementing statute, the Cooperation Within Undertakings Act (2007) applies to undertakings employing at least 20 employees. Some provisions of the Act apply to undertakings employing at least 30 employees.

5.3 Has the Directive been implemented by legislation or by collective agreements?

Legislation.

5.4 What impact has this Directive had on the process of consultation

- in businesses where there *are* collective agreements and/or works councils?
- in businesses where there is no collective agreement or works council?

The implementation of the Directive has had only minor impact on the pre-existing national legislation on worker participation. A few amendments were made to the 1978 Cooperation Within Undertakings Act, which was later replaced by the 2007 Act.

The consultation procedure is based on the representation of employees by shop stewards who are elected by the local trade union concerned. The shop steward system is regulated in collective agreements. Works councils do not exist in the Finnish labour market system.

Should a personnel group not have a shop steward, which is rare in practice, or if the majority of a personnel group has not been entitled to take part in the election of the shop steward, such a group or a majority may elect a personnel representative for the purposes of cooperation with the employer. The Directive has had no impact on these national arrangements.

- 5.5 Is it possible for an employee who is not a member of a union to benefit from this directive?
- 5.6 If so, what can be done and by whom to enforce this?

The main rule is that the shop steward represents all employees belonging to the personnel group in question, regardless of unionization. For the cases where there is no shop steward or the majority of the employees are unorganized, see above (5.4).

6. Transnational impact

- 6.1 Has the Posting of Workers Directive 96/71/EC been implemented in your country?

Yes. The implementing statute is the Act on Posted Workers (1999, as amended).

- 6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

Yes, no industries are excluded from the application of the Act, except sea fare.

- 6.3 Has this created any problems or led to litigation? - Not reportedly.

6.4 How has this Directive related to collective agreements, where the terms of the collective agreement are more favourable than those to which the worker is entitled under the Directive?

By virtue of Art. 3(10) of the Directive, it is provided in the Act on Posted Workers that all posted workers enjoy the protection of the generally applicable collective agreement, applicable to the field in question, as regards annual leave, working time, occupational health and safety, and minimum pay.

6. French Report

EUROPEAN ASSOCIATION OF LABOUR COURT
JUDGES

CONGRESS OF EALCJ

Oslo Military Academy
29th and 30th June 2007

"Collective Agreements - a hindrance or a support for social protection?"

QUESTIONNAIRE

Response of Mr Michel Blatman (France)

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1 Introduction

The intention of this Congress is to concentrate on the effect of collective agreements on the individual and the role they play in implementing and developing European labour law. I am indebted to Michel Blatman's General 4th Report to the XIVth Meeting of European Labour Judges in Paris on September 2006 (available on the ILO web-site www.ilo.org together with national reports) which covers with great clarity the comparative role of collective agreements in the participating countries.

This short questionnaire is intended to be used as a springboard for national reports dealing with the specific issues of this Congress. I hope that you will use it as a basis for explanation rather than feel confined to the exact format of the questionnaire.

1. Definition of collective agreements:

1.1

How is a collective agreement defined in your country?

Collective agreement is commonly defined as an agreement concluded by one or more unions representative of workers, and an employer or one or several organizations of employers, that determine the conditions of employment, vocational training and social guarantees of workers. Article L. 131-1 of French Labour Code says that workers' right for collective bargaining touches all their conditions of employment, occupational training and work, as their social guarantees. But, as regards to these themes, article L. 132-1 of the same code makes a distinction between "collective agreement" ("convention collective") and "collective covenants" or collective accords ("accords collectifs").

The criterium is the following :

-The collective agreement has authority to deal with the whole previous matters for all the concerned professional categories.
-The collective covenant deals with only one or several of these subjects

1.2 At which level are collective agreements concluded: company, industry, national, other?
Every level is concerned, even establishments inside the company. Collective agreements rule a geographical sector (departmental, regional, national) or/and a professional sector (firm, company, branch, interprofessional)

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements?

More than 90 %

2.2

What proportion of employees are members of trade unions?

About 6 %

3. Enforcement of collective agreements

3.1 Are collective agreements legally binding?

Yes

3.2 If so, who is bound by a collective agreement?

Employers belonging to an employers' union that has signed a collective agreement must apply it. But if this agreement has been "extended" by a ministry of labour' order, it is applicable to every employer and worker entering within the scope of the agreement. Employers may provide in individual labour contracts better terms and conditions for the employee.

3.3

Can collective agreements be enforced in the courts?

...by unions

Yes

• ...by individuals

Yes

3.4

Which court has jurisdiction?

-Labour court ("conseil de prud'hommes") for individual claims

-Civil court ("tribunal de grande instance") for collective disputes

4. Effect on individual contracts of employment

4.1 Are collective agreements incorporated into individual contracts of employment?

No, as a principle. Collective status is distinguished from individual contract of employment. These are two different spheres. But individual contract must comply with collective agreement's provisions. Collective agreement is said both of immediate effect, binding (imperative) and automatic. Once the collective agreement has expired, the employee can no longer invoke it, barring some "droits acquis" (vested interests, established rights).

4.2

Does this apply only to employees of companies which are bound by the collective agreement?

3 Employers who voluntarily are not bound by a collective agreement may apply it

4.3 Do the provisions of collective agreements apply to unorganised workers?

Yes. It applies to every worker entering within its scope (if the employer is bound).

4.4 Do the provisions of collective agreements have automatic "erga omnes effect" that is, are unorganised employers obliged to apply those provisions?

Only if the agreement has been extended by an order of the ministry of Labour

4.5 Can "erga omnes effect" be applied to a collective agreement by a declaration of general applicability from a public authority?

Yes, as aforesaid : it is an order of the ministry of Labour ("arrêté d'extension")

4.6 If so, which provisions can be declared generally applicable?

The ministry may decide to declare generally applicable the whole agreement. It is also possible for the ministry to extend only some provisions. Sometimes, the declaration is made under reserves (for instance about the consistence with some legal rules, or under condition of specific interpretation).

4.7

Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

Yes, but as regards work execution conditions (eg : health and safety at work)

The principle "equal pay for equal work" often implies that agency workers would get wage amounts similar to those of other employees.

4.7 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?

Yes. They are minimum norms.

4.9

To what extent are deviations and derogation from the provisions of collective agreements allowed?

A new legislation (article L.132-23 § 4 provides that a company or establishment collective agreement may derogate in pejus to a wider-scale agreement, unless otherwise specified by the latter. But this derogation is precluded in some matters such as minimum wages, collective guarantees, classification.

5. Implementation of the Consultation Framework Directive -
2002/14/EC

5.1

Has this Directive been implemented in your country?

Yes

5.2

Does it apply to all undertakings, or only to those employing at least

100, or at least 50, employees?

At least 50 employees

5.3

Has the Directive been implemented by legislation or by collective agreements?

By legislation

5.4

What impact has this Directive had on the process of consultation

•

in businesses where there are collective agreements and/or works councils?

Facilitation and increase of social dialogue

• in businesses where there is no collective agreement or works council?

Workforce delegate can have a subsidiary office.

Mandated delegates may also negotiate

5.5

Is it possible for an employee who is not a member of a union to benefit from this directive?

I am not sure: maybe could he seize the civil court in order to have the employer fulfill his duties in the matter ? But this is rather the affair of unions

5.6

If so, what can be done and by whom to enforce this?

-

6. Transnational impact

6.1

Has the Posting of Workers Directive 96/71/EC been implemented in your country?

Yes (article L 342-1 and D. 341-5 & sq)

6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

Yes

6.3

Has this created any problems or led to litigation?

Not identified, yet

6.4

How does this Directive relate to a situation where the terms of the collective agreement is more favourable than those to which the worker is entitled under the Directive?

Workers are entitled to the rights set out by extended collective agreements

(D. 341-5-1 : working time, Sunday working, night work, paid vacation, public holiday, etc)

7. Hungarian Report

NATIONAL REPORT FROM HUNGARY

Maria Kulisity

1. Definition of collective agreements:

1.1. How is a collective agreement defined in your country?

The Labour Code (Act XXII of 1992) gives the following definition: Collective bargaining agreements may govern:

- a) rights and obligations originating from employment relationship, the method of exercising and fulfilling and the procedural order of such relationship;
- b) the relations between the parties to the collective bargaining agreement (Article 30).

This definition contains only one aspect: the subject of the collective agreement. Other aspects (who can conclude it etc.) are regulated in other places of the Act.

1.2. At which level are collective agreements concluded: company, industry, national, other?

There are collective agreements on the *enterprise level*: we can differentiate between *single-employer and multi-employer agreements*. There are also *sectoral agreements* and *extended collective agreements*. The Minister of Labor may extend the scope of the collective bargaining agreement to the entire sector (or sub-sector). The enterprise level might be considered the most decisive in Hungary, thus sectoral agreements are of secondary importance.

National-level collective is typical only of the areas of public employees, because wage negotiations affecting state budget expenditure are applicable for the employees of several sectors.

2. Impact of collective agreements

2.1. What proportion of employees overall are covered by collective agreements?

Collective agreements cover *all employees* who work at the affected employer even if the employees are not member of trade unions. A collective bargaining agreement shall also apply to the employees of the affected employer who are not members of the trade union concluding the collective bargaining agreement. That is the reason why the Code states: Only one

collective agreement may be concluded with an employer (Article 33.). The only exceptions are *the employees who are in executive positions*, because the Code states that the collective bargaining agreements shall not apply to executive employees (Article 189.).

The effect of a collective bargaining agreement, in the absence of any extension of scope, shall apply to employers who

- a) concluded the collective bargaining agreement, or
- b) were a member of the employer interest representation organization at the time the collective bargaining agreement was concluded, or
- c) subsequently joined the employer interest representation organization. In this event the consent of the local trade union branch shall be required for the collective bargaining agreement to apply to the employer (Article 36.).

2.2. What proportion of employees are members of trade unions?

In Hungary the number of trade unions' members are decreasing. We have data for 2004, when the 17% of the employees were members of a trade union. Between the young employees this rate is lower. In 2004 8,5% of the employees under 30 were members of a trade union.

3. Enforcement of collective agreements

3.1. Are collective agreements legally binding?

Yes

3.2. If so, who is bound by a collective agreement.

Employers, trade unions and the individual employees are bound by a collective agreement, even if not all trade unions took part in the contract, and also if the employees are not members of a trade union.

3.3. Can collective agreements be enforced in the courts?

- **by unions** – yes

. **by individuals** – yes

Even *the employer* can refer to it in the court, because the Labour Code states that a collective bargaining agreement is qualified as an employment-related regulation (Article 13 para (5)), so it is binding for everyone at the employer and enforceable.

3.4. Which court has jurisdiction?

The labour court.

4. Effect on individual contracts of employment

4.1. Are collective agreements incorporated into individual contract of employments?

Yes, its their natural content.

4.2. Does this apply only to companies which are bound by the collective agreement?

Yes

4.3. Do the provisions of collective agreements apply to unorganised workers?

Yes

4.4. Do the provisions of collective agreements have automatic „erga omnes effect“ that is, are unorganised employers obliged to apply those provisions?

No, just in case of an extended collective agreement.

4.5. Can „erga omnes effect“ be attributed to a collective agreement by a public authority? (declaration of general applicability)

Yes, the Minister of Economic may extend the scope of the collective bargaining agreement to the entire sector (or sub-sector). The Act orders that the Minister of Economy shall publish his resolution on the initiation or cancellation of extension of scope of collective bargaining agreement, and the official text of collective bargaining agreements with extended scope in the Ministry's official gazette. An extension of scope shall become effective on the day of its publication (Article 34 para (8)).

4.6. If so, which provisions can be declared generally applicable?

The conditions are the followings:

1. the contracting parties need to be representative in the sector (sub-sector)
2. the contracting parties need to apply for it.

The conditions for sectoral and sub-sectoral representativeness are independently defined. In this respect, the law says that those interest representation organisations of the employer are especially representative that are the most significant in terms of the number of their members, economic importance and the number of employees. Based on similar criteria, those trade unions are representative that are the most significant in terms of the number of their members and their support by the employees. Support by the

employees should be measured on the basis of the results of the last work-council elections held prior to the conclusion of the collective agreement. (The lists on the criteria of representativeness of the employers and the trade unions are not complete as they only give examples. The legislator did not exclude the possibility to take other characteristics, not listed in the act, into account when defining representativeness.) In respect of the extension of the scope of a collective bargaining agreement concluded by more than one trade union, the representative rights of the trade unions shall be reviewed collectively.

4.7. Can people who are not direct employees (e.g. Agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

The regulation is rare, the only specific provision is in the Chapter XI at the *Hiring-out of workers* and it is the following: If the employment contract does not contain the information, the employer shall provide such information to the employee within two weeks from the date of signing the employment contract: whether the placement agency is bound by a collective agreement. In case of these workers the placement agency and the user enterprise jointly exercises the employer's right, but mainly the placement agency is the employer, so these workers are also covered by *the placement agency's collective agreement*. However there are regulations related to the principle of equal pay which should apply to the workers during hiring out if their employment relationship is longer than 183 days or 2 years. Therefore the collective agreement of the user enterprise may also be applicable for the employees.

Because there is no specific regulation, the general rule is applicable, which means that the collective agreement also covers *the persons employed in teleworking*.

4.8. Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?

As a basic rule, collective agreements may differ from the minimum standards defined by the Labour Code only in favour of the employees. Exceptionally, based on concrete authorisation granted by the law, the collective agreement may prescribe regulations that are more unfavourable for the employees. In general these regulations facilitate for differences from the regulations on working hours, rest periods and remuneration for work. Mainly the collective agreements contain not just minimum standards, but *more grants/benefits to the employee*. Labour contract or local agreement may differ from the collective agreement(s) if it contains even more favourable regulations for the employee.

4.9. To what extent are deviations and derogation from the provisions of collective agreements allowed?

Labour contract may differ from the collective agreement(s) if it contains

even *more favourable regulations for the employee*. So it is not possible to differ in a less favourable way. There exists a similar relationship also among the different collective agreements. Lower-level collective agreements may differ from the higher ones, but only when the differing regulations are more favourable for the employees.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

5.1. Has this Directive been implemented in your country?

Yes

5.2. Does it apply to all undertakings, or only those employing at least 100 or at least 50 employees?

It is applicable to all undertakings.

5.3. Has the Directive been implemented by legislation or by collective agreements?

By legislation.

5.4. What impact has this Directive had on the process of consultation

- in business where there are collective agreements and/or works councils

- in businesses where there is no collective agreement or works council

Is no matter is there a collective agreement or works council, because it also refers to trade unions.

5.5. Is it possible for an employee who is not a member of a union to benefit from this directive?

Certainly yes, because the trade union can represent the unorganised workers also.

5.6. If so, what can be done and by whom to enforce this?

Trade unions may file for court action (demurrer), also the works council in case of collective redundancy.

6. Transnational impact

6.1. Has the Posting of Workers Directive 96/71/EC been implemented in your country?

Yes

6.2. Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

No

6.3. Has this created any problems or led to litigation?

Yes

6.4. How has this Directive related to collective agreements, where the terms of the collective agreement are more favourable than those to which the worker is entitled under the Directive?

The Labour Code states that the regulation need not be applied if the employee posted is subject to more favourable regulations in terms of the requirements by virtue of the relevant labor law or the parties' agreement to the contrary.

8. Icelandic Report

CONGRESS OF EALCJ

**Oslo Military Academy
29th and 30th June 2007**

“Collective Agreements – a hindrance or a support for social protection?”

QUESTIONNAIRE

Icelandic Report

1. Definition of collective agreements

1.1 How is a collective agreement defined in your country?

There is no definition of collective agreement to be found in statute law, however a collective agreement has been defined in this way:

A collective agreement is a written agreement between a trade union on the one hand and employers or Confederation of Employers on the other hand relating to workers wages and terms of employment and applies to every member of the trade union.

The basic legal ground of collective agreements is in the Act on Trade Unions and Industrial Disputes no. 80/1938 which was passed in 1938. The Act sets out the rules governing industrial disputes, the foundation of and open admittance to trade unions, rules on collective agreements, shop stewards, strikes and lockouts, conciliation in industrial disputes and the Labour Court.

1.2 At which level are collective agreements concluded: company, industry, national, other?

Collective agreements differ according to their nature. A collective agreement can apply to every member of a trade union and can cover many different topics. Collective agreements are also concluded at a national level for a special company or industry.

Thus there is a distinction between general collective agreements and agreements that are more specified in the concerned field or pertaining to few matters but referring in other matters to the provisions of the general collective

agreement. No distinction is made between different types of collective agreements in the sense of definition or legal status.

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements?

2.2 What proportion of employees are members of trade unions?

The occupational coverage of collective agreements is linked to the signatory trade unions and covers under Act no. 55/1980 all work that is customarily performed by workers who are members of the signatory union or is performed by workers engaged in the same type of work that the agreement applies to.

Trade unions are open to all those working in the trade concerned within the district of each union in accordance with further fixed rules contained in their statutes. Applicants may not be denied membership based on gender, national origin or on other similar grounds. Union density is very high in Iceland compared to most countries, or around 88%.

3 Enforcement of collective agreements

3.1 Are collective agreements legally binding?

3.2 If so, who is bound by a collective agreement?

Collective agreements between trade unions and employers relating to workers wages and terms are primarily binding between the parties. But they are also legally binding as the minimum right of the worker according to the Act on Wage Earners' Terms no. 55/1980. The worker can negotiate for better wages and terms, but all agreements with less right than the collective agreement states are by law invalid. This applies to all workers and employers, regardless of their membership in unions.

3.3 Can collective agreements be enforced in the courts?

- by unions
- by individuals

3.4 Which court has jurisdiction?

The Labour Court of Iceland has jurisdiction in matters concerning violations of a collective agreement or relating to disagreement on the interpretation of a collective agreement or its validity. Federations of trade unions and employers' associations proceed with cases before the Court for and on behalf of their members. Associations not being members of the Federations proceed with their cases themselves. Unaffiliated parties will proceed with their cases themselves. If a federation or union refuses to instigate proceedings for its member the party concerned is authorized to file the suit himself, but prior to a writ of summons being issued he shall submit to the Precedent of the Labour Court evidence of the refusal of the union or federation concerned.

As the jurisdiction of the Labour Court is mainly limited to the above mentioned matters concerning collective agreements other disputes that may arise concerning collective agreement must be brought before the ordinary court system and enforced there. Claims arising from individual contracts of employment must also be tried in the general courts.

4. Effect on individual contracts of employment

- 4.1 Are collective agreements incorporated into individual contracts of employment?**
- 4.2 Does this apply only to companies which are bound by the collective agreement?**
- 4.3 Do the provisions of collective agreements apply to unorganised workers?**
- 4.4 Do the provisions of collective agreements have automatic “erga omnes effect” that is, are unorganised employers obliged to apply those provisions?**
- 4.5 Can “erga omnes effect” be attributed to a collective agreement by a public authority? (declaration of general applicability)**
- 4.6 if so, which provisions can be declared generally applicable?**
- 4.7 Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace?**

Collective agreements are considered incorporated into employment contracts between mutually bound parties. This applies only to companies which are bound by the collective agreement. The provisions of collective agreements can apply to workers who do not belong to a union either by reference clauses in the employment contracts or because it is mandatory by law.

Collective agreements have an “erga omnes effect” according to the Act on Wage Earners’ Terms no. 55/1980. Provisions in a collective agreement can be declared generally applicable by law and most often it regulates wages, working hours, holidays etc. People who are not direct employees (e.g. agency workers, or economically dependent workers) are protected by collective agreements in their workplace if such provisions are agreed or it is stated in law or exists because of “erga omnes effect”.

- 4.8 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?**
- 4.9 To what extent are deviations and derogation from the provisions of collective agreements allowed?**

Ref. 3.2

5. Implementation of the Consultation Framework Directive – 2002/14/EC

- 5.1 Has this Directive been implemented in your country?**
Yes, as Act no. 151/2006.
- 5.2 Does it apply to all undertakings, or only to those employing at least 100 or**

at least 50 employees?

It applies to those undertakings employing at least 50 employees.

5.3 Has the Directive been implemented by legislation or by collective agreements?

The Directive has been implemented by legislation.

5.4 What impact has this Directive had on the process of consultation

-

- **in businesses where there are collective agreements and/or works councils?**
- **in businesses where there is no collective agreement or works council?**

Up until now there have been now Acts in the Icelandic legislation providing for a general participation in the preparation of decision making in companies as is provided for in this Act. Furthermore, there is no tradition in the country for cooperation between employees and employers although such cooperation has occurred. Therefore, the right of the employees working with the companies to which the Act applies increased considerably when the Act took effect.

5.5 Is it possible for an employee who is not a member of a union to benefit from this directive?

Yes, the law applies to everyone.

5.6 If so, what can be done and by whom to enforce this?

Pursuant to Article 9 the employees' representatives enjoy the same protection by law as shop stewards do pursuant to Act no. 80/1938 and Act no. 94/1985 on the collective agreements for civil servants. Companies violating the Act may have to pay a fine.

6. Transnational impact

6.1 Has the Posting of Workers Directive 96/71/EC been implemented in your country?

Yes, as Act no. 54/2001.

6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

The Act includes posted workers in all kinds of industries/ activities.

6.3 Has this created any problems or led to litigation?

Not as known of.

6.4 How has this Directive related to collective agreements, where the terms of the collective agreement are more favourable than those to which the worker is entitled under the Directive?

The remuneration and employee benefits are regulated by law with the reservation that the employee can enjoy higher wages, better terms or greater benefits pursuant to the employment contract with the employer

in question or pursuant to collective agreements or law and regulations of the state where he usually works.



9. Report of Irish Labour Court

The Labour Court

1. Definition of collective agreements:

- 1.1 How is a collective agreement defined in your country?
- 1.2 At which level are collective agreements concluded: company, industry, national, other?

Response.

The meaning ascribed to the term “collective agreement” varies somewhat for the purposes of different statutes. The most commonly used definition is that contained at s 25 of the Industrial Relations Act 1946 which defines an “employment agreement” as meaning: -

“An agreement relating to the remuneration or the conditions of employment of workers of any class, type or group made between a trade union of workers and an employer or a trade union of employers....”

The terms “employment agreement” and “collective agreement” are co terminus. A shorter and broader definition of the term “collective agreement” is contained at s 2(1) of the Employment Equality Act 1998 (as amended), as follows: -

“Collective agreement means an agreement made between an employer and a body or bodies representative of employees to whom the agreement relates”

Collective agreements can be negotiated at the level of the individual enterprise, at industry level or nationally.

The system which has operated in Ireland for many years is that social partnership agreements are periodically negotiated nationally between the Government, the employers body and the trade union congress on a broad range of social and economic issues. These agreements also provide for pay increases and associated matters relating to employment. These national agreements invariably provide that the pay and other employment related terms should be negotiated and implemented at local or industry level as appropriate.

Thus, while the national agreement can properly be described as a collective agreement, the practice is that its terms are subsequently incorporated into the collective agreements relating to individual employments or industries, depending on the level at which such agreements are normally concluded.

The majority of collective agreements are made at the level of the individual employment. There are, however, a number of industry or sector agreements. These are found mainly in homogeneous industries which are labour intensive and characterised by internal competition. For example, there are currently industry agreements in relation to such activities as construction, electrical contracting, contract cleaning and private security services

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements?

2.2 What proportion of employees are members of trade unions?

Response

There is a significant disparity in the proportion of workers covered by collective agreements as between the public and the private sectors. In the public sector circa 90% of employees are encompassed by collective agreements. Here trade union density is of the order of 80%.

In the private sector the position is markedly different. There are no official statistics relating to the coverage of collective bargaining or collective agreements. However, using trade union density figures, with certain adjustments, academic opinion is that circa 28% of the private sector workforce are covered by collective agreements. The trade union density in the private sector is of the order of 23%. The difference between the proportions covered by collective agreements and those in trade unions is explained by the fact that while some workers in employments covered by a collective agreements may not be members of a trade union their pay and conditions are nonetheless determined by the agreement.

3 Enforcement of collective agreements

- 3.1 Are collective agreements legally binding?
- 3.2 If so, who is bound by a collective agreement?
- 3.3 Can collective agreements be enforced in the courts?
 - by unions
 - by individuals
- 3.4 Which court has jurisdiction?

Response

There is a presumption in Irish law that the parties to a collective agreement do not intend to create legal relations. Hence a collective agreement is not normally enforceable in law. There are however exceptions to this rule.

- *The parties may expressly provide that the agreement is intended to create legal relations or the conduct of the parties may be such as to imply such a term.*
- *The parties may register the agreement with the Labour Court under the Industrial Relations Act 1946 and this has the effect of making it legally enforceable.*
- *Parties may derogate from the provisions of certain provisions of the Working Time Directive by collective agreement. These agreements are legally enforceable.*

Where an agreement is registered by the Labour Court under the Act of 1946 it is applicable to every worker of the class, type or group to which it is expressed to relate and his or her employer. Otherwise the agreement is only applicable to employers and workers who are party to the agreement or where the terms of the agreement are expressly incorporated in an individual contract of employment.

In the case of a registered agreement a complaint regarding non-compliance may be made by an employer or a trade union affected by the agreement. The complaint is made to the Labour Court. An individual worker does not have locus standi to bring a complaint.

Where a term of a collective agreement (whether registered or otherwise) is incorporated in the individual contract of employment an

aggrieved employee may bring proceedings seeking redress for breach of contract before a Court of competent jurisdiction.

4. Effect on individual contracts of employment

4.1 Are collective agreements incorporated into individual contracts of employment?

Response

The terms of a registered agreement are incorporated by operation of law in the contract of employment of every worker to whom it relates. In other cases the terms may be incorporated by an expressed or implied provision in the contract.

4.2 Does this apply only to companies which are bound by the collective agreement?

Response

Generally speaking yes. However for the reasons mentioned above companies which come within the ambit of a registered agreement are covered by its terms regardless of whether or not they are party to the agreement.

4.2 Do the provisions of collective agreements apply to unorganised workers?

Response

Yes, in the case of registered agreements. In the case of employments covered by a collective agreement the terms of the agreement can be applied to those who are not members of a trade union by a provision in their contract of employment incorporating the terms of the collective agreement.

4.3 Do the provisions of collective agreements have automatic “erga omnes effect” that is, are unorganised employers obliged to apply those provisions?

Response

No, except in the case of registered agreements.

- 4.4 Can “erga omnes effect” be attributed to a collective agreement by a public authority? (declaration of general applicability)

Response

No.

- 4.5 if so, which provisions can be declared generally applicable?

N/A

- 4.6 Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

Response

There is no reason in principle as to why such workers cannot be covered by collective agreements. However the agreement would have to contain an express provision to that effect. In practice very few collective agreements do contain such a provision.

- 4.7 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?

Response

Yes. This is particularly the case with industry agreements, including registered agreements.

- 4.8 To what extent are deviations and derogation from the provisions of collective agreements allowed?

Response

There is provision in all national agreements (national partnership agreements referred to at 1 above) whereby an employer can plead inability to pay the terms of the agreement. Such a plea, if contested, must be processed in the manner prescribed in the agreement. This involves the employer making full disclosure of its financial circumstances to the trade Union, the assessment of the financial data by an independent assessor and finally, if agreement is not reached, a reference to the Labour Court. The decision of the Court is then final and binding. The Court can, in limited circumstances, make provision for the introduction of cost off-setting measures to ameliorate the impact of implementing the agreement.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

- 5.1 Has this Directive been implemented in your country?

- 5.2 Does it apply to all undertakings, or only to those employing at least 100 or at least 50 employees?

5.3 Has the Directive been implemented by legislation or by collective agreements?

5.4 What impact has this Directive had on the process of consultation - in businesses where there *are* collective agreements and/or works councils?

in businesses where there is no collective agreement or works council?

5.5 Is it possible for an employee who is not a member of a union to benefit from this directive?

5.6 If so, what can be done and by whom to enforce this?

Response

The Directive has been implemented. It applies to undertakings employing at least 50 employees. It was implemented by primary legislation. To date it has had little discernable impact.

The provisions of the legislation are applicable in all employments which meet the threshold numbers regardless of whether the workforces is unionised or not. Procedures provided by the legislation can be triggered by a request made by 10% of the workforce (subject to a minimum of 15 and a maximum of 100 workers) requesting that a forum be put in place. The request can be made to the employer or in confidence to the Labour Court. If a request is made to the Court it will investigate if the statutory conditions are met and if so it can issue a notice requiring the employer to put arrangements in place.

Where a request is made directly to the employer and a dispute arises as to the applicability of the Act, the matter is referable to the Labour Court.

6. Transnational impact

6.1 Has the Posting of Workers Directive 96/71/EC been implemented in your country?

6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

6.3 Has this created any problems or led to litigation?

6.4 How has this Directive related to collective agreements, where the terms of the collective agreement are more favourable than those to which the worker is entitled under the Directive?

Workers posted to work in Ireland from other EU Member States have the protection of all Irish employment legislation in the same way as

employees who have an Irish contract of employment. This is by virtue of the Protection of Employees (Part-Time Work) Act 2001, section 20, which states that all employment legislation which confers rights or entitlements on an employee applies to a posted worker in the same way that it applies to any other employee and that, a person, irrespective of nationality or place of residence, who works in the State under a contract of employment, has the same rights under Irish employment protection legislation as Irish employees.

As the Industrial Relations Act 1946 applies to posted workers, all collective agreements registered under section 27 of that Act apply to posted workers.

There has been a significant number of cases brought before the Labour Court and the Rights Commissioners under various statutes alleging contraventions of both employment rights law and registered agreements. These have been mainly from workers from the new accession states

10. Italian Report

Ealcj meeting on collective agreement - Oslo 2007
QUESTIONNAIRE
Italian reply

1. Definition of collective agreements:

1.1 How is a collective agreement defined in your country?

As a private contract between Unions and undertakings Association under civil code force and according to the type of the civil contract in favour of third persons (the workers).

1.2 At which level are collective agreements concluded: company, industry, national, other?

We distinguish between two levels: first level is the national one, second level is the company, plant, or territorial level.

Beginning from the highest level, we have: a) accordi (agreements) confederali, for all workers, agreed by Confederation of Unions, e.g. the collective agreement of 1964 on fair dismissals, received in the Act 604/1966; b) federal agreements, agreed from all Unions of an industry (e.g. for metal workers, which includes automotive, steel, electricity, etc; textile; chemical, etc); c) company and plant agreement.

There is a pressure from undertakings association to reduce the number of levels of bargaining.

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements?

Due to the number of levels of bargaining, I have not found in official websites any statistic; the main and historical Union websites give the following numbers of members in the year 2006: CGIL 5.566.000, CISL 4.346.000, UIL 1.936.000; between 1/2 and 1/3 of these members are retired workers; the minor Unions don't give statistic about their members.

2.2 What proportion of employees are members of trade unions?

Due the fact that in Italy we don't have the close shop system, the number is not high; it can be calculated through the deductions on the salary made by the employer in favour of the Union chosen by the worker.

3. Enforcement of collective agreements

3.1 Are collective agreements legally binding?

The Italian Constitution recognises the right of citizens to associate freely (sec. 19) and the right of employers and employees to join associations or unions.

Sec. 39 of the Constitution regulates trade unions and specifies that only the registered ones can obtain legal status and can make collective agreements valid erga omnes (for all employers and employees). This provision never was actuated, because a bill regulating the registration of unions never passed, for political reasons (the main Union, CGIL, was collateral to the Communist Party).

So, as the constitutional model of erga omnes agreement never was enforced, collective bargaining is still now ruled by civil code. Unions do not need any recognition and can organize themselves without any fixed legal model. They stipulate collective agreements, which are legally enforceable not erga omnes, but only towards the employers and the employees associated with the stipulating unions, according to the rules of the civil law. Usually the employers recognise collective agreements stipulated by the most important unions and fix wages in accordance with them for all their employees.

The force of collective agreements is then based on civil code representation (see n. 2.c); so the agreements are compulsory only for parties enrolled in the unions who have signed the collective agreement relevant in the case. When the employer is not enrolled the judge can apply the minimum wage of the collective agreement of the category the industry belongs to as a parameter of the fair salary, according to sec. 36 of the Constitution and sec. 2099 of civil code.

In judiciary there are many consequences of this civil approach; e.g., in interpretation we apply the rules of civil contracts, not of Acts; the Courts cannot know directly the agreements, etc..

Moreover some Acts refer to some parameters of collective agreements signed by most representative Unions to establish a uniform regulation and so they reach indirectly an effect erga omnes: for instance the maximum

age of apprenticeship, or the minimum salary on which calculate the social security contributions.

3.2 If so, who is bound by a collective agreement?

3.3 Can collective agreements be enforced in the courts?

- by unions
- by individuals

3.4 Which court has jurisdiction?

Of course, as civil contract in favour of third persons, both by Unions and by individual, in Labour Court.

An Act of 1998 allowed the Corte di Cassazione to interpret directly the national collective agreements of civil servants; a successive Act also the collective agreements of private workers, an to give a prejudicial interpretation. The Unions or the individual rarely have asked for such prejudicial interpretation.

4. Effect on individual contracts of employment

4.1 Are collective agreements incorporated into individual contracts of employment?

Yes, for the time of there validity.

4.2 Does this apply only to employees of companies which are bound by the collective agreement?

See 3.1.

4.3 Do the provisions of collective agreements apply to unorganised workers?

No, but if the employer belongs to an association which has signed the collective agreement of the industry, he is bound to apply the collective agreement also to all workers, also to the unorganised ones.

4.4 Do the provisions of collective agreements have automatic “erga omnes effect” that is, are unorganised employers obliged to apply those provisions?

No. See 3.1

4.5 Can “erga omnes effect” be applied to a collective agreement by a declaration of general applicability from a public authority?

No. But there is a kind of reception by decree and publication on Official Gazette of the collective agreements of civil servants.

4.6 If so, which provisions can be declared generally applicable?

4.7 Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

Yes. There is a nominal distinction: collective agreements are for employees, economic accords are for same categories of self-employed (i.e. commercial agents, doctors (those who are not employees) of National Health Service).

4.8 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?

Yes.

4.9 To what extent are deviations and derogation from the provisions of collective agreements allowed?

The vertical levels are independent; a collective agreement of lower level can derogate in pejus (pejorative) to a national agreement; the individual contract can derogate just in melius (can just improve the conditions of collective agreement).

5. Implementation of the Consultation Framework Directive – 2002/14/EC

5.1 Has this Directive been implemented in your country?

Yes.

5.2 Does it apply to all undertakings, or only to those employing at least 100, or at least 50, employees?

At least 50 employees.

5.3 Has the Directive been implemented by legislation or by collective agreements?

By Act 6 febbraio 2007 n. 25, which gives a general framework and refers to the collective agreements signed by the most representative Unions on national level for the way how to inform and consult employees.

5.4 What impact has this Directive had on the process of consultation -

- in businesses where there are collective agreements and/or works councils?
- in businesses where there is no collective agreement or works council?

5.5 Is it possible for an employee who is not a member of a union to benefit from this directive?

The short time from implementation doesn't allow any experience on it.

5.6 If so, what can be done and by whom to enforce this?

6. Transnational impact

6.1 Has the Posting of Workers Directive 96/71/EC been implemented in your country?

Yes, by Act 25 febbraio 2000 n. 72.

6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

6.3 Has this created any problems or led to litigation?

No, even because the principles of the Directive belong already to the Italian legal framework.

6.4 How does this Directive relate to a situation where the terms of the collective agreement is more favourable than those to which the worker is entitled under the Directive?

The principle of the most favourable treatment prevails.

Aldo De Matteis

11. Luxembourg Report

EALCJ 2007 TECHNICAL SEMINAR

“ Collective Agreements – a hindrance or a support for social protection “

Report from Luxembourg

1. Definition of collective agreements :

Article L. 161-2 of the Labour Law Code (Code du Travail), introduced by the Act concerning collective labour relations of June 30th 2004, defines the collective agreement as a contract concerning work relations and conditions concluded by one or more trade unions and one or more employers' organizations, or a specific company, or a group of firms having the same professional activity, or finally a group of firms which form an economic and social entity.

2. Impact of collective agreements :

In Luxembourg nearly all workmen (in the year 2000: 116.000 workmen) are members of the two major trade unions (OGB-L and LCGB), whereas the intellectual workers (“ employés privés “) are not syndicated at the same level (in the year 2000: 122.000 intellectual workers) with an exception for the financial and insurance sector in which mostly all members are represented by a specific trade union named ALEBA (judgement of the Administrative Tribunal of Luxembourg of October 24th 2000 : approximately 45.000 intellectual workers are members of a trade union and in this category ALEBA represents 9.200 intellectual workers or 20 %).

It can be thus concluded that the coverage of employees by collective agreements reflect the above mentioned proportions of employees who are members of trade unions.

It must be stressed that only trade unions which are representative on a national general scale are allowed to conclude collective agreements: these trade unions must have the necessary organization and power in order to stand a major social conflict, furthermore, obtain at least 20 percent of the expressed votes of workmen and intellectual workers in the latest professional and

social elections or, in a particularly important economic sector, dispose of the necessary efficiency and power in order to assume this responsibility and specifically on the level of the concerned employees to stand a major social conflict. “ A particularly important economic sector ” is the one that represents at least 10 percent of the employees comprising both workmen and intellectual workers. (cf. articles L. 161-3 to L. 161-7 of the Labour Law Code).

The decision about the granting, the refusal or the retreat of the national general representativity is taken by the Minister of Labour. The administrative courts (Administrative Tribunal of first degree and Administrative Court) have jurisdiction for the legal objections of these decisions.

3. Enforcement of collective agreements :

The collective agreement has to be signed by all parties that participated in the negotiations and is deposited at the Labour inspection office (“ Inspection du travail et des mines “). The collective agreement thus deposited is effective on the day following the deposit and is communicated to the employees by advertisement on their working place or, on request of the employee, by electronic mail or by traditional mail.

The collective agreement has a validity of at least six months to a maximum period of three years and is legally binding for all the parties that have signed it personally or by a representative. When an employer is bound by such collective agreements he has the obligation to apply them to the whole personnel concerned by the agreement. But, except a contrary disposition of the collective agreement, the working and the salary conditions of the employees who have managing qualification (“ cadres “) are not regulated by the collective agreement.

Interpretation requests of the collective agreements can be formed by individuals or trade unions before the Labour courts (art. L. 162-13.). The Labour courts are also competent for questions arising from the execution of the collective agreement. Furthermore, trade unions, which are contracting parties of a collective agreement, can exercise all legal actions that can arise from this agreement in favor of one of their members without having to justify a mandate of this member, under the condition that this member has been informed and has not expressed any opposition.

4. Effect on individual contracts of employment :

The collective agreements are not incorporated into the individual contracts of employment but the contracts have to

respect the provisions of the collective agreement. In fact the Labour Law Code provides in its Article L. 162-12 (7) that any stipulation of an individual employment contract, any interior regulation or any general disposition that are contrary to the clauses of a collective agreement are null and void, unless they are more favourable for the workers.

Article L. 164-8 of the Code provides that any collective agreement can be declared of general obligation (“ déclaration d’obligation générale “) for the whole of the employers and employees of the concerned profession, activity, branch or economic sector and this “ Declaration of general obligation “ has to determine precisely its application domain. The declaration demand is addressed to the Minister of Labour, either by the professional group of employers of the concerned sector or by the trade union that is representative on a national general scale or by the trade union that has the representativity in a particularly important economic sector of the country. The Declaration of general obligation is made by a government decree (“ règlement grand-ducal “) on the basis of a joint proposition of the two groups of the equal composed commission of the National Conciliation Office.

The collective agreement having thus obtained the Declaration of general obligation applies therefore to companies which are not subscribing parties of the collective agreements as well to unorganized workmen and intellectual workers. If the Declaration of general obligation foresees it the provisions of the collective agreement can also apply to agency workers or economically dependent workers, i.e. when the above mentioned Declaration points it out specifically in its provisions concerning its application domain.

As we underlined above, any stipulation of an individual employment contract, any interior regulation or any general disposition that are contrary to the clauses of a collective agreement are null and void, unless they are more favourable for the workers (cf. art. L. 162-12 (7)), and on the other hand any stipulation of a collective agreement that is contrary to the laws and decrees is null and void, unless it is more favourable for the employees (cf. art. L. 162-12 (6)).

5. Implementation of the Consultation Framework Directive – 2002/14/EC :

It must be underlined that the domain of the representation of the personnel was regulated in our Labour Law by the Act of May 18th 1979 reforming the delegations of personnel (“ Loi du 18 mai 1979 portant réforme des delegations du personnel “).

The 2002 Directive has been implemented in our legal framework by the law of July 31st 2006 and is now incorporated in the newly published Labour Law Code (Code du Travail).

It is provided that any employer of the private sector that employs regularly at least 15 employees is due to organize personnel's delegations elections, as well as the employer of the public sector that employs regularly at least 15 workmen (art. L. 411-1 (1) of the Labour Law Code). In the company whose personnel doesn't exceed 100 employees a unique personnel's delegation is appointed by a unique election, whereas in the companies that exceed 100 employees a workmen's delegation has to be elected if the firm employs more than 15 workmen and an intellectual workers' delegation is to be elected if the firm employs more than 15 intellectual workers. For the computation of the personnel occupied by a temporary work agency the number of the permanent employees and the number of the workers that have been employed by mission contracts during a minimum period of ten months in the year preceding the computation are to be considered.

Article L. 414-1 (1) of the Labour Law Code provides that the mission of the personnel's delegation is to preserve and to defend the interests of the personnel of the company in the fields of working conditions, of employment security and of social statute and in this context the personnel's delegation is specifically competent for giving its opinion on and formulating propositions concerning any question regarding the improvement of the working conditions and of the social situation of the employees, for presenting any individual or collective complaint to the employer, for giving its opinion on the elaboration or the modification of an interior regulation, for proposing modifications of the interior regulation, for participating in the working place protection and of its environment and in the preventing of professional accidents and sicknesses and giving its opinion on the instauration, modification or abrogation of a complementary pension regime. Furthermore, each principal delegation designates amidst its members a delegate for the personnel's security and a delegate for the equality between the male and female employees.

It is to be added that the employer or his managing director has to deliver monthly the delegation all useful information regarding the evolution and economic life of the company, i.e. all information about security and health risks and the needed protection and prevention remedies. He is also obliged to give the delegation the statistics by gender of the recruitment policies, promotions, mutations, dismissals, remuneration and formation of the personnel.

The above mentioned Directive, as incorporated fully in our labour law, has thus an important impact on the consultation process within the personnel's delegations, regardless of the existence of collective agreements, and the employees who are not members of trade unions but who are employed by a company that complies to the legal requirements concerning the implementation of delegations of personnel (cf. art. L. 411-1 of the Labour Law Code) get therefore full protection by the Directive 2002/14 EC.

6. Transnational impact :

The Directive 96/71 EC of the European Parliament and the Council of December 16th 1996 has been implemented in our legal framework by the law of December 20th 2002 (“ Loi du 20 décembre 2002 portant: 1. Transposition de la directive 96/71/CE du Parlement Européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services ; 2. Réglementation du contrôle de l'application du droit du travail “) and is now incorporated in our Labour Law Code, the law of 2002 having been abrogated by the July 31st 2006 law creating a Labour Law Code.

According to article L. 010-1. (1) of the Labour Law Code (article 1 of the 2002 Act) and article L. 141-1. (1) of the Code *constitute policy dispositions of national public order* applicable to all workers having a professional activity on the territory of the Grand-Duchy of Luxembourg and to the workers temporarily detached *all legal, governmental, administrative dispositions, as well as the dispositions of collective agreements having received a Declaration of general obligation, concerning the employment contract, the social minimum salary, the working time, the paid holidays, the legal festive days, the regulation of part-time work, the non-discrimination, the collective agreements and the security and health of workers on their work place.* The provisions of this article apply to all employees, regardless of their nationality, working for any company, regardless of its nationality and its legal office.

Detachment of a worker is defined as being the one executed for a short or determined period on behalf of the company on the territory of the Grand-Duchy of Luxembourg in the framework of a contract concluded by the sending firm and the recipient company of the service which has its activity in Luxembourg and concerns mainly the construction activities such as setting up of a machine, excavation, installation of security and alarm devices, renovation, demolition, maintenance or cleaning and painting activities (article L. 141-1. (2) of the Code). The above mentioned legislation has therefore not been extended to other activities.

It has to be added that the Labour inspection office is charged with the control of the application of the law and that the workers

having been detached can intent a legal action before the competent Luxemburgish jurisdictions in order to enforce their rights regarding working and employment conditions that are guaranteed by articles L. 141-1 to L. 141-4 of the Labour Law Code regardless of the faculty, according to international conventions concerning judiciary competence, to intent a legal action before the competent jurisdictions of another country.

Esch-sur-Alzette, Luxembourg, June, 2007

Tom MOES, juge de paix à Esch-sur-Alzette, juge-suppléant au Conseil arbitral des assurances sociales – Past President of EALCJ.

12. Maltese report

QUESTIONNAIRE

Introduction

The intention of this Congress is to concentrate on the effect of collective agreements on the individual and the role they play in implementing and developing European labour law. I am indebted to Michel Blatman's General Report to the XIVth Meeting of European Labour Judges in Paris on 4th September 2006 (available on the ILO web-site www.ilo.org together with national reports) which covers with great clarity the comparative role of collective agreements in the participating countries.

This short questionnaire is intended to be used as a springboard for national reports dealing with the specific issues of this Congress. I hope that you will use it as a basis for explanation rather than feel confined to the exact format of the questionnaire.

1. Definition of collective agreements:

1.1 How is a collective agreement defined in your country?

A Collective agreement is an agreement entered into between a trade union, or an employers' association and a group of workers.

1.2 At which level are collective agreements concluded: company, industry, national, other? Company

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements? 40 per cent

2.2 What proportion of employees are members of trade unions? 60 per cent

3. Enforcement of collective agreements

3.1 Are collective agreements legally binding? Yes

3.2 If so, who is bound by a collective agreement? Both parties.

3.3 Can collective agreements be enforced in the courts?

- by unions Yes
- by individuals Yes

3.4 Which court has jurisdiction? Industrial Tribunal and the First Hall of the Civil Court

4. Effect on individual contracts of employment

4.1 Are collective agreements incorporated into individual contracts of employment? In some cases yes and in some cases no.

- 4.2 Does this apply only to employees of companies which are bound by the collective agreement? Yes
- 4.3 Do the provisions of collective agreements apply to unorganised workers? No
- 4.4 Do the provisions of collective agreements have automatic “erga omnes effect” that is, are unorganised employers obliged to apply those provisions? No
- 4.5 Can “erga omnes effect” be applied to a collective agreement by a declaration of general applicability from a public authority? No
- 4.6 If so, which provisions can be declared generally applicable? N/A
- 4.7 Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace? Yes
- 4.8 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement? No
- 4.9 To what extent are deviations and derogation from the provisions of collective agreements allowed? They are not allowed

5. Implementation of the Consultation Framework Directive – 2002/14/EC

- 5.1 Has this Directive been implemented in your country? Yes
- 5.2 Does it apply to all undertakings, or only to those employing at least 100, or at least 50, employees? Those employing 100
- 5.3 Has the Directive been implemented by legislation or by collective agreements? By legislation
- 5.4 What impact has this Directive had on the process of consultation -
- in businesses where there are collective agreements and/or works councils? Positive impact.
 - in businesses where there is no collective agreement or works council? Positive impact.
- 5.5 Is it possible for an employee who is not a member of a union to benefit from this directive? Yes
- 5.6 If so, what can be done and by whom to enforce this? By the employee.

6. Transnational impact

- 6.1 Has the Posting of Workers Directive 96/71/EC been implemented in your country? Yes
- 6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)? No.
- 6.3 Has this created any problems or led to litigation? Not yet
- 6.4 How does this Directive relate to a situation where the terms of the collective agreement is more favourable than those to which the worker is entitled under the Directive? The more favourable terms apply.

13. Netherlands Report

***COLLECTIVE AGREEMENTS IN THE NETHERLANDS* A HINDRANCE OR A SUPPORT FOR SOCIAL PROTECTION?**

Answers to the Questionnaire for the EALCJ congress
Oslo, June 2007

Tjaard van Löben Sels
Taco van Peijpe

1. Definition of collective agreements

An agreement between one or more employers or organisations of employers and one or more organisations of workers, which mainly or exclusively regulates working conditions to be observed in employment contracts *Article 1 of the Act on Collective Agreements* .

A distinction is made between *branch agreements*, concluded by an employers organisation (or several employers organisations) and *enterprise agreements* concluded by a single employer. Branch agreements usually cover all enterprises in an certain branch of industry without territorial limitations and are thus nearly always national.

In some branches of industry a mixture of branch- and enterprise agreements is found: the branch agreement regulates only the main topics of the working conditions and leaves room for further bargaining about detailed matters at sectoral and enterprise level. The printing industry is an outstanding example in this respect.

2. Impact of collective agreements

Approximately 80 % of the employees are covered by collective agreements.

25 % of the employees are member of trade unions.

3. Enforcements of collective agreements

In the Netherlands, collective agreements are legally binding.

Collective agreements are treated as contracts under civil law. However, the normative function of the agreement (Articles 12 and 13 of the Act on Collective Agreements) makes the collective agreement directly binding on the members of the contracting organisations, which lends it metaphorically speaking a “legislative” character.

Provisions of collective agreements can be declared generally applicable by decree of the Minister of Social Affairs (*erga omnes effect*). The thus “extended” provisions have the same effect as secondary legislation and therefore may be said to have statutory status.

Collective agreements can be enforced in the courts both by unions (i.e. the union which is party tot the collective agreement) and by individuals.

All legal disputes concerning collective agreements fall within the jurisdiction of the *Kantonrechter*, an unus chamber of the ordinary Court (*Rechtbank*). The *Kantonrechter* is competent in all cases concerning employment

contracts, all cases concerning rent, small civil claims (up to € 5000,-), penal misdemeanours and a number of other fields.

In several branches of industry the organisations have established joint bodies for arbitration of conflicts concerning collective agreements.

4. Effect on individual contracts of employment

The terms and conditions of employment contained in a collective agreement *by which both the employer and the employee are bound* are automatically incorporated into the employment contract.

The terms and conditions of employment contained in a collective agreement *by which only the employer is bound* are *not* incorporated into the employment contract, but there is an obligation of the employer (towards the contracting organisations) to apply the collective agreement as well with regard to unorganised employees.

The terms and conditions of employment contained in *extended provisions* of a collective agreement are automatically incorporated into all employment contract to which they apply, regardless of whether the employers and employees are organised or not.

Provisions of collective agreements do not have an automatic “erga omnes effect”. Unorganised employers are only obliged to apply provisions of a collective agreement if those provisions are declared generally binding by a decree of the Minister of Social Affairs and Employment (on basis of the *1937 Collective Agreements (Declaration of Generally Binding and Non Binding Status) Act*).

Not all provisions can be declared generally binding, only those which are related to employment conditions (broadly interpreted). The Minister of Social Affairs en Employment has in 1998 published the policy guidelines against which the provisions can be checked.

As an exception others than direct employees can be protected by collective agreements in their workplace. For agency workers this is regulated by law (*the 1998 Placement of Personnel by Intermediaries Act*).

In principle the agency worker has to be paid the wages of the recipient. If the collective agreement for temporary employment agency workers (uitzend-CAO) is applicable this agreement has priority. If the Uitzend-CAO is not applicable, but there is a collective agreement by which the recipient is bound, this agreement has priority. If both collective agreements are applicable the law states no preference rule. It is assumed that, in this overlapping situation, the collective agreement to which the recipient is bound has priority.

Article 12 of the Act on Collective Agreements says that any deviation or derogation of the collective agreement is void.

It is assumed, however, that in general it is possible to deviate in favour of the employee. This deviation is not possible if the collective agreement itself states that it has a “maximum” or “standard” character.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

legislation

The Consultation Directive has been implemented in The Netherlands. To be precise: the “implementing” legislation existed already before the adoption of the Directive, only some minor adaptations were considered necessary. It is generally believed that the provisions of the Dutch Works Councils Act (1971) meet the requirements of the Directive.

with regard to Article 4 of the Directive

Works Councils must be consulted by the employer about proposed important decisions, for example concerning restructuring of the enterprise. The employer is required to provide all the information the works council needs for a proper fulfillment of its tasks. Information must be given at such a stage that the works council will have an opportunity to influence the decisions to be taken by the employer.

with regard to Article 5 of the Directive

The Works Councils Act allows for the possibility for an employer to opt out of the regime of the Act. The employer needs the permission of the (tripartite) National Social and Economic Council (SER). The Works Councils act was amended in December 2004 in order to meet the requirements of the Directive. Now The Social and Economic Council can only give its permission for an opt-out if provisions have been made (for example on the basis of an agreement) for information and consultation as required in article 4 of the Directive.

In practice it is very unusual to opt out. Consultation offers a good opportunity for the employers to gain support for their policy. A codetermination regime in a collective agreement as an alternative for the statutory regime is possible, but this is usually unattractive for the unions and the workers since the Act offers a high level of codetermination rights (including the right to appeal against employers’ decisions which deviate from the advice of the works council and also including certain codecision rights). Sometimes the capacities of the works councils are extended by collective agreement, for example by adding topics to the list of codecision rights.

with regard to Articles 6 and 8 of the Directive

Confidentiality of certain information as mentioned in Article 6 of the Directive is also provided by the works Councils Act. Since Article 8 of the Directive requires protection of rights, the Dutch legislator has deemed it necessary to introduce a special provision offering a remedy in case an employer imposes

confidentiality on the works council in an unreasonable manner. The Court (Kantonrechter) has the power to lift the confidentiality.

with regard to Articles 7 and 8 of the Directive

The Dutch Works Councils Act protects the workers' representatives against any retaliation or hindrance in the performance of their duties. It is in principle forbidden to dismiss a member of a Works Council.

scope of the Works Councils Act

The Works Councils Act applies to all enterprises which have employees with an employment contract. The Act also applies (with some restrictions) to the public service. Exempted are the military, the judiciary, and the education sector. For those branches there are separate provisions for information and consultation.

If an enterprise employs 50 or more employees, it must have a works council. Approximately 80% of these enterprises actually fulfill this requirement. The other 20% could be forced by Court order to establish a works council in case the employees or the unions were to insist that they do.

The Works Councils Act also contains provisions for smaller enterprises, but these do not have to establish works councils. Enterprises with 10-50 workers must have consultation meetings with the the employees (or representatives) at least twice a year and also when a quarter of the employees asks for consultations. The provisions about information and consultation in these small enterprises appear to meet the requirements of article 4 of the Directive.

impact of the Directive

So far no noticeable effects of the Directive on the practice of information and consultation in The Netherlands can be reported. It remains to be awaited whether future litigation in The Netherlands will show influences of "consistent interpretation" of Dutch codetermination law in conformity with the Directive as interpreted by the ECJ.

position of the (unorganised) employee

The Works Councils Act applies to unorganized and organized employees without distinction.

Unions have the right to propose candidates for the works councils (as do the unorganized workers), but the works councils are formally completely independent from the unions.

At the time of introduction of the Act in 1971 the unions showed a hesitating and sometimes even negative attitude towards the works councils, since they feared that their position as independent representatives of the workers could be undermined by employer-friendly works councils. The attitude of the unions has changed over the years. The unions now co-operate with the works councils and the works council members who are unionized often play a predominant role.

Any employee in the enterprise can go to Court (Kantonrechter) and demand that the employer fulfills his obligations concerning the establishment of a works council and the election of its members.

The Works Council itself has standing in Court to enforce its rights under the Act.

6. The Posting Directive and transnational impact of collective agreements.

implementing legislation

The Posting of workers Directive 96/71/EC has been implemented by the 1999 Act on employment conditions in case of transnational employment (WAGA; hereafter: Transnational Employment Act). The Act was amended in 2005, when its scope concerning employment conditions in generally applicable collective agreements was extended to other industries than those mentioned in the Annex to the Directive. This amendment was intended to protect the Dutch labour market against wage-competition by employers using posted workers from recently acceded Member States.

According to the Posting Directive a posted worker is entitled to the employment conditions of the Member State where he is posted (the host State) in so far as these conditions correspond with the “hard core” list (a)-(g) in Article 3, paragraph 1, of the Directive. The Dutch Transnational Employment Act of 1999 declares the corresponding articles of the Dutch Civil Code applicable. In addition, the corresponding provisions of generally⁶ applicable collective agreements in the construction industry must be applied to posted workers in The Netherlands since 1999. The conditions of mandatory labour legislation concerning health and safety, working time and minimum wages were already held to be applicable to posted workers, pursuant to the Rome Convention.

Since 2005 the “hard core” conditions (corresponding to the list in the Directive) of **all** generally applicable collective agreements must be applied to posted workers.

problems

exemption from generally applicable agreement

In the Dutch system it is possible for the employer to apply (to the Minister of Social Affairs) for an exemption from the universal applicability of an industry wide collective agreement. In order to obtain such an exemption, the employer may conclude a special collective agreement for his own company. In 2005 a Temporary Works Agency specializing in the employment of temporary

⁶ Usually the term “generally binding” or “generally applicable” is used as a translation of the Dutch “algemeen verbindend”, to indicate the erga omnes effect, which can be given to a collective agreement by Ministerial Decree. In this context the term “generally applicable” is preferred since it is the terminology of the Directive. Confusingly for a Dutch context, the Directive also uses the term “generally binding” which appears to indicate a widespread but not universal application of the collective agreement.

workers from Member States with a low wage level applied for an exemption from the generally applicable collective agreement in order to apply its own less favourable agreement. The exemption was refused by the Minister of Social Affairs, since he considered the application of the less favourable agreement discriminatory for the foreign workers. The Agency lost its case in Court against the Ministers decision.

enforcement of applicable conditions

In May 2007 The Netherlands has lifted the last restrictions on the free movement of workers from the recently acceded Member States (except Bulgaria and Rumania). The representatives from both sides of industry in the Foundation of Labour have welcomed this step. In a framework agreement between those parties and the Minister of Social affairs special measures have been proposed to enhance the enforcement of applicable employment conditions in order to prevent social dumping. The Labour Inspectorate will play a more active role in the future.

In addition, a penal provision has been added to the Minimum Wages Act. An employer offending this Act may forfeit a fine up to € 6700,- per worker.

more favourable collective agreement

As explained above, the posted worker is entitled to the “hard core” employment conditions of generally applicable Dutch collective agreements. Since the principle of favour (German: *Günstigkeitsprinzip*) is applied in Dutch collective labour law, it may be possible (in theory) for the worker to benefit as well from more favourable conditions of another collective agreement. However, in order to benefit, the worker himself as well as his employer would have to be bound by this more favourable agreement. This is not likely to occur.

14. Norwegian Report

QUESTIONNAIRE EALCJ 29th AND 30th JUNE 2007

NORWEGIAN NATIONAL REPORT

1. Definition of collective agreements

1.1 How is a collective agreement defined in your country?

In statute law, a collective agreement is an agreement concluded between on the one side a trade union and on the other side an employer or an employers' association concerning term and conditions of employment or other matters of labour relations. This definition is similar in the two relevant acts, the 1958 Public Service Labour Disputes Act (PSLDA) applying to state civil service only, and the 1927 Labour Disputes Act (LDA) applying to all other parts of the labour market.

1.2 At which level are collective agreements concluded: company, industry, national, other?

Collective agreements are concluded at different levels. In general all agreements are collective agreements (*tariffavtaler*) in the statutory sense, and in principle the same rules apply to agreements at all levels. An exception obtains under the PSLDA, in which a distinction is made between general collective agreements and "supplementary" agreements (*særavtaler*), the latter being agreements concluded subsequent to the conclusion of a general agreement. Supplementary agreements often specify the provisions in the general ('superior') collective agreement, but are also pertaining to matters not covered by the general agreement.

Part on the employeeside of a collective agreement can only be a trade union. On the employersside both a single employer and an employers' association can be part. However, the trade unions and the employers' associations can occur at different levels;

"Basic agreements" (*hovedavtaler*) are concluded primarily between the superior organisations (*hovedsammenslutningene*) at the national level. So to say an agreement on the "inter – industry level". They are not a separate type of collective agreement, technically speaking, but merely one form of (national level) collective agreement in the general legal sense. The importance of "basic agreements" lies primarily in that they are included into, and thus form part of, the various sector or branch specific collective agreements that are concluded between the basic agreement parties and their affiliated organisations. However, a hierarchy of levels between the collective agreements exists only by virtue of, and contingent on, collective agreement regulation itself. No such hierarchy is established by legislation.

General (or 'superior') collective agreements (*overenskomster*) are concluded mainly between labour market organisations and associations at the national level, for a sector, an industry, etc.

The local subordinate collective agreements are concluded mainly between the local division of the organisation and the undertaking. General agreements provide for the conclusion of these local follow-up agreements at the enterprise level.

2. Impact of collective agreements

2.1 What proportion of employees overall are covered by collective agreements?

The coverage in the private sector can be measured in several ways. In a report from the Norwegian Working Life Committee (*Arbeidslivsutvalget*), numbers from a manpower investigation in 1998 are reproduced; nearly 60 % of the employees in the private sector are covered by a collective agreement. It is known from previous experience that survey investigations like this operate with rather high estimates. An alternative is to base the measure on numbers of employees with a pension by virtue of an agreement (*AFP*), which covers all the employees in an undertaking. Supplied by a few other sources, this gives an estimate on maximum 53 % of all employees in private sector (2000/2001).

In the public sector the situation is a bit more “surveyable”; a collective agreement concluded by an employer in the public sector must be practised also on the unorganized employees. Consequently the actual number of employers covered by collective agreements in the public sector, is 100 %.

This means that maximum 70 % of the total labour market is covered by collective agreements.

2.2 What proportion of employees are members of trade unions?

In Norway approximately 1.547.000 were members of trade unions at the end of 2006. The total number of manpower was 2.400 000 in 2005.

3. Enforcement of collective agreements

3.1 Are collective agreements legally binding?

A collective agreement is legally binding.

3.2 If so, who is bound by a collective agreement?

Primarily, it is the parties who are bound by the collective agreement. The part on the employer side can both be an employer or an employers' association. On the employee side a trade union has to be part. A single employee cannot be a part of a collective agreement as such, but in addition to the parties, the members of the organisations are bound by the collective agreement. This includes organisations affiliated the superior organisations (*hovedsammenslutningene*) and each and every employer and employee. A collective agreement is effective and enforceable from the day of it being signed or, as the case may be, from the point in time at which according to its own stipulation enters into force.

The common contract law constitutes limits; if the collective agreement by its content lies outside the authority of the organisation, the members will not be bound.

However, an employer bound by a collective agreement may, by virtue of the agreement, be committed to practise the agreement to unorganized employees. Consequently the collective agreement may have an effect beyond the parties and their members, though the unorganized employees do not have any rights or duties by virtue of the agreement.

3.3 Can collective agreements be enforced in the courts?

- by unions

- by individuals

Collective agreements can be enforced in the courts. The LDA contains provisions about both active and passive competence of lawsuit. That is who can take legal action and who can be brought an action against.

When it comes to offences against provisions in the collective agreement, the main parties of the agreement holds the competence of law suit. That is, who can be plaintiff and defendant in an action brought to the Norwegian Labour Court. If the collective agreement, in addition to the main parties, are concluded between a subordinate affiliated trade union or employers' association, it is still the main parties that holds the competence of lawsuit. However, the main parties can transfer their competence to a subordinate union or association which has signed the agreement (LDA § 8).

A single employee, or an employer that is not a part of the collective agreement, cannot appear in court as a plaintiff. In practice, employees and employers sometimes are entered as part in the summons, but this does not give them status as a part. However, a single employee or employer can remand intervention of help on the term that he or she has legal interest in the case.

On the defendantside, there are exceptions from the principle that says that only the trade union and the employers association are allowed to appear in court as a part; claims against specific members can be summoned *beside* an employers association or a trade union.

3.4 Which court has jurisdiction?

As a main rule it is the Norwegian Labour Court which has the jurisdiction in matters concerning collective agreements' validity, interpretation and existence, breaches of collective agreements and the peace obligation and claims for damages in case of breach. The Labour Court has exclusive jurisdiction in these cases; these disputes can not be tried in the ordinary court system – other than prejudicial.

The LDA gives an exhaustive enumeration of which *provisions in law* that can be enforced by the Norwegian Labour Court. Consequently claims based on provisions other than the enumerated, can not be tried in the Labour Court.

For example the Labour Court can not pass sentence about rate of interest, unless this is regulated in the collective agreement itself; that will be a decision based on statutory provisions not enumerated in the LDA.

As a main rule the Labour Court can not try claims arisen out of the individual contracts of employment. These matters the employee has to bring into the ordinary court system and the court has to interpret the collective agreement prejudicially. However, in the LDA exceptions are made for claims which will get its *sudden decision by the judgment in the maincase*.

The parties can agree to settle a dispute refer to arbitration. The LDA and the PSLDA also have provisions allowing the parties to agree that the dispute is going to be tried in the ordinary court system.

4. Effect on individual contracts of employment

4.1 Are collective agreements incorporated into individual contracts of employment?

The collective agreement (its “normative” provisions) is considered as incorporated into employment contracts between mutually bound parties. As for employees who are not bound by the collective agreement the point of departure is the opposite. Collective agreement rules may however be considered incorporated by virtue of reference clauses in employment contracts, e.g. in pursuance or provisions laid down in law transposing Directive 91/533/EEC, or on the basis of prevailing practice within the enterprise or undertaking.

4.2 Does this apply only to companies which are bound by the collective agreement?

Yes, this applies only to companies which are bound by the collective agreement, see 4.1.

4.3 Do the provisions of collective agreements apply to unorganized workers?

The employer may be committed by virtue of the collective agreement not to give any better or worse wage- and working conditions to the unorganized workers. If the employer enters into an agreement containing diverging wage- and working conditions, the opposite party in the collective agreement can bring it into court as an offence against the agreement. However, the agreement concluded between the employer and the employee outside, will not be invalid and the collective agreement will not be in force between them, unless the individual agreement say so. Collective agreement rules may also be considered incorporated by virtue of reference clauses in employment contracts, e.g. in pursuance or provisions laid down in law transposing Directive 91/533/EEC, or on the basis of prevailing practice within the enterprise or undertaking.

4.4 Do the provisions of collective agreements have automatic “erga omnes effect” that is, are unorganized employers obliged to apply those provisions?

The provisions of collective agreements do not have automatic “erga omnes effect”. Unorganised employers are not obliged to apply those provisions.

4.5 Can “erga omnes effect” be attributed to a collective agreement by a public authority? (declaration of general applicability)

Yes. Superior organisations can claim provisions in a collective agreement general applicable by virtue of the Act relating to general application of collective agreements (*allmenngjøringsloven*). The declaration of general applicability is given as a provision of the Act (*forskrift*) by the Ministry of Labour and Social Inclusion and often establishes the sphere of application and the period of time.

4.6 If so, which provisions can be declared generally applicable?

In principle, all provisions can be declared generally applicable. However, most often it regulates wages, working hours, overtime payment, travel expenses, board and lodging, protection of occupation, holidays etc.

4.7 Can people who are not direct employees (e.g. agency workers, or economically dependent workers) be protected by collective agreements in their workplace?

This is contingent on the relevant agreement contents provisions regarding these kinds of workers, or not. If so, it is most often a general agreement which regulates these conditions. In addition to this, the collective agreement can apply to these workers by virtue of a collective agreement being claimed general applicable, see 4.5.

4.8 Are the provisions of the collective agreement merely minimum norms which can be extended by individual contracts or local agreement?

No, the provisions are not merely minimum norms. The provisions *can* be minimum norms which local agreements can deviate from in favour of the employee. But the provisions can also be exact stated provisions that cannot be deviated from at all.

4.9 To what extent are deviations and derogations from the provisions of collective agreements allowed?

A common point of departure is a simple one: Whether a collective agreement may deviate or derogate from stipulations in legislation or in a superior collective agreement is contingent on the relevant act or agreement, whether and to what extent it permits of deviation and derogation.

As regards employment law *legislation*, this is to a large extent minimum standards legislation from which deviation and derogation “in melius” may be contracted for. To some extent, on limited and specific topics and under specified conditions, statute law standards may also be deviated or derogated from “in pejus”.

As for *collective agreements*, it is a basic rule that unless otherwise ensues from the agreement itself, explicitly or by construction, a superior agreement cannot be deviated or derogated from by a subordinate agreement, neither “in

pejus” nor “in melius”. Thus, no “principle of favourability” applies. This is true for subordinate collective agreements as well as for individual employment contracts concluded between employer and employee both bound by the collective agreement. – In practice, however, superior (industry or branch) collective agreements usually grant considerable scope for bargaining, mainly for derogation and deviation “in melius”, at the subordinate (local, enterprise or undertaking) level. Such local level, collective or individual, bargaining is an important element of collective bargaining and industrial relations as a whole.

5. Implementation of the Consultation Framework Directive – 2002/14/EC

5.1 Has this Directive been implemented in your country?

Yes.

5.2 Does it apply to all undertakings, or only to those employing at least 100 or at least 50 employees?

It applies to those undertakings employing at least 50 employees, including workers employed on a part time basis.

5.3 Has the Directive been implemented by legislation or by collective agreements?

The Directive has now been implemented by legislation. However, provisions about consultation have been a part of the basic agreements (*Hovedavtalene*) for centuries.

5.4 What impact has this Directive had on the process for consultation - in businesses where there are collective agreements and/or works councils?

In businesses where there are collective agreements and/or works councils, it must be assumed that the impact of the Directive has been minimal or none; as mentioned, the basic collective agreements have had provisions about consultation, and the undertakings have lived up to these rules for years.

- in businesses where there is no collective agreement or works council?

In businesses where there is no collective agreement or works council, the implementation by legislation may have made a difference. However, the limit of at least 50 employees implies that 62% of all workers in private sector are not covered by the statutory provisions.

5.5 Is it possible for an employee who is not a member of a union to benefit from this directive?

Yes, the law applies to everyone. It is evident from the preparatory works, that the conception “employee representative” (*tillitsvalgte*), does not only refer to representatives affiliated a trade union, but also representatives in general, such as safety deputy (*verneombud*) and members of work environment committees (*arbeidsmiljøutvalg*).

5.6 If so, what can be done and by whom to enforce this?

It is the Directorate of Labour Inspection (*Arbeidstilsynet*) (UK: the Health and Safety Executive) which inspect the consultation being implemented in

accordance with the statutory law. However, The Directorate of Labour Inspection does not have the competence to enforce provisions about consultation in collective agreements.

6. Transnational impact

6.1 Has the Posting of Workers Directive 96/71/EC been implemented in your country?

The Directive 96/71 is implemented in the Working Environment Act by a provision of the Act. In addition to this, the Directive has impact on the Act relating to general application of collective agreements (*allmenngjøringsloven*). The intention behind the law is to ensure equal wage- and working conditions for the national and the posted workers respectively, performing the same type of work. Consequently, the law gives organisations which fulfil certain conditions the right to claim nationwide collective agreements erga omnes effect.

6.2 Is the implementing legislation extended to other industries/activities than those listed in the Annex to the Directive (broadly: construction industry)?

The Act relates to general application of wage agreements etc. in all industries/activities. The reason is that there are many posted workers in other industries, for example the oil industry in Norway. From the Ministry point of view there is no reason to restrict the Directive to construction industry only.

6.3 Has this created any problems or led to litigation?

There have been no cases regarding posted workers in Norway.

6.4. How has this Directive related to collective agreements, where the terms of the collective agreement are more favourable than those to which workers is entitled under the Directive?

Where the terms of the collective agreement are more favourable than those in the Directive, it is contingent on the collective agreement if the provisions also apply to the workers entitled under the Directive. If so, the party of the collective agreement can claim the posted workers getting the same wage- and working conditions as the other employees. Another opportunity is that the organisation claim that the collective agreement is given erga omnes effect.