

# The autonomy of collective agreement

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Niklas Bruun

*“(H)istory writes the grammar of the labour law system which still survives even though subsequent social events have changed the story”*  
Lord Wedderburn<sup>1</sup>

## 1. Conceptual background and structure of the presentation

### 1.1 Conceptual background

The concept of autonomy within labour law is often used in two different senses that, however, are closely interrelated. Firstly, the autonomy of labour law is used to stress the fact that labour law is regarded as a legal discipline in its own right; that the legal rules on dependent labour form an “independent” legal system and a distinct legal discipline. The reason for this autonomy is especially the fact that labour law is distinguished from civil law by its collective character; its umbilical cord to the social facts.<sup>2</sup> It must deal in categories of collective negotiations and acceptable, collective compromises, and cannot as such be subsumed under the individualistic concepts, categories and institutions of civil contract law.

When regulating collective agreements the source of the law itself is derived from the freedom and independence of the social partners and the process of collective bargaining that they pursue. This second meaning of the fundamental principle of autonomy is described by classical concepts like “collective laissez faire” in Britain, “tarifautonomie” in Germany or “l’autonomie collective” in France.<sup>3</sup>

There is no real collective bargaining without autonomy of the social partners and the process of negotiating, concluding and enforcing an agreement. The notion of autonomy is a central element in most European collective bargaining systems, although the legal structure varies widely, as does the way in which autonomy is perceived and embedded in the legal structure.

Autonomy can best be described by tracing the elements of which it comprises. Firstly, there has to be some independence of trade unions in relation to both employers and the State. Secondly, there has to be some independent sphere (in relation to the State authorities) in which the parties to the collective agreement can act. Thirdly, the independent sphere of action presupposes some given balance of power between the parties, which the unions can achieve by being representative and well organised. Furthermore, there must be some instruments and tools available for the parties to put pressure on their counterparts.

The autonomy of collective bargaining has often been regarded as one of the essential features of a western pluralist democracy indicating that several institutions and groups participate in social policy and rule-making.<sup>4</sup> The 20<sup>th</sup> century's social experience of communist-socialism and right-wing fascism was essentially characterised by a lack of genuine autonomy of collective bargaining on the labour market.

## 1.2 International treaties

The post-war international treaties which deal with collective bargaining are very clearly building on an explicit or implicit notion of autonomy or its preconditions. The ILO 87 and ILO 98 conventions are good illustrations of this.<sup>5</sup> ILO 87 declares that workers and employers without distinction whatsoever, are to have the right to establish and to join the organisations of their own choosing without previous authorisation. Furthermore organisations on both sides are to have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities, and to formulate their programmes. Organisations on both sides are also to have the right to establish federations and confederations and to affiliate with international organisations. Authorities are to take all necessary measures to ensure that workers and employers may exercise freely the right to organise and are to refrain from any interference which would restrict this right or impede the lawful exercise thereof. ILO 98 prescribes that workers are to enjoy adequate protection against anti-union discrimination in respect of their employment, and that measures are to be taken to encourage and promote voluntary negotiations between employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements. Free and voluntary collective bargaining, which imply entitlement for the workers to defend their economic and social interests by using strike<sup>6</sup> as a legitimate means, is the core content of these ILO instruments, which in a way can be seen as a codification of the principles underlying the autonomy of collective bargaining.

The same starting points are codified in the European Social Charter (1961), art. 5 and art. 6, the UN Treaty on Fundamental Economic, Social and Cultural Rights (1966), and the European Community (1989) solemn declaration called the Community Charter of the Fundamental Social Rights of Workers. The Charter of Fundamental Rights of the European Union (2000) also contains an article on the right to collective bargaining and action.<sup>7</sup>

## 1.3. The concept of a collective agreement

In most EU Member States collective agreements are defined in legislation as formal written agreements characterised by the fact that they regulate working conditions for individual employees. Usually the parties to the agreement are, on the one side, an employer, a group of employers or an employers' association and, on the other, a representative of workers or an organisation of workers (trade union).<sup>8</sup>

Denmark and the UK have no statutory definitions of a collective agreement. In Denmark the written form of a collective agreement is not required, although most agreements are in written form. Ruth Nielsen describes the Danish concept of a collective agreement as broad and imprecise.<sup>9</sup>

As an introductory remark there is also reason to stress that the ways in which collective agreements are assessed within the legal systems of European countries differ considerably. In the Nordic countries, the UK<sup>10</sup> and Italy<sup>11</sup> it is primarily regarded as a private law contract, while in France, Spain and Belgium the relationship between legislation and collective agreement is closer and the public law elements in the system are stronger. Germany is in a kind of intermediate position between these extremes.<sup>12</sup>

#### 1.4 Focus and structure of the presentation

The fundamental starting points for collective agreement autonomy are quite clear. It should, however, be made clear from the start that collective bargaining not only covers agreements on terms and conditions of the employment relationship, but also joint regulation of key procedural and substantive rules governing this relationship.<sup>13</sup> The implications and interpretations of various autonomy-relevant issues vary widely, however. The debate is extensive and focuses on various issues in different countries. This presentation has no ambition whatsoever to cover the whole range and area of themes that are involved in the autonomy issue. I cannot even take up all the points the organisers kindly indicated in their outline to the programme.

It is not the autonomy of collective agreements as such, but the latest developments on the western European labour market and its implications for this autonomy over the last 20 years or so that are in focus in this presentation. In this kind of general report one has to be selective. We should therefore focus on some essential issues. Our aim is not to cover the whole picture, but to tell some interesting anecdotes or consider some aspects against a general background presentation of the main features in the recent development. I hope these aspects can increase our understanding of the complicated system of collective bargaining and of the changing general conditions for its autonomy, still taking into account that the development differs from country to country.

Very different opinions of the situation of collective bargaining systems in the European Union Member States have been presented today. Some scholars see the system as very stable, with collective bargaining as a part of the European social model. Other say that although no major changes have taken place on the legal surface, in fact the system has undergone – and is undergoing – fundamental restructuring. Some of these authors also speak of a crisis or future crises for the system due to continually declining membership figures for the trade unions and due to lack of legitimacy for collective solutions and collective bargaining.<sup>14</sup>

In the following presentation I intend to chart some of the developments in the national collective bargaining system, especially in the light of collective agreement autonomy. Thereafter I try to discuss the impact of the globalisation and European integration of economies on collective bargaining. In this respect we have to discuss both the impact of this evolution on national collective bargaining and on the relationship and bargaining between the social parties on a European level.

The structure is as follows. In chapter 2 we chart the developments on the labour market and regarding collective bargaining over the last 20 years in Western Europe (i.e. the European Union). My colleague professor Mrachkov will focus on the problems of the states outside the European Union, especially the candidate countries. In chapter 3 we describe the impact of the process of

globalisation and European integration, and especially how the evolving European system of industrial relations within the European Union will influence the autonomy of the system of collective bargaining at national level. Finally, we will analyse the relationship between the European system and the national level bargaining system (chapter 4). In addition to all of this, we shall try to present some conclusions concerning autonomy in the new millennium.

## 2. Developments in national collective bargaining systems in Western Europe since the early 1980s

### 2.1. The promotional role of the State

#### *Historical development*

The autonomy of collective bargaining in its modern form has never indicated that the legislator should take no steps to promote collective bargaining. Actually we can find two historical steps in this development. Firstly, the legislator accepted and created, at least in many countries, a legal framework for collective bargaining: the contract was regarded as valid, the right to take industrial action was accepted etc. But besides this institutional recognition, the role of the State was one of abstention.<sup>15</sup> The second stage came during the early 1970s but made itself felt throughout western Europe by the end of the 1980s<sup>16</sup> and indicated a more active role towards the dynamics of collective labour relations. The State adopted a promotional role and has, in various ways, tried to enhance bargaining or co-operation between the social partners at various levels. In the Nordic countries this trend can be detected in the Swedish Codetermination Act of 1977 and the Finnish Co-operation Act of 1978. The Swedish legislation on the legal position of the shop stewards (1974) can also be assessed from this perspective.<sup>17</sup> The Auroux legislation in France and legislation in Spain and Portugal regarding the obligation to bargain in good faith can be seen as steps in this direction.<sup>18</sup>

Mechanisms making collective agreements generally applicable are clearly also a far reaching step by the legislator to promote collective bargaining and approve its content. The legislative tradition known as so-called semi-mandatory minimum legislation, where a deviation from the legislative standard is only possible through a clause in a collective agreement (or a nation-wide collective agreement), not only shows acceptance of the social partners, but even recognition that the balance of power between them and their sense of responsibility is of such a standard that there is no risk that they might seriously undermine legislation that has been considered so important for protective or other reasons that it has been made mandatory. At the same time this is naturally promoting behaviour on the part of the legislator towards making collective bargaining more flexible, especially from the point of view of employers and creating incentives for participating in such bargaining. Actually inflexible legislation with derogation clauses might be an effective way of promoting collective bargaining.

### 2.2. The structural crises of collective bargaining

Although a fundamental change has taken place since the early 1970s in the attitude of the legislator towards collective bargaining, we must also note that the collective bargaining system has been under pressure and seriously questioned

since the late 1970s. In the following I shall briefly try to sketch the criticism that has not only been rooted in neo-liberal ideology, but also has many other roots and reasons and cannot be passed over.

### *Membership figures in labour market organisations*

A clear indication of the crisis can be seen in the declining membership figures of trade unions throughout Europe, with the exception of the Nordic countries and Belgium. The same development can also be traced on the employers side, although reliable statistical data are not available. In the United Kingdom since 1979 there has been a clear fall in trade union membership from about 13.2 million members in 1979 to somewhere between 7 and 8 million today. The TUC easily dominates the union side with 6.8 million members. The union density figure according to EIRO was 29.0 % in 2000. The picture of collective bargaining in Germany shows stability of the institutional structure but a remarkable decline in trade union membership, especially in the new "ländern" of the former East Germany. From almost 40 % in 1991 membership figures have fallen below 30 %. The coverage of collective agreements in Germany is also significantly higher than those membership figures might suggest, because employers have traditionally been very well organised. A decline is also reported on the employers side. In France there has been a strong and long-sustained trend towards de-unionisation of the workforce. The trend of falling membership numbers has continued throughout the 1990s, and although there are different versions of the precise figures involved, all observers agree that the decrease has been significant and that average membership figures are now clearly below 10 %, which is the lowest figure among the European Union Member States.<sup>19</sup> De-unionisation is also apparent in Italy. The peak of 49 % in membership figures reached in 1980 has now fallen to 35.4 %.<sup>20</sup> During the years of political transition from 1976 to 1978 in Spain, trade unions achieved membership figures of about 30 %, <sup>21</sup> However this rate very soon fell and statistics show that it was about 10 % in 1981. Thereafter the situation has stabilised at about 15 %. Due to an *erga omnes* mechanism the coverage of collective bargaining is much larger.<sup>22</sup>

### *Unemployment*

An unemployment problem has arisen in the Member States of the European Union, where the average unemployment rate was still 8,4 % for all Member States in January 2002.<sup>23</sup> Although there has been a clear overall improvement since the mid- 1990s, the figures are still high in several countries.

Traditionally, collective bargaining between the sides of industry has paid little attention to those outside the labour force, although of course the question of unemployment benefits has been an issue of interest to the trade unions.

The responsibility for employment policy is borne by the State, and one of the reasons for interventions on the labour market by the State might be explained by this. The debate initiated by those economists who view collective bargaining as the main obstacle to recruitment because of excessive minimum wages naturally creates some tension between the trade unions as bargaining parties and the State. The economists describe this as a conflict between insiders and outsiders. Outsiders are denied access to the labour market because insiders give priority to high minimum wages.

The unemployment issue has been one important argument when questioning the functioning of the collective bargaining system. Some efforts have been made to answer this challenge on the part of the parties to collective agreements, as we shall see below.

#### *Lack of flexibility*

In various ways the collective bargaining system in many countries has been strongly criticised for its inflexibility. Within this critique many different issues are addressed. One of these has to do with bargaining that has been regarded as too centralised. Increased diversity in various branches has made it very difficult to regulate the terms and conditions of employment relationships at sectoral level. Another criticism has highlighted the issue that the collective agreement in its classical form sets a minimum standard that cannot be undermined by individual agreements. This has been an issue for debate in many countries in recent years. Furthermore, the fragmentation of the workforce into various groups with so-called atypical employment contracts has made it more and more complex to regulate.

#### *Lack of representativity*

It is clear that the legitimacy of the collective bargaining process can be questioned by small and medium-sized companies that deliberately choose to remain outside of the employers' confederation. This conflict might arise particularly if there is a big difference between the private law-based normal coverage of the collective agreement compared with its public law-based *erga omnes* applicability. Moreover if the range of terms and conditions that become binding through the force of a generally applicable agreement is a very wide one, then the problem of legitimacy might be raised.

#### *Competing legal institutions*

The traditional collective agreement has essentially focused on regulating pay and other benefits of distributive character. Issues concerning information, consultation and codetermination at the workplace might be seen as an area for other types of co-operation falling outside the traditional scope of collective bargaining. A good example might be the German Mitbestimmung-system which gives the workers dual channels of influence, but might also offer an explanation as to why trade union affiliation is relatively low in Germany.<sup>24</sup> This might in turn place some restrictions on modernisation of the collective bargaining system. On the other hand, the employer side is not too keen to integrate new issues into the collective bargaining process, at least in so far as the possibility of resorting to industrial action in the last instance in one way or another is regarded as an important element of the collective bargaining process.

### 2.3. New developments and the responses from trade unions and organised employers

The general impression is that the legislation on collective bargaining has been quite stable, and even static since the 1980s. The legislative debate and new legislation within labour law have been focusing on individual labour law. How has collective bargaining survived the last 20 years in Europe? The answer is that collective agreements have acquired new and changing roles. Some of these roles have been well known in some countries from earlier times, but have spread to

other European countries and enjoyed increased attention. There are some developments that I would like to stress here, of which the first two might seem contradictory. Firstly, the *decentralisation* of collective bargaining should be stressed, but at the same time there are some tendencies toward *centralised* bargaining. The so-called social pacts for employment and competitiveness are examples of the latter. There has, as I see it, simultaneously been a tendency towards inter-sectoral negotiation and local and enterprise-level negotiation. Another important tendency is that collective bargaining is taking on new and wider functions. Sometimes the content of legislation is even agreed upon by collective bargaining, but collective bargaining seems to have been given greater responsibility for implementing legal provisions (i.e. a *regulatory function*). The collective agreement has also been used as an instrument of adaptability (*flexibility function*) and some authors even argue that it has involved employees in economic policymaking in companies and thus has a *management function*.<sup>25</sup> In the following we try to chart these changes.

#### *Union density and the coverage of collective agreements differ*

During the 1990s no Nordic country has seen any significant decrease in trade union membership. On the contrary, trade union affiliation has even increased in some sectors. Therefore the coverage of collective bargaining is extensive in these countries, although there are some loopholes. Denmark, Norway and Sweden apply no general system for extension of collective agreements, Finland, on the other hand, has such a system.<sup>26</sup>

Generally speaking the coverage of collective agreements has remained remarkably high in Europe due to the *erga omnes* mechanisms in use.<sup>27</sup> The tradition of French collective bargaining has been one of active State intervention and balancing weak and divided organisations with a system of general applicability or an *erga omnes* effect of collective agreements.<sup>28</sup> Therefore the coverage of the sectoral collective agreements in France is very high, almost on a Nordic level.<sup>29</sup> The same is true for Belgium, the Netherlands and Spain.

Although it is true that collective bargaining has a good coverage in Western Europe, we must stress that a huge mismatch between union density and coverage cannot in the long run be a sustainable situation. Such arrangements might lend stability to the system, but the legitimacy of such a system might be vulnerable in a crisis situation. Furthermore, it creates problems when efforts are made to decentralise the system. The question arises as to who are the parties or representatives at local level who are entitled to apply the decentralised procedures? What is the role of non-union representative works councils and other local bodies?<sup>30</sup>

#### *Rationalisation*

One answer to decreasing membership figures or reduced bargaining power has been restructuring of organisations. Although it is very difficult to assess the reasons for mergers and divisions among labour market parties, it is clear that we have seen such a process of rationalisation over many years in several countries.

A development towards *cartel forming or cartelisation* is also evident in all Nordic countries, although there also are accidental divisions as, for example, occurred in Norway in 2000.<sup>31</sup> There are several examples of mergers between trade unions or employers' organisations. There are many reasons for this phenomenon. A larger organisation is more cost-effective and has greater

bargaining power. The development also has something to do with the different position on the international market of different companies. The industrial sector that competes on an international market has common interests and seeks to conduct negotiations together. The public sector is in quite another position, while the private service sector might work in co-operation. This cartelisation leads to a situation where different groups of labour market organisations act together and take over some of the functions that were previously performed by the national central confederations (for instance LO and SAF in Sweden).<sup>32</sup> The situation in Denmark illustrates the development: 46 trade-unions were affiliated to the LO, in 1960, by 1980 the number was 33 and in 1998 it was 23.<sup>33</sup> Furthermore, these unions form six negotiating cartels.<sup>34</sup> This cartel forming might also imply a merging together of agreements covering blue and white-collar workers into one single employee agreement. A remarkable example of such an attempt can be found in the year 2000 Danish bargaining round in manufacturing, where such an agreement was made in principle and is to be achieved over a time span of four years.

In Germany and the Netherlands, for instance, there has also been a dramatic regrouping of trade unions, especially in form of mergers.<sup>35</sup> In the United Kingdom as well, the many years of decreasing membership numbers seem<sup>36</sup> to have led to structural changes, with 475 unions in 1979 and 237 in 1999. The reasons for union structural development are complicated, however.

### *Decentralisation*

In Sweden the explicit policy goal for several important large multinational employers has been to dispense with national collective agreements. These employers seek to replace such agreements with company-level collective agreements. The ideological debate in Sweden on this issue has not resulted in the structural change demanded by the employers.<sup>37</sup> On the other hand, the employers have achieved remarkable changes within the existing system of collective agreements. Nation-wide collective agreements in Sweden nowadays are something completely different compared to collective agreements 20 years ago. At that stage all wages and material conditions of employment were primarily decided centrally.<sup>38</sup> Today almost all important issues are decided at local level. The nation-wide collective agreement merely sets some very moderate minimum standards and a procedure for settling disputes. The same development towards decentralisation has taken place in Denmark<sup>39</sup> and Finland<sup>40</sup>, although the debate has been far more pragmatic.<sup>41</sup> In Norway<sup>42</sup> the same development can also, to some extent, be traced.

The trend towards decentralisation is also clear in Germany. Weiss describes a situation in which so-called opening clauses were hardly ever included in collective agreements in the 1980s (meaning that works councils were explicitly allowed to supplement or specify some clause in the collective agreement).<sup>43</sup> During the 1990s the situation has changed dramatically. One topical example is the collective agreement for the metal industry concluded in 1994. Weiss & Schmidt describe the situation in the following terms<sup>44</sup>:

“The collective agreement fixes a weekly working time of 36 hours and a certain minimum wage. But it contains a so-called opening clause allowing the works council and employer not only to specify the collective agreement, but, within certain limits, to deviate from it. For the works council and individual employer two options are available: one

referring to all employees and another referring to groups of employees or to parts of the company. As far as the first option is concerned, the works council and employer may conclude a works agreement further reducing the weekly working time for all employees from 36 hours down to a minimum of 30 hours (or something in-between) In this case the wages are reduced correspondingly. As a trade-off, dismissal for economic reasons is excluded for the duration of the works agreement. The second option allows the conclusion of a works agreement for groups of employees and/or parts of the company. Again, a reduction of the weekly working time down to a minimum of 30 hours is possible. In this case the affected employees do not suffer a fully corresponding wage loss. The pattern for partial wage reduction, however is fully described in the collective agreement.”

Weiss and Schmidt describe this clause as an example of the search for a “fair balance” between centralised and decentralised collective bargaining in Germany.<sup>45</sup>

In France there are said to have been two changes in the collective bargaining process during the 1980s. Firstly, there was a trend towards decentralisation, whereby bargaining took place within individual enterprises. There is statistical evidence that the number of agreements signed in individual enterprises has increased significantly, with 11,797 agreements registered in 1997. Secondly, there has been a shift in focus regarding the matters subject to negotiation at enterprise level. The number of agreements on pay has fallen, while agreements regulating working time, employment, savings and welfare schemes have proliferated.<sup>46</sup> One explicit intention with the legislation on the 35-hour working week was to promote collective bargaining at enterprise level.

The collective bargaining system in the UK has usually been described as based on voluntarism and decentralism. This is still true today: the 1999 Employment Relations Act has created a new statutory procedure for trade union recognition, which compels employers to recognise trade unions for collective bargaining purposes if the majority of the workforce so wishes. The new legislation entered into force in June 2000 and it is too early to evaluate its effects.<sup>47</sup>

The Italian system is often described as one of least legislative control and is essentially based on private law freedom for the parties. The system is often described as a system of bi-polarity, emphasising shifting from industry-wide bargaining at national level and decentralised bargaining at company or district level. Nevertheless, the system can be described overall as being quite decentralised. On the other hand, the 1990s show a tendency towards centralisation of the Italian system as well.<sup>48</sup>

To sum up, I think it is general knowledge that the main trend in collective bargaining in the European Union Member States during the 1990s has been one of decentralisation. Within the European Union there are clearly some features of *convergence* in the development.

### *Centralisation*

Paradoxically enough, the trend towards decentralisation of collective bargaining has been accompanied with a tendency for centralised bargaining. The legal status of this “collective bargaining” differs from country to country. We might have “recommendation agreements”, “guidelines agreements” or “framework agreements”, “Incomes policy” or real “collective agreements”. The most prominent examples are the so-called *Social Pacts* that were concluded in many countries

in the 1990s. At sectoral level we talk about *concession bargaining* or *collective bargaining on employment and competitiveness*.

The essential feature in this development is that employment and competition matters have become the subject of multi-employer or enterprise-level collective agreements. These agreements are in many countries integrated components of comprehensive national employment and labour market policy strategies in which State policy plays an important and in some cases even a driving role. Examples of this integrated approach can be found at least in the Netherlands, Germany (Alliance for Jobs pact), France, Italy, Spain, Austria, Ireland, Finland and Portugal (Strategic Social Pact) and Greece (Confidence Pact).<sup>49</sup> These Pacts are usually tripartite agreements in which the State gives concessions or guarantees regarding tax policy, the level of unemployment benefits, subsidies to vocational training and so on.<sup>50</sup>

Several countries had experiences with social pacts during the 1990s, which usually meant that the trade unions froze or restricted their demand for wage increase and might agree on other cost-cutting measures in order to secure employment for workers and competitiveness for enterprises. The approaches to securing and improving the employment and competition situation show a different pattern from country to country, principally as a result of differing legal and institutional arrangements governing labour market structures, traditional policy orientations and industrial relations traditions.<sup>51</sup>

In all cases, however, the result seems to be at least a three-level negotiating process. Below the tripartite State level we have the genuine branch or multi-employer collective bargaining level. Depending on the subject matter regulated, the policymaking can then be left to the third level of local or enterprise negotiations. It seems evident that working time arrangements are, to a large extent, a mix of different levels where the local level is also important.

On the level of real “collective bargaining” the content of collective agreements on employment and competitiveness usually covers<sup>52</sup>

- pay
- working time arrangements
- work organisation
- skills and qualifications
- socially tolerable reduction of the workforce
- facilitating atypical employment

Collective bargaining in the shadow of social pacts can often be influenced by the availability of State subsidies for certain measures such as vocational training, job rotation and so on.<sup>53</sup>

The whole process has significant features of policy implementation, which in some cases means that the implementation process is decentralised, while in other cases it might indicate direct rule-making, for instance in assuring atypical workers (part-timers or temporary workers) some special benefits such as permanent employee status after a certain number of placements etc.<sup>54</sup>

The most important impact of collective bargaining for employment and competitiveness is that new subject matters are covered by collective bargaining and that the collective agreement becomes an instrument for “agreed” adaptability or negotiated flexibility in modern working life.

### *Regulatory function*

One quite common feature of Swedish and Finnish labour law for many years is statutory clauses giving sectoral labour market organisations the competence to derogate from mandatory provisions of labour legislation if the derogation is agreed upon in a nation-wide collective agreement. Such derogation clauses giving the parties increased flexibility are not uncommon, and the reason for placing the derogatory powers at the nation-wide sectoral organisation level is that the legislator seeks to ensure that the employers are represented by a strong counterpart when negotiating derogations. Such derogation clauses in legislation might have an impact in preserving the centralised level at which collective agreements are concluded. Working time issues in particular are nowadays to a large extent settled at workplace level.

A special kind of derogatory power is represented by the introduction of the “opening clauses” or “hardship clauses” that we find in Austria and Germany. These allow, under certain restrictively defined circumstances, deviations from the minimum standard according to the collective agreement. Another kind of clause of this type can be found in Spain in the form of “salary opt-out clauses” giving enterprises whose financial stability may be damaged as a result of application of the agreement an opportunity to opt out.<sup>55</sup>

In many European countries the important issue of pensions and pension benefits is regulated – at least in part – in collective agreements. Early retirement schemes and other issues related to this issue are also regulated at the level of collective agreements (often extended by *erga omnes* decisions or legislation).<sup>56</sup>

The task of implementing legislation is increasingly given to the social parties via collective agreements. It is an impossible task for the legislator to be able to regulate the fragmented and differentiated labour market of modern society in a reasonable way. Therefore modern working time regulation seeks to integrate genuine policymaking at the workplace into the general normative framework. In this context the parties to the collective agreement can, to a large extent, set the substantial and procedural rules for the local policymaking.

The increased tendency towards the use of atypical work and of a temporary workforce supplied by an employment agency, and in some cases even the use of so-called self-employment or outsourcing, raise problems for traditional collective agreements. These tendencies can be summarised as a process of *fragmentation*. Should the parties seek to regulate these special forms of work in collective agreements, and how could this be done? There are an increasing number of young workers in atypical work (fixed-term) and their trade union affiliation rate is clearly lower than the general average. This is a topical issue at least in Finland and Sweden, and the view of how these phenomena should be regulated differs to a large extent between employers and trade unions, although some collective agreements have been concluded on temporary agency work in some sectors. The regulation also sets the standard or the rules for procedures. These prescribe how various types of conflict are to be settled, how decentralisation is managed and so on. In this way the regulatory power also discharges a *procedural function*. This is of the utmost importance for the functioning of collective bargaining systems nowadays, in which the rules are complicated and policymaking decentralised.

### *Enhanced State responsibility for industrial peace*

The right to strike is a fundamental freedom or right in the Member States of the European Union. This does not prevent the State from establishing various rules on how this freedom can be used and exercised. In this respect there have been various ways of restricting strikes. The Norwegian and Danish Parliaments may interfere in the bargaining process and, in the last instance, decide on collective agreements. In the UK the Thatcher government introduced complicated legislation on strike ballots etc. In Sweden a new institution, a special mediator, has been established. In Italy the 1990 legislation introduced some restrictions on strike activity. On the other hand, the protection of workers from dismissals during strikes enacted in the UK in 1999 points in the other direction.

The traditions are very different in the European Union when it comes to the role of the State authorities during the process of negotiating collective agreements. It seems evident that in Austria, Germany, Ireland, Finland and Sweden it is out of question that any State authority could intervene in the negotiations, in the sense that a settlement could be forced upon any party against its will, although there are various mechanisms available for seeking settlements.<sup>57</sup> In the Netherlands the Minister has the power to intervene in the process of collective bargaining in situations of crisis<sup>58</sup>. In Denmark the Parliament has, in certain situations, prolonged the validity of collective agreements, while in Norway there is a special body that can decide a binding settlement for the parties.

## 3. European Union, social dialogue and collective bargaining

### 3.1. Introductory remarks

So far the presentation has focused on the national collective bargaining systems of the western European countries belonging to the European Economic Area.<sup>59</sup> Some of the features noted above of the national collective bargaining system certainly are indirectly due to the process of European integration and globalisation. In the following part of the presentation we shift focus and will study the impact of the European Union on collective bargaining and the autonomy of the collective agreement.

The European Union and its strongly unique character of forming a legal system of its own with the European Court of Justice (ECJ) as the interpreter and guardian of the Treaty influences the industrial relations systems of the Member States in many direct and indirect ways. Some proponents have even foreseen a shift to collective bargaining from national to international level and we shall discuss this prediction in the last part of this chapter. As a starting point, however, we shall begin by presenting some of the channels through which European influence might appear.

Firstly, one has to mention the EMU which links together the economic policy of those Member States that are involved in this co-operation. Secondly, the European Employment Policy (EEA) has implications in several ways for labour market policy in the Member States. Thirdly, there has been a clear development towards a kind of “social partnership” within the European Union since the mid-1980s.

This “social partnership” consists, as Alan C. Neal points out, of at least three separate components.<sup>60</sup> One is the bipartite option and position the “social partners” on European level have acquired through the Amsterdam Treaty

(originally the Maastricht Treaty and its so-called Social Protocol, from which the UK opted out, but opted back in again in Amsterdam) and its article 139 stating:

Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

Another option consists of the tripartite co-operation between the “social partners” and the European Commission, where the initiatives taken by the Commission might be overtaken by the social partners, which might initiate a process leading to an agreement on the actual subject matter.

The third option is at the interface of the Community and the national Member State levels, where various legislative measures at European level explicitly open up for a national implementation using agreements between employer and employee representatives.

In this chapter (3) we shall focus on the European level of industrial relations and its impact on national industrial relations systems and collective bargaining systems. The impact from the European level should definitely not be underestimated, although we are still partly at the beginning of an evolving process.

In the following discussion we first focus on the EMU and the co-ordination of wage policy that the common currency and economic policy implies (3.2.) Thereafter, we shall discuss the impact of the relatively rigid economic regulation at EU-level and its impact on national collective bargaining (3.3). Negotiations with a view to reaching an agreement between the “social partners” at European level will be in focus in section 3.4. The implementation of European Union Directives with means of collective agreement at national level will be examined in section 3.5. Finally, the impact of the European industrial relations system on national level collective bargaining will be summed up in the concluding remarks.

### 3.2. EMU and the co-ordination of wage policy

The establishment of the EMU and the European Central Bank system in 1999 mark a far-reaching historical change in the European Union towards a common centralised monetary system and a true co-ordination of economic policies in the Member States. This development is also a huge challenge for the different national systems of collective bargaining which have been built up in the various European countries during the 20<sup>th</sup> century.<sup>61</sup> Actually, we already have some examples of attempts to respond to these challenges.

#### *Intersectoral and sectoral bargaining*

One often presented, and almost classic example of the European integration of collective bargaining at intersectoral level is to be found in Belgium. After the national labour market organisations in Belgium had failed to reach an intersectoral agreement in 1996, the Belgian government enacted a “law on competitiveness”, which included the introduction of a legal wage norm for the years 1997-98. Under this wage norm, pay increases in Belgium were not to exceed the average wage increases in France, Germany and the Netherlands. The explicit goal in this legislation was to meet the conditions for fulfilling the economic performance criteria, or so-called EMU convergence criteria.<sup>62</sup>

One example of wage co-ordination on the part of trade unions in order to respond to the EMU-challenge is the so-called “Doorn initiative” taken by the Belgian, German, Luxembourg and Dutch trade union confederations. These

organisations met in the city of Doorn in September 1998 and adopted a joint declaration emphasising the need for close cross-border co-ordination of collective bargaining under the EMU in order to prevent possible competition on wages and working conditions with the prospect that this raises of a downward spiral. The essential content of the “Doorn declaration” is the definition of a formula for national bargaining, according to which trade union negotiators should seek collective agreements which provide at least the equivalent of “the sum total of the evolution of prices and the increases in labour productivity”.

The European Trade Union Confederation (ETUC) welcomed the Doorn initiative, adding that such initiatives must be extended to the entire euro zone.<sup>63</sup> The ETUC adopted a resolution at its Congress in Helsinki in 1999, according to which it promotes a strategy for co-ordinated European collective bargaining at sectoral and cross-sectoral level, and secures a consistent approach via co-ordination within the ETUC. Furthermore the ETUC declared that its intention was to establish the tools and procedures needed for such co-ordination, including the creation of a committee for the co-ordination of collective bargaining policies.

This Committee was established after the congress and, in the year 2000, formulated a guideline for co-ordinating collective bargaining at European level. The aim of the guideline is threefold:<sup>64</sup>

- 1) Nominal wage increase should at least exceed inflation rates whilst maximising the proportion of productivity allocated to the rise in gross wages in order to secure a better balance between profits and wages;
- 2) Any remaining part of productivity should be used for other aspects in the collective agreements, such as qualitative aspects of work where these are quantifiable and calculable in terms of cost; and
- 3) Public and private sector should increase in parallel.

On the employer side, there are no similar initiatives towards a cross-border co-ordination of collective bargaining policy. On the contrary, representatives at UNICE emphasise that collective bargaining is a matter to be dealt with primarily at national level. There is, however, a highly developed system for exchanging information on the development of wages and other costs, including the content of collective agreements, among certain national employers' sectoral associations. Indirectly EMU and the convergence criteria also bring about some pressure towards convergence regarding the content of collective agreements, which the various Social Pacts of the late 1990s already shows.<sup>65</sup>

There seem to be two different approaches to collective bargaining in the shadow of or within the EMU.

The first of these approaches is defensive, and argues that the traditional, national collective bargaining process will be endangered if it is polluted by an international element. There are many arguments here, and they look different in separate Member States. In the Nordic countries there are fears that weaker trade unions in southern Europe will not be able to keep up a reasonable level of minimum protection. In the southern part of Europe there might be a fear that the North will not accept due consideration for productivity differences, but will try to maintain a high level of costs throughout Europe. This again creates problems for low productivity enterprises. The huge differences in traditions, mechanisms and

enforcement of collective agreements has also been used as an argument against any co-ordination of collective bargaining.

On the employer side, where deregulation and decentralisation have been keywords for a long time, co-ordination of collective bargaining at sectoral level is of little interest.

Against this background it is not surprising that the proponents of collective bargaining co-ordination at European level are quite cautious. They emphasise that the intention of a co-ordination-based approach is not to approximate arrangements in order to produce a homogenous European system of collective agreements. Instead, co-ordination should take account of regional diversity and develop a complementary European level.<sup>66</sup>

Mermet & Hoffmann clearly state the strategic trade union arguments for a co-ordination of collective bargaining within the European Union<sup>67</sup>:

“Despite undeniable trends towards the decentralisation of collective bargaining structures in Europe, the sectors and branches of industry still constitute the main level of bargaining in Europe. At the same time, the tendency towards a company-based approach to collective bargaining cannot be ignored. Moreover, the coverage offered by collective agreements is indicative of the efficiency of the respective systems governing collective agreements. In the long run, successful co-ordination at European level will help stabilise national systems of collective agreements. Were European co-ordination to fail, the risk would be further erosion of the various national systems.”

In the short and medium term the most likely outcome is that trade union networks at various levels will engage in a growing exchange of information and co-ordination of the bargaining possible among unions at enterprise, sectoral and confederation level, providing for a variable geometry of European integration<sup>68</sup>. Agreements in place do not actually deserve the concept of collective bargaining (see below).

### 3.3. Economic regulation at EU-level and autonomy for collective bargaining

The autonomy of collective bargaining has always meant that the social partners have enjoyed some freedom and acceptance for contractual relations within the legal system. The evolution of a specific field of law with a special relative autonomy from other disciplines of law has been an important achievement in this legal development. The repressive tradition of the 19<sup>th</sup> century meant that various kinds of criminal law institutions were applied to trade unions, strikes and the like<sup>69</sup>. Today the special immunity of collective bargaining has, in many European countries, a constitutional anchorage such as the German “Tarifautonomie”, which has an important specific legal content. In several other European Member States the legitimisation of collective bargaining can also be found in the constitution. In the Nordic context, and perhaps also in Italy, the legitimisation is very much based on a freedom of contract in which the specific labour law character of the contractual relation has legitimated a far-reaching power for the social partners to “freely” regulate and supervise the regulation of the conditions and terms in the individual employment relationship. In that sense the private law aspect of the collective agreement is emphasised in the Nordic countries.

One starting point for EU regulation has been that the Community always intended not to interfere in collective bargaining at national level in the Member States. During the early days in the evolution of the European integration there was little tension between collective bargaining at national level and EU regulation, because the Community was primarily dealing with matters of economic policy outside the labour market. When increased attention was attached to the social dimension during the preparations for the Maastricht Treaty, the philosophy of the architects of the social provisions was clearly to give the European Community increased competencies for legislative interference and harmonisation in the field of social policy without interfering in or disturbing national collective bargaining. This can clearly be detected in article EEC 136.6, where it is stated that the “provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts”<sup>70</sup>. Without commenting on the tricky business of interpreting this clause, the reasonable justification for this exception is that these matters are the key elements in the national autonomy of collective bargaining, and that the European Union wanted national collective bargaining to remain untouched by the new competence rules<sup>71</sup>. Of course, recognition of the principle of subsidiarity in art 5 of the Treaty also provides arguments in favour of a policy respecting the functioning of collective bargaining structures at national level.

The potential indirect impact of EU economic regulation on national collective bargaining and its autonomy attracted little attention before the issue began to arise in the context of the relationship between competition law and national labour law. The 1957 Treaty of Rome set up EC competition rules as core elements of a common market that was meant to promote the harmonious development of economic activities within the Community. A tension has been on the agenda regarding the Community public procurement regime, where the issue at stake has been the extent to which individual public purchasers may prescribe that bidders are to apply a certain collective agreement<sup>72</sup>. Another issue that has drawn extensive attention lately concerns the applicability of EC articles 81 and 82 on collective agreements, although these rules were not drafted having regard to their applicability to collective agreements. This issue has now been tried several times in the ECJ and also the EFTA court. The ECJ first examined these issues in 1999 in the three cases *Albany International*, *Brentjens* and *Drijvende Bokken* (hereinafter referred to as *Albany* unless otherwise indicated.<sup>73</sup>). Then came two important cases that were decided in September 2000: *Pavlov* (joint cases C-180/98 to C-184/98) and *van der Woude* (C-222/98).<sup>74</sup> The EFTA court case E-8/00 was decided on 22 March 2002.

In these cases the ECJ emphasised that social policy was enshrined as a function of the Community by the Single European Act, which also recognised European level social dialogue. The Maastricht Agreement on Social Policy further fostered the status of collective agreements, and has now also led to three European agreements transformed into European Directives by the Council. Social dialogue has been promoted by the European Commission and recommended by the Council. At the same time, national collective agreements are still very essential in regulating working life.

Without any clear guidance from the EC Treaty in *Albany*, *Brentjens* and *Drijvende Bokken*, the Court expressly established the basic antitrust immunity of sectoral collective agreements. The Court held that the negotiating (sectoral) social

partners do not fall under competition rules when seeking jointly to adopt measures to improve conditions of work and employment. The ultimate reason was that falling under those rules would seriously undermine the social policy objectives of collective agreements.

By an “interpretation of the Treaty as a whole that is both effective and consistent”, the Court concluded that collective agreements also fall *prima facie* outside competition rules (Brentjens, paragraph 57). Hence, collective agreements were granted a basic immunity and a sphere of application in relation to competition rules. Nevertheless, any provision of a collective agreement can be tested under competition rules. The nature and purpose of a provision need to justify its exclusion from competition rules in order to avoid any distortion of competition by masking it as a collective agreement. The limits of this immunity are shown either by “conditions of work and employment” or by “social policy objectives”. Both can be backed up with good reasons. In any case, at least “conditions of work and employment” are thus *prima facie* sheltered from competition rules. The Court thereby also excluded an overall application of the proportionality principle while assessing the “collective agreements” exclusion.

This basic antitrust immunity certainly also applies to inter-professional and European agreements, and basically also to company level agreements. The judgements *Albany*, *Brentjens* and *Drijvende Bokken* also consolidated the use of the *erga omnes* extension of collective agreements enjoying antitrust immunity. It does not violate competition rules.

The position of joint bodies established by a collective agreement in relation to competition rules was further elaborated by these judgements. Such bodies are widely held as undertakings subject to competition rules if operating on a market. Their exclusive rights or monopoly position granted by the authorities under Article 86 (ex 90) EC can now also be directly justified by a special *social* function of general public interest.

Disputes involving competition rules and collective agreements are relatively rare but generally a growing tendency towards conflicts can be discerned in several Member States. In a study in which this author participated we distinguished between three groups of countries, especially in respect of their manner of regulating the relationship between competition law and collective agreements:<sup>75</sup>

Firstly, in the *Nordic group of countries* we find statute-based immunity for collective agreements explicitly confirmed in national competition law. Secondly, in the *Continental European group* of countries national law defines no antitrust immunity for collective agreements. Such immunity can, however, be derived in several countries from constitutional rights or freedoms pertaining to collective bargaining. In other words, some kind of autonomy for the collective agreement also seems to protect it with respect to competition law. Thirdly, we have the *Anglo-Saxon* tradition, where competition law in principle applies to the entire sphere of labour law and explicit exceptions have been rather weak. Furthermore, the assessment of collective agreements in terms of fundamental or constitutional rights has not gained ground. The new British laws provide the last example of States with national competition rules remodelled according to EC rules, implying the possibility of resorting to competition scrutiny of collective agreements. The old immunity seems to disappear, while the principles of EC law are applied instead. The new Dutch legislation has adopted the same approach.

The national disparities at sectoral and inter-professional level in defining the 'peaceful coexistence' of collective agreements and competition law are somewhat alleviated by the effect of the judgements *Albany*, *Brentjens* and *Drijvende Bokken*. In particular, an analysis of EC competition rules demonstrates that collective agreements falling only under national law are none too common. Nationwide agreements normally fall under EC law (as in *Albany*, *Brentjens* and *Drijvende Bokken*), but even merely regional agreements may qualify. On the other hand, the issue is complicated where a contradiction between the EC law immunity and national immunity of collective agreements might arise.

To sum up, we can conclude that that EC economic regulation so far has passed the test of accepting or respecting the national results of the collective bargaining process. In other words, the European Union has not directly interfered in the autonomy of collective agreements at national level. On the other hand, the ECJ clearly indicates that the Court might also scrutinise collective agreements if they are used for other than genuinely social purposes. The Competition law regime of the European Union thus seems to respect national collective bargaining within its traditional limits.

The same attitude prevailed when the preparatory work for the so-called Monti-regulation was conducted. At that time the tension between the regime on the free movement of goods, on one hand, and the national industrial relations system were at stake. The background was to be found in the fact that industrial action carried on at national level naturally might factually hinder the free movement of goods<sup>76</sup>.

The assumption that this kind of obstacle to free movement is to be regarded as some kind of force majeure from the point of view of the EC legal system was thrown into doubt by ECJ decision C-265/95. The case concerned violent destruction of imported fruit and vegetables from Spain by French farmers, and the responsibility for taking adequate measures to stop the violence. The conclusion of the Court was rather general, stating that the French Republic had failed to fulfil its obligations under the EC Treaty "by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions of private individuals". The Court did not specifically stress the fact that the actions in the case were of criminal character, which raised some doubts regarding the relevance of the judgement to obstacles to trade resulting from industrial action.

These doubts were reinforced by the presentation by the Internal Market Commissioner M. Monti of a proposal for a Council Regulation creating a mechanism whereby the Commission may intervene in order to remove certain obstacles to trade. This proposed regulation was clearly, according to its explanatory memorandum, intended to cover at least some industrial action, and gave the Commission competence to intervene in national procedures when obstacles to the free movement on goods occurred at national level. The proposal led to a debate on the immunity and autonomy of the national industrial relations systems in relation to the fundamental principle of the free movement of goods on the internal market. The final outcome of the debate in the form of a regulation on the matter introduced a clear guideline for interpretation in conflict situations. Art. 2 of the regulation reads as follows:<sup>77</sup>

This regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.

### 3.4. Negotiations and bargaining at Community level

The role of the social partners was dramatically enhanced in the Amsterdam Treaty (in fact originally already by the Maastricht summit). The social partners have a recognised role as the legitimate representatives of capital and labour within the competencies of the Community. The Treaty recognises that “should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements”. This formula, which was actually based on an agreement between the all-European Labour market parties ETUC, UNICE and CEEP<sup>78</sup>, arose from a debate in which the autonomous role and independence of the European social partners were stressed.

In many analyses it has been pointed out that the open formulation in art. 139.1 cited above allows for many types of agreements. Bercusson gives four examples:<sup>79</sup>

- i) an inter-confederal/inter-sectoral agreement between the social partners organised at European level (ETUC/UNICE/CEEP)
- ii) a European industry/sectoral/branch agreement between social partners organised on an industry/sectoral/branch basis at European level
- iii) an agreement with a multinational enterprises having affiliates in more than one Member State
- iv) an agreement covering more than one Member State.

The starting point for Bercusson is that an agreement at community level does not exclude contractual arrangements encompassing only some of the Member States. Certainly, we can have agreements “at community level” that only cover certain Member States. On the other hand, the mere fact that labour market issues in two or three Member States are involved does not as such qualify for being at community level if there are no legislative or other community related factor involved.

In the following discussion we focus on the different types of agreements separately.

#### *Inter-sectoral agreements*

Article 139 of the Treaty provides a clear basis for concluding agreements at community level. These agreements may be the result of a procedure initiated by the Commission in accordance with art. 138 of the EC Treaty that charges the commission with the task of promoting the consultation of the social partners. Before making any proposal for action in the social field, the Commission must consult the social partners “on the possible direction of Community action”. The social partners have six weeks within which to respond to this initial consultation and if they choose, they may negotiate between themselves on the matter over a period of nine months.

The second option for the social partners is to enter into contractual relations autonomously without a prior initiative from the European Commission. There is little experience of such agreements, but there are attempts and ongoing negotiations concerning conditions for so-called telework.

For the implementation of these agreements art. 139 of the EC Treaty offers two alternatives. They may offer their agreement to the Commission, which then proposes it to the Council for approval as binding EC law. The other alternative is to leave the implementation to the social partners according to “the procedures and practices specific to management and labour and the Member States”.

The social partners have entered into negotiations on several issues that have been on the legislative agenda in the European Union. In fact the social partners have reached three important agreements, one on parental leave, one on part-time work and a third on fixed-term work, which have subsequently been transformed into EC Directives.<sup>80</sup> The alternative route of implementation has not been used, and many authors point out the difficulties in achieving effective implementation with sufficient coverage using procedures and practices specific to management and labour in the Member States.

There are also experience of situations in which the social partners have not entered into negotiations because UNICE has not been prepared to do so. The Directive on European Works Councils had a prehistory in which the social partners had the option of entering into negotiations on the issue. UNICE refused to do so, and the same happened again concerning the Directive on a general framework for informing and consulting employees in the European Community.<sup>81</sup> There are also examples of situations in which such negotiations have failed. This happened in the negotiations on a framework agreement concerning the working conditions of temporary workers. On this issue the social partners entered into negotiations, but had to conclude that an agreement could not be achieved.

In all of the situations referred to, the background to the negotiations or proposed negotiations has been a situation of “bargaining in the shadow of the law”. The subject matter has clearly been on the legislative agenda for the Community authorities. Furthermore, the legislative process had run into difficulties, as with the proposal for a Directive on atypical work, in which a proposal had already been presented in 1990.<sup>82</sup> On the other hand, when the employers have refused to negotiate they have ended up with a Directive rather soon, as in the case of European works councils and information and consultation. Following the unsuccessful negotiations concerning the working conditions of temporary workers the European Commission also submitted a proposal for a Directive.<sup>83</sup>

In these cases of negotiation on the legislative content of binding legislation the social partners actually do not autonomously decide on all aspects of the bargaining result. They can autonomously decide:

- i) whether to enter into negotiations
- ii) on the content of the legislative product according to adequate competence rules of the EC
- iii) on approval of the outcome of the negotiations.

The social partners cannot, however, decide on the implementation, supervision and enforcement of the agreement. The agreement passes completely beyond their control and into the hands of EC authorities such as the European Court of Justice and the Council when the result is reached. Even the content of the agreement has to go through a detailed procedure of checks. This can be seen from the considerations attached to Directives 96/34/EC and 97/81/EC, according to which the Council, before transforming the agreement into a binding Directive, checked the following:

- compatibility with the Community Charter of Fundamental Rights, and notably its anti-discrimination provision, and with the European Convention on Human Rights and Fundamental Freedoms;
- compatibility with the principles of subsidiarity and proportionality;
- the status of the signatory parties with respect to representativeness;
- the legality of the clauses of the agreement;
- compatibility with the provision in a clause of art. 137 of the EC Treaty, according to which Directives are to avoid imposing administrative, financial and legal constraints on small and medium-sized undertakings;
- the contribution of the measure to realisation of the social aims of art. 136 of the EC Treaty.<sup>84</sup>

When the outcome of the first joint agreement by the social partners on Parental Leave had been turned a binding Directive, it was challenged by the organisation for small and medium-sized undertakings UEAPME in the Court of First Instance of the European Union on the grounds that this organisation was excluded from the negotiations even though it represents a group which had important interests at stake. UEAPME lost its case, but the Court took a position on several important issues of principle. It clearly demanded that an agreement must be made by representative social partners, taking the totality of the signatories together, and must meet the legality requirements in order to fulfil the implicit requirements for an agreement that can be implemented by a Council decision on a proposal from the Commission.<sup>85</sup>

The social partners do not – as stated above – own the life of the outcome of the negotiations after their formal conclusion. There have, however, been some minor efforts to influence the later process in the agreements themselves. All three agreements contain a clause according to which the signatory parties should be given an opportunity to be heard on the content of the agreements. The Parental Leave Agreement (clause 4.6) states:

“Without prejudice to the representative role of the Commission, national courts and the Court of Justice, any matter relating to the interpretation of this Agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who will give an opinion”<sup>86</sup>. This implies that the Commission has to give the social partners an opportunity to express their views before submitting its observations to the court, and if the social partners submit their opinion, then this must be included in the observations of the Commission. Moreover, the prolonged period for national implementation when the social partners are consulted with a view to implementing the “negotiated” Directives by means of national collective agreements

might be seen as a way of giving incentives for the involvement of social partners at national level in the national implementation.

Are there any features that indicate that the social partners have an autonomous position during these negotiations? The answer is very few, although formally these are clearly bipartite negotiations, and not tripartite. In practice, however, the representative of the Commission is present during the negotiations and also provides the social partners with technical and legal support when they request it, etc.<sup>87</sup> One important legal interpretation can be made that underlines the autonomy of the negotiations. The question is that of how the EC authorities should proceed if they find some clauses in an agreement that has been concluded that they cannot approve, either for reasons related to legality or for policy reasons. Here the author agrees with the interpretation of Bercusson and other authors that the authorities can – or are even obliged to – refuse to implement an agreement that is unlawful in some respect. The EC authorities cannot, however, change the agreement in this respect and implement it in an amended form.<sup>88</sup> They have to send the agreement back to the social partners for revision, and the social partners can, if they so wish, change their agreement. Such an interpretation respects the autonomous character of the agreement as a totality that cannot be divided without the joint co-operation of the parties. Naturally the Commission can make new legislative initiatives if an agreement made by the social partners is blocked, but in that case all normal procedures have to be followed.

Several authors have pointed out the fact that the procedure for “negotiated legislation” in the EC Treaty is very different from collective bargaining as we know it at national level in the Member States. Here we lack the real possibility for the trade unions to resort to industrial action, and we also lack the constitutional principle of freedom of association. Even in the year 2000 Charter of the Fundamental Rights of the European Union freedom of association at Community level is only implicitly present.<sup>89</sup> Moreover, the explicit clause (art. 28) on the right to collective bargaining and action states only that workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels. Lo Faro therefore characterises bargaining at Community level as “tied” collective bargaining, and denies its character as a “guarantee for collective autonomy at European level”.<sup>90</sup> The social partners themselves have also announced the need for a “more autonomous social dialogue”, and that they are preparing a programme of work for this to be presented during the Danish Presidency of the European Union (autumn 2002).<sup>91</sup>

One can, of course, ask whether the right point of reference when discussing “negotiated EC legislation” implemented by the Council according to the art. 138 and 139 of the EC Treaty is collective bargaining at all. Faro stresses its public law character and its function as a resource of the Community legal order or generally public regulatory functions.<sup>92</sup> This author thinks that the role of the social partners really can be compared to some corporative features in the system of such Member States as Austria, in which the social partners might have a strong say in the legislative process. In the European Union we have, however, gone one step further: the social partners have been given exclusive legislative competence. As Jacobs and Ojeda-Aviles put it: with the new legislative structure in the Treaty “corporatism is back on stage, more prominent and powerful than it has ever been in the two centuries since the French revolution”<sup>93</sup>.

### *Sectoral agreements at Community level*

There is no exclusion indicating that the procedures prescribed in art. 138 and 139 are not also applicable to sectoral agreements at Community level. There has been such an agreement, for example, concerning working time in sea and rail transport. There are also sectoral organisations in place in many sectors that could perform the task of negotiating. Various kinds of agreement have been reached, but the general impression is that sectoral organisations at the present stage especially have functions related to co-ordinating and exchanging information (see the above remarks on the impact of EMU). It is also clear that both the federations at national level, on the one hand, and the European level inter-sectoral confederations, on the other, are reluctant or hesitant to abandon any of their functions or competencies in favour of sectoral organisations.

### *Enterprise-level collective bargaining*

The European Union has undoubtedly created a special form of Community level "collective negotiations" in multinational companies, which are Community-scale undertakings. Directive 94/45/EC prescribes that undertakings employing at least 1,000 employees in at least two establishments with a minimum of 150 employees in each must establish a mechanism for information and consultation between workers' representatives and the central management.

The Directive specifies that the precise form and content of the information and consultation should be defined through agreements negotiated within the individual company; or more typically within groups of companies. Only if the parties fail to reach an agreement will the subsidiarity requirements apply. These grant employee representatives minimum participation rights, such as the right to form a European Works Council (EWC) and to meet with the Group management at least once a year. Furthermore, extra meetings may be held in the event of closures and relocations, and employee representatives are entitled to assistance by experts of their own choosing.

The Directive also offered advantages to multinationals concluding agreements before 22 September 1996, which was the deadline for national implementation of the Directive. Article 13 specifies that multinationals concluding an agreement on information and consultation before this date are exempt from the requirements of the Directive. This clause was designed partly to meet employer criticism of the Directive's alleged rigidity, and partly to stimulate multinationals to rapidly establish a transnational structure for information and consultation. The legal relevance of this was shown in 1997 when Renault was condemned by a French court for failure to inform and consult before the public announcement of its decision to close the Vilvoorde plant in Belgium.

This Directive has been transposed into national law in all EU Member States. Many studies have been made of the functioning of European Works Councils and about the content of the agreements made either before or after implementation of the Directive.<sup>94</sup> The results clearly show that above all the agreements made focus on the structures and procedures of the information and consultation process. The significance of EWCs depends to a large extent on the policy of the management of multinationals. They can see several advantages in the active use of EWCs to reinforce the corporate culture of the multinationals and promote some social aspects of their global image towards public opinion.

Moreover, in order to unify certain practices within the multinational, the EWC-procedure might be useful. For workers' representatives the EWC creates a network and a tool for information which certainly can be important. Several studies indicate that EWCs have not become real negotiating bodies, which is partly due to the fact that the trade union representatives are keen to ensure that the EWC-procedure does not interfere with national collective bargaining. This can clearly be detected in the Nordic experiences in the field, and explains why the rather strong Nordic trade unions did not push for far-reaching "strong" EWC-agreements<sup>95</sup>.

In the future also within the European Company a negotiation process will take place in order to ensure that information and consultation procedures at trans-national level are guaranteed in all cases of creation of a European Company (SE). The Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees is to be implemented in the Member States in 2004.<sup>96</sup>

A European company will be a public limited-liability company that can be formed according to the rules and procedures laid down in the Statute and the Directive.

In both of these examples Community-level bargaining is conducted without necessarily involving social partners in more than two or in several Member States. The autonomy of the parties is also quite restricted here. Actually we are implementing specific legislation and building up a dynamic structure for information and consultation. The parties are, of course, free to enter into negotiations on this point and the workers' representatives might even decide not to invoke the opportunities laid down in the EWC-Directive and national legislation. It can also be observed that the legal status of the contract clearly differs in various Member States. In some Member States an EWC-agreement might be regarded as a collective agreement, while in other countries – due to the fact that the party on the employee side is usually not a trade union – it might be seen as an agreement *sui generis* of collective character. Naturally this does not change the conclusion that the negotiation still has a collective character.

### 3.5. Collective bargaining at national level as an instrument for implementing EU-legislation

#### *Starting points*

The EC Treaty (art. 137.4) clearly defines the competence for the Member State to use collective agreements as a tool or instrument for the national implementation of Directives:<sup>97</sup> "A Member State may entrust management and labour, at their joint request, with the implementation of Directives ... (i)n this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 189, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the result imposed by that Directive."

The starting point is clear: collective agreement is a legitimate instrument for implementing Directives at national level. On the other hand, the use of collective agreements as instruments of implementation does not discharge the Member State from full responsibility for guaranteeing the full coverage of the Directive.

Furthermore the Directive might contain clauses with a possible incentive effect on implementation through collective agreements:

- i) by extending the transposition period in the case of use of collective agreements
- ii) through semi-mandatory clauses in the Directive allowing derogations by collective agreements. An example of this is Article 17 of the Working time Directive 93/104/EC, according to which, on various detailed conditions, derogations from a number of provisions in the directive can be adopted by means of laws, regulations or administrative provisions, or by means of collective agreements or agreements between the two sides of industry.
- iii) through semi-mandatory clauses in agreements between “management and labour”. One notable example is art. 5 of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community: “Member States may entrust management and labour at the appropriate level, including at undertaking level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees.”

In the examples above it is evident that the agreements defined at national level must at least have some kind of collective character. It seems evident that the Member State cannot accept derogations that are based on individual consent from an employee. At least with respect to the examples on derogations from (otherwise) mandatory working time regulation one must presume that derogations can only be agreed upon in collective agreements which have a mandatory normative effect.

#### *Strategies for implementation*

At least four models of interaction between EC law and national law have been used for the implementation of EC Directives:<sup>98</sup>

1) Ordinary labour law legislation can be used as the sole instrument of implementation. In that case the legislation can, however, open up at national level for collective agreements to the extent that this is allowed for in the Directive itself. This means that the national law makes use of the competence given to it by the Directive and regulates the boundaries within which the social partners at national level may act.

2) A combination of statutory legislation and collective agreements might be used. This has been a common mode of implementation in Denmark and Sweden. The background to this issue is that in all the Nordic countries, but especially in Denmark and Sweden, collective agreements are the main instrument for regulating terms and conditions in the labour market. The discussions have for a long time centred mainly on whether or not the Nordic countries are able to fulfil the regulatory requirements set out in EC directives through their own national collective agreements. The background to this problem is that Article 249 (former 189) of the Treaty of Amsterdam states that the Member States may choose their own “forms and methods” for achieving the results set out in the Directive. Despite this wording, the European Court of Justice has repeatedly affirmed that

collective agreements are not an adequate means of realising an EC Directive unless the coverage of the agreements is so comprehensive that they do protect all of the individual employees concerned. This was already before art. 137.4 was inserted into the Treaty. Where this is not the case, the State is deemed to have failed to meet its obligation to ensure compliance with the Directive in all respects.

Both in Denmark and in Sweden the role of the collective agreement has been discussed in an official exchange of views with EC authorities, especially with the former Commissioner Flynn.<sup>99</sup> In this exchange of letters that took place before the second Danish referendum on the Treaty of Maastricht and before the Swedish referendum on EU Membership Commissioner Flynn stated that the Maastricht Social Protocol indicates that membership will not require a change of Swedish and Danish practice in labour market issues.

However, so-called semi-mandatory legislation with an EU-barrier<sup>100</sup> can, of course, be introduced. This will mean that the legislation is secondary and comes into effect only in cases where the social partners have not regulated the issue in a collective agreement in a way that complies with EC requirements. This kind of statute, prescribing for example that “by means of collective agreements the parties are entitled to deviate from the clauses in the law, but they must guarantee that the regulation in the collective agreement fulfils the minimum requirements according to Directive 75/129/EEC, 77/187/EEC and 92/56/EEC” (the Swedish Codetermination Act sec 4.2). By this method the social partners maintain quite an extensive bargaining power. The informative value of this kind of clause is evidently restricted. On the other hand, it is addressed towards professional experts in the field. In these cases the basic requirements of the Directive are written into the legislation, but alternative ways of fulfilling the requirements are in principle open.

A new way of mixing law and collective agreements has been used lately in Denmark for implementing the EC part-time work Directive. Here the main central organisations in the private sector, LO and DA, entered into a so-called “fejebakke-agreement”, which meant a covering up agreement that was to be applicable for those in the sector that had not included necessary clauses on part-time work into their local or sectoral agreements. This general agreement was concluded in order to satisfy the EC requirements, but the Danish government wanted to introduce legislation for sectors having no such general agreement. The result was that the LO-DA agreement was made generally binding by an explicit decree in cases where no collective agreement meeting the requirements of the Directive was in place.<sup>101</sup> Denmark has thereby introduced a kind of *erga omnes* legislation which marks a new opening on the Danish labour market.

3) The third model for implementation through collective agreements is to use the ordinary method of extending national agreements *erga omnes* which is already available in the national system. As we may observe, several States have a developed mechanism for extension. On the other hand, in many countries the *erga omnes*-system does not give full coverage. Therefore it might be an open question whether it can be used. In Finland there is a newly developed model for statute-based extension of collective agreements that are generally applicable. A special board decides *in casu* whether the requirements are fulfilled<sup>102</sup>. This system

has been little used to implement Directives. Only in the case of the Directive concerning posting of workers (91/76/EC) has the requirement of a national minimum wage been linked to the system of generally applicable collective agreements. In countries like Belgium, where generally applicable collective agreements have a coverage reaching all employees, there seems to be no problem at all with such implementation.

4) The fourth model of implementation is to use collective agreements as the sole tool. This has been the Danish approach and ambition for a long time. The reasonable background to this approach has been that it is fully in accordance with Danish traditions, for instance in the area of working time. Working time has, for about 100 years, been regulated by collective agreement in Denmark. Denmark also decided to use collective agreements to implement the Working Time Directive, and did so in the mid-1990s. The Commission notified Denmark in November 1999 because the Working Time Directive<sup>103</sup> had not been implemented by legislation, but only by collective agreements. This had, according to the Commission, meant that full coverage for the minimum standard prescribed in the Directive had not been achieved. Furthermore, some recent studies indicate that the coverage for Danish collective agreements was slightly lower than generally claimed.<sup>104</sup> The issue was politically highly controversial in Denmark, where the prevailing opinion did not want the EU authorities to intervene in the Danish system. The Danish government and the social partners did, however, decide not to defend the Danish system in court, but to implement the Working Time Directive by means of statute. In this way the long debate on whether collective agreements alone, with no *erga omnes* arrangements, could meet the requirements of the Treaty seems to have been put to an end.

In the Nordic countries there has been an ongoing debate on why the social partners do not seem to be very keen to implement EC legislation through collective agreements. This has been debated especially in Sweden, where a paucity of interest, especially on the side of the employers, has been apparent. The answer is almost self-evident: the question is that of what to negotiate on. The minimum standard has to be met, and there is no room for real bargaining below the statutory minimum standard that might apply in national collective bargaining. Furthermore, the Directives are often of a very general character and not sector-specific. In this case the Swedish employers confederation (earlier SAF, now Svenskt Näringsliv) does not consider its role to be that of entering into negotiations on general agreements.

The Swedish debate shows something of the weakness in the whole concept of implementation of Directives through collective agreements. Usually the subject matter of the Directive is typically a legislative matter in most Member States. The important issue is to get the legislation to work in the national context of collective agreements. In other words, there is little collective autonomy left when the bargaining concerns the implementation of a Directive.

## 3.6. The impact of EU labour law on national collective bargaining

### 3.6.1 Symbiotic relationship

#### *Introduction*

An important new element in the industrial relations system of the European Union Member States during the last 20 years has been the evolving impact of European labour law. It must, however, be stressed that this is not an influence that goes only one way. EC labour law and the national labour law systems form a symbiotic totality of a new industrial relations system in each of the 15 Member States. The impact of European regulation varies, of course, depending on national traditions, but it is still possible to assess some general influence that is more or less commonly felt in all Member States. In the following discussion this impact has been divided into two more or less distinctive areas. The first of these concerns more or less intended, direct consequences of the inter-relationship between national and EC law, while the other area concerns so-called indirect and spillover effects of a less direct character.<sup>105</sup>

### 3.6.2 Direct impact

For systematic reasons I here discuss the ideological impact, the trend towards convergence, the strengthening of the local system of workers' representatives, the tension between individual and collective labour law, and finally the codification and constitutionalisation of the labour law system.

#### *Ideological impact*

On an ideological level it seems evident that one of the ways in which the "European social model" has been made visible is through European labour law and the recognition in the Treaty of both of the social partners as responsible lawmakers, but also the recognition of collective agreements as a legitimate tool for lawmaking and implementation. At the same time, the concept of "collective agreement" has been seriously diluted. Everything that can be described as an "agreement between management and labour" seems to qualify.

#### *Convergence*

It is clear that continuous co-operation in preparing Directives and in their implementation brings about a trend towards convergence. The interrelationship between legislation and collective bargaining tends to develop in a similar direction, although it is evident that the trend towards convergence is stronger on the individual law level (part-time work, fixed-term work, sex discrimination etc). The European employment strategy, in which the employment policy of the European union is co-ordinated through a soft-law framework, also pushes towards convergence. As this author has pointed out, the European employment strategy has become the accepted framework, not only for the employment and social policies of the Member States, but also for co-ordinating national legislation in the field of social policy and labour law.<sup>106</sup>

#### *Workers' representatives.*

Several Directives clearly define a role for workers' representatives, who are given the power to negotiate with a view to reaching an agreement and enjoy several

rights. These representatives are already mandatory in the old Directives on transfers of undertakings and collective dismissals. They have a clearly defined role in the context of European Works Councils and European Companies (SE). These Directives have had an important impact in the UK, where the infrastructure of worker representation has been weak. In several systems the workers' representatives are at the same time union representatives, while in other systems we have dual arrangements. Therefore European labour law has been quite neutral in this sense. It can, however, be stressed how important it is to have a system of representation in place when policymaking is increasingly decentralised. From the point of view of the trade unions, these representatives can be both a threat and an opportunity. If the representatives form competing structures in relation to collective bargaining, then problems may arise.

#### *Individualistic approach*

EC law has clearly caused some tension in relation to the clauses on pay in some collective agreements. One example of this might be equal pay, where the fact that comparable persons of opposite sex have been covered by different collective agreements has not been regarded as a factor justifying differences in pay.<sup>107</sup>

#### *Codification*

Harmonisation brings about a huge volume of low quality regulation that does not actually fit very well in the system, because it is designed to fit into 15 different systems. The amount of legislation being adopted is not negligible, and this especially narrows the autonomy for social partners to freely negotiate their agreements. The Danish example with working time legislation is an example.

#### *Constitutionalisation*

The trend towards viewing the collective agreement as something with a constitutional dimension seems necessary in the European Union system, which is strongly based on a hierarchy of norms. If clauses on collective bargaining are to have any impact or significance, then they must be regarded as being constitutional or Treaty-based or fundamental.

### 3.6.3 Indirect and spillover effects

There are several important effects of the European labour law system that are indirect in various senses.

#### *Impacts from other fields of law*

It is of central importance that the EC competition law regime respects the autonomy of collective bargaining and its special social character. In the same way, it is important that the principle of free movement of goods is not given priority over certain freedoms that belong to the national collective bargaining system. This is still an area where there is ground to clear.

#### *Convergence*

The economic pressure towards similar solutions, wage co-ordination, adoption of best practice etc. clearly brings us indirectly towards convergence<sup>108</sup>.

#### *Indirect regulation of pay*

It is well known that wages are excluded from the competence of the social partners according to art. 136.6 of the EC Treaty. It is therefore something of a

paradox that we find Directives explicitly regulating pay – under the heading of free movement of services – in a way that indirectly also puts some pressure on national collective bargaining. The most prominent example is the Directive on posting of workers.<sup>109</sup>

#### *Enhanced role for national central organisations*

As a consequence of the co-operation between the social partners at European level, the national parties have acquired a new role. They are usually not much involved in collective bargaining at national level, but now many issues become issues for the organisations that are members of organisations participating in the social dialogue.

#### *More detailed State regulation*

It is evident that the scope for collective bargaining will be reduced when detailed legal regulation covers certain areas. For instance legal regulation on non-discrimination, which is contained in several EC-directives, has a clear impact as an intervention into the bargaining process. This has so far mainly been evident in the area of equal opportunities, but the prohibition on discrimination against part-timers and employees working on a fixed term base will also have an impact on national collective agreements. On the other hand, collective bargaining has for a long time been difficult to conduct on other than a rather general level.

## 4. Conclusions – autonomy of the collective agreement in the new millennium

### 4.1. The changed basis and background for collective bargaining

#### *Folke Schmidt revisited*

This presentation has tried to chart at least some of the important new features that can be traced in the practice of collective bargaining within the European internal market. We have to ask whether the collective agreement basically still perform its traditional functions.

The Father of Swedish labour law, Folke Schmidt, in his posthumous comparative study, which was finalised by Alan Neal, summed up the basic functions of collective agreements in the following way: the process of collective bargaining and the collective agreement serve the following five basic functions:<sup>110</sup>

- (1) A cease-fire agreement, or a treaty securing industrial peace;
- (2) An instrument for the employees to control the supply of labour, and to protect the individual employee, as the weaker party to the contract of employment, against pressures from the employer;
- (3) A form of standard conditions; rather like a form for an insurance policy, or a bill of lading;
- (4) An instrument of co-operation between the Sozialpartner;
- (5) An industrial code, i.e. a method of regulating wages and other conditions of employment, comparable to a statutory enactment.

Furthermore, these authors pointed out that the collective agreement has a particularly national character in various national contexts, but that the distinguishing feature of that phenomenon was its binding effect on the parties to

the agreement, irrespective of whether that binding effect was made effective and backed up by legal or extra-legal sanctions.<sup>111</sup> This list of important traditional functions is not exhaustive. We have to add the important aspects of effective enforcement of the system, on the one hand and, on the other, its clear effect of causing a significant codification of the system, at least in all of the countries in which the collective agreement and its binding force is recognised by statute.

### *Major changes*

It is easily observed that the new elements that we have observed, such as European collective bargaining, national pacts and concession bargaining, far-reaching erga omnes mechanisms extending the effects of agreements in several countries, and the whole general set up on the European labour market, have profoundly changed the environment and functions of national collective bargaining and collective agreements.

The conditions and circumstances for collective bargaining have changed dramatically on the labour market of all EU Member States. Governance of the national industrial relations system has a symbiotic connection to the international system characterised by globalisation and the activity of strong multinational actors. The functional changes that have taken place can be summed up in four aspects:

1) In all countries we have detailed statutory labour law legislation in place. The emphasis on collective bargaining is no longer merely to give the employee, as the weaker party, basic protection via the collective agreement. This basic protection is to a large extent provided by other mechanisms, such as minimum income legislation in some countries. In other systems collective agreements might set the minimum standard, but usually coupled with the State system, and not autonomously. Moreover, the growth in the number of employees performing atypical work and the terms and conditions of such work have been difficult to handle through collective bargaining because these employee groups usually have a relatively weak position within the bargaining system<sup>112</sup>. While it was correct generally to observe that collective bargaining and its autonomy were the heart and soul of national industrial relations systems 50 years ago, nowadays they are one important element in a complex system of industrial relations.

2) The autonomy of collective bargaining cannot remain unaffected by the fact that bargaining is taking place on an international global market of intense competition. Employers and State authorities are very sensitive towards ongoing developments in other countries. It is difficult to get innovations in the field of social policy accepted, and there is pressure to cut all national “additional cost factors”. The economic pressure towards convergence is extremely strong and “overly autonomous” social partners might not be able to adapt accordingly.

3) The general picture of collective bargaining has changed dramatically. It is nowadays a complex multilevel system of regulation, which often has an important impact on the labour market. The most important feature is the decentralisation and fragmentation of the system. There are many reasons for this development, and also for the fact that instruments of co-operation or concertation are used as a complement to collective bargaining in many countries.

The fragmentation of the labour market system has also had the effect that it is difficult to find trend-setters or the centre of gravity for bargaining, in the sense that leading national industry still was in the 1960s and 1970s.

4) The completely changed picture of collective bargaining also indicates changes in its functions. It is not, to the same extent as before, a primarily private law, autonomy system, but an integrated element of a modern system of a partly corporative governance of the labour market. If we use the Habermasian terminology we might claim that the collective bargaining system has been colonised by the industrial relations system. It also has very clear links to national systems of unemployment insurance, pensions, taxation etc. Within the system we find strong features of reflexive self-regulation, but this is clearly linked to EU-policies, State policy, labour market policy on both EU and national levels etc. An analysis of the functions that collective bargaining performs nowadays would in many countries give a very different picture compared to the situation 30 years ago, although the basic philosophy of the institution is still in place. What evolved as a cease-fire agreement in a class-conflict is today a rational instrument and tool for enforcing a social partnership at various levels. Moreover, the growing degree of decentralisation of collective bargaining has changed its function towards some kind of company level codetermination, which again in some countries has generated tensions with other institutions (works councils) established especially for this purpose<sup>113</sup>.

#### 4.2. Autonomy today and tomorrow

##### *Autonomy today?*

Against the foregoing background one has to ask what impact the important changes that have taken place within the field of collective bargaining has for the autonomy of the collective agreement.

At all levels rhetorical adherence to the principle of the autonomy of the collective bargaining and the parties thereto seems to be thriving. Several authors<sup>114</sup> and the social partners themselves are keen to emphasise the importance of autonomous policymaking and procedures at European level.<sup>115</sup>

Autonomous collective bargaining is still a concept of central doctrinal importance throughout Europe, although there are important national differences in how this is assessed. Generally speaking and to my understanding, there has been little national debate on the changes that have occurred in fundamentals of this autonomy over the latest 20 years. The question, therefore, is how the changes that have taken place should be assessed. It seems evident that the scope for autonomy has been narrowed during this period, and autonomy as such has been clearly undermined, although the extent to which this general development has occurred differs in various countries. On the other hand, there have also been diverse attempts on the part of the State authorities in several countries to strengthen and resuscitate the process of collective bargaining.

These indicators of crises for the collective agreement, which are felt to a varying extent in various European Union Member States, do not to my understanding indicate that we should give up the idea of autonomy of collective bargaining altogether. On the contrary, when the autonomy of the collective agreement is

under threat or undermined it is more important than ever to underline the significance and indispensability of autonomy for collective bargaining.

*Why does autonomy matter?*

If we are seeking to get rid of collective bargaining altogether, then we could certainly think that autonomy is of no significance, either.

Collective bargaining, however, can and does offer an important element of flexibility, subsidiarity, self-determination and reflexivity, social dialogue, decentralisation etc. in most European Union Member States. There are clear values and advantages involved in collective bargaining. These can be traced both from economic and social arguments. The economic arguments are related to transaction costs, which can be reduced by avoiding overly extensive individual bargaining and conflict resolution, and the competition aspect that provides the argument that competition basically should focus on productivity and other cost factors, rather than wage competition. These arguments also have their social aspect. It is important to avoid social dumping. Collective agreements can, in a balanced way, guarantee adaptation to external change and a minimum standard. Furthermore, they can create an effective enforcement mechanism and also foster a culture of social partnership within workplaces. Collective agreements nowadays can be regarded as an essential tool in the toolbox of a sustainable labour law and a smoothly functioning labour market.

Collective bargaining cannot function without a certain amount of autonomy for the social partners and for collective agreements and labour law generally. Without such autonomy there is little to bargain about, and without autonomous partners there is no real enforcement and effect of the agreements. The real power in the collective bargaining system lies in the organisations that are parties to the collective agreements. Therefore the issue of where bargaining should take place is often the object of harsh controversy. Collective agreements based on a lack of autonomy will, in the end, be dead letters.

Nowadays autonomy is under threat, especially indirectly by the general development towards globalisation of the economy. In such a situation it is important to identify and defend the core elements of the modern autonomy for collective bargaining. These concern issues such as the legal position of the parties and the binding effect and control of the collective agreement in individual labour relationships, but also the interrelationship between various bargaining levels. They also have to do with due respect for agreements in force and their outcome, so that legislators and authorities should refrain from intervening in the content of existing agreements. At the European level the legislator should carefully avoid legislative measures that indirectly or directly create obstacles for collective bargaining at national level.<sup>116</sup> The task for labour lawyers and practitioners all over Europe is to develop a strategy for reinforcing and strengthening the core autonomy for collective agreements and ensuring a functional balance between policymaking at various levels. This is an essential task when assessing how to solve the problems involved in the evolving crises of collective agreements in several Member States of the European Union.

## Notes

- <sup>1</sup> Kahn-Freund, Gamillscheg, Wedderburn Sinzheimer etc. Wedderburn (1992) 2.
- <sup>2</sup> Wedderburn (1991) 108.
- <sup>3</sup> See Sinzheimer (1927) 46–51, Kahn-Freund (1978) 11–24, Biedenkopf (1964), Wedderburn (1991) 106–137 and Gamillscheg (1997) 263–373.
- <sup>4</sup> Blanpain (2000) 426.
- <sup>5</sup> These conventions have been ratified by 44 out of 45 European countries, Armenia being the only European country remaining outside of them. World-wide the number of ratifications is 139 for Convention 87 and 151 for Convention 98.
- <sup>6</sup> Strike is not explicitly mentioned in ILO Conventions 87 and 98, but it is established practice that the right to strike forms an implied, essential part of the principles of freedom of association within the ILO. See for instance Freedom of Association Digest (1996) 101–123, Ben-Israel (1988) 70 and Dunning (1998) 164.
- <sup>7</sup> See Schmidt and Neal (1984) 4, Nielsen, Laerebog (2001) 116. The Charter was proclaimed on 7 December 2000, on the fringe of the Nice European Council, by the Presidents of the European Parliament, the Council of the European Union and the European Commission, and was published in Official Journal C 364, on 18.12.2000.
- <sup>8</sup> See Schmidt & Neal (1984) 4, Bamber & Sheldon (2001) 549–584, Rebhahn (2001a) 103–117 and Rebhahn (2001b) 763–774.
- <sup>9</sup> Nielsen (2001) 116.
- <sup>10</sup> Deakin & Morris (1998) 15–25.
- <sup>11</sup> See Treu (1998) 172–199.
- <sup>12</sup> See Hanau & Adomeit (2000) 53–76.
- <sup>13</sup> This is a classical notion stressed already by Flanders (1970), but self-evident in a Nordic context where the whole process of collective bargaining has been based on procedural and substantial “main agreements” between the parties. The classical model for this is to be found in the Danish main agreement, which dates back to the year 1898. Similar arrangements can be found in the other Nordic countries, see Bruun (1992) 13.
- <sup>14</sup> Welch (2000) 625 and Blanke (2002).
- <sup>15</sup> Veneziani (1999) 102.
- <sup>16</sup> The United Kingdom is the exception here. Perhaps only the 1999 Employment Relations Act can be seen as an indication of this kind of (cautious) attitude. See Anderman (1999) 286 and Novitz & Skidmore (2001) 47–59.
- <sup>17</sup> See Fahlbeck (1997) 22.
- <sup>18</sup> See Veneziani (1999) 104.
- <sup>19</sup> The European Foundation’s EIRO-report gives the figure of 9.1% for France (2000).
- <sup>20</sup> See Negrelli & Treu (1999) 133 and EIRO, Industrial Relations in the EU, Japan and USA, 2000.
- <sup>21</sup> van der Meer, Marc (1996). 316.
- <sup>22</sup> See Ahlberg-Bruun (1996) 84–91.
- <sup>23</sup> Eurostat statistics for January 2000, [www.europa.eu.int/comm/eurostat](http://www.europa.eu.int/comm/eurostat)
- <sup>24</sup> See Weiss & Schmidt (2000) 207–210 and Blanke (2002).
- <sup>25</sup> See Sisson (2001). 602–603.
- <sup>26</sup> See Bruun (2002) 183–185.
- <sup>27</sup> Visser (1996) 15.
- <sup>28</sup> See Ahlberg-Bruun (1996) 42–66.
- <sup>29</sup> According to Visser (1996) 15 the coverage of the collective bargaining system is almost on the same level in France and Sweden.
- <sup>30</sup> See Supiot (2001) 112–135.
- <sup>31</sup> See for instance Nergaard (2000) 280 concerning developments in Norway in 2000.
- <sup>32</sup> The Swedish development is described by Nyström (1999) 279–298.
- <sup>33</sup> See Lind, Jens (2000) 170.

- <sup>34</sup> Ibid. 170 pp.
- <sup>35</sup> See Supiot (2001) 116.
- <sup>36</sup> Visser & Waddington (1996) 21 pp..
- <sup>37</sup> See Törnqvist (1999) 71–87.
- <sup>38</sup> Eklund (1998–1999) 531–551.
- <sup>39</sup> See Scheuer (1998), 146–170.
- <sup>40</sup> Lilja (1998) 171–189. See also Bruun (2000) 108–110.
- <sup>41</sup> See Knudsen, Lind & Sørensen (2000), who show the interaction between intersectoral, sectoral and local bargaining through some concrete examples.
- <sup>42</sup> Dølvik & Stokke (1998) 118–145.
- <sup>43</sup> See Weiss & Schmidt (2000) 206.
- <sup>44</sup> Weiss & Schmidt (2000) 207.
- <sup>45</sup> See also Zachert (1996) 140–150 and Waltermann (1996) 129–139.
- <sup>46</sup> Boulin (2000) 236.
- <sup>47</sup> See Novitz & Skidmore (2001) 1–21.
- <sup>48</sup> See Treu (1998) 172–184.
- <sup>49</sup> See Social Pacts in Europe (1997). Experience from several countries is reported in this book.
- <sup>50</sup> The Swedish bipartite agreement for several sectors of industry can be seen as some kind of “minipact” in this connection.
- <sup>51</sup> Freyssinet & Seiffert (2001) 626.
- <sup>52</sup> This list is presented by Freyssinet & Seiffert (2001) 620.
- <sup>53</sup> Knudsen, Lind & Sørensen (2000) 57.
- <sup>54</sup> See Freyssinet & Seiffert (2001) 625.
- <sup>55</sup> Supiot (2001) 106.
- <sup>56</sup> See the reports in *Collective bargaining in Europe 2000* (ed. Faiertag).
- <sup>57</sup> See de Roo & Jagtenberg (1994) for the (then) 12 EC Member States, Tiitinen & Ruponen (1997) for Finland and Fahlbeck (1997) 56 for Sweden. About the latest Swedish legislative developments, see Magnusson & Karlsson (2001) 349.
- <sup>58</sup> The intervention by the government in wage settlements and its conformity with ILO Conventions 87 and 98 has been an issue in the Netherlands for many years, see Boostra (1996) 185–216.
- <sup>59</sup> In other words, the Member States of the European Union and Norway, Iceland and Liechtenstein.
- <sup>60</sup> Neal (2001) 115.
- <sup>61</sup> See Magnusson (1999) 9.
- <sup>62</sup> See the report “Europeanisation” of collective bargaining. [www.eiro.eurofound.ie/](http://www.eiro.eurofound.ie/) 1999.
- <sup>63</sup> *Towards a European System of Industrial Relations*. Adopted by the IX<sup>th</sup> Statutory Congress in Helsinki 29/6–2/7/1999 ([www.etuc.org](http://www.etuc.org)).
- <sup>64</sup> Here cited from Fajertag (2001), 38.
- <sup>65</sup> See above, chapter 2.2.
- <sup>66</sup> See Mermet & Hoffman (2001), 46.
- <sup>67</sup> Ibid. 47.
- <sup>68</sup> This is the prediction of Dølvik (1998) that is shared by Pochet (1999) 278.
- <sup>69</sup> See Jacobs (2001) 585.
- <sup>70</sup> The interpretation of EEC 136.6 has been subject to an intense debate, to put it mildly. See Maier, Bercusson, Faro, etc.
- <sup>71</sup> Treu (1996) 170.
- <sup>72</sup> See Krüger, Nielsen & Bruun (1998).
- <sup>73</sup> Cases C-67/96, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*; joined cases C-115–117/97, *Brentjens’ Handelonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*; and case C-219/97, *Drijvende Bokken v. Stichting Pensioensfonds voor de vervoer – en havenbedrijven*.

- <sup>74</sup> These cases are discussed in detail in Bruun & Hellsten (2001) 33–80, on which this presentation draws. There is already quite a body of literature dealing with the matter, see Gyselen (2000) 425–448, Vousden (2000) 181–191, Evju (2001) 165–184 and Ichino (2001) 185–198.
- <sup>75</sup> See Bruun & Hellsten (2001) 70.
- <sup>76</sup> See Bruun & Veneziani (1999) 85.
- <sup>77</sup> Regulation 2679/98/EC (7.12.1998).
- <sup>78</sup> The agreement between the parties was reached 31.10.1991. See Bercusson 1996, 523, Petersen 1997, 76–78.
- <sup>79</sup> Bercusson (1996) 542.
- <sup>80</sup> These three Directives are Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ No L 145, 19.6.1996 p.4, Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part time work concluded by UNICE, CEEP and the ETUC, OJ No L 14, 20.1.1998, p.9, and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ No L 175, 10.7.1999, p 43.
- <sup>81</sup> See Directive 94/45 EEC on the establishment of a European works council or a procedure in Community-scale Undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees, and Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community. OJ L 80, 23.3.2002.
- <sup>82</sup> See a proposal for a Directive on the approximation of the laws of the Member States relating to certain employment relationships with regard to distortions of competition (COM (90) 228 final; OJ C 224, 8.9.1990).
- <sup>83</sup> Proposal for a Directive concerning the working conditions of temporary workers. European Commission, March 2002.
- <sup>84</sup> See also Jacobs & Ojeda-Aviles (1999) 61.
- <sup>85</sup> See Case T-135/96, UEAPME v. Council of the European Union [1998] ECR II-2335. The case was appealed to the ECJ, but the appeal was later dropped following conclusion of a co-operation agreement between UEAPME and UNICE. See also Franssen & Jacobs (1998) 1295 and Bernard (2000) 279.
- <sup>86</sup> For some reason this clause is written into the preamble in the Directive on Fixed-term work. See Bercusson-Bruun (1999) 130 pp.
- <sup>87</sup> See Ahlberg (1999) 17–18.
- <sup>88</sup> Bercusson (1996) 548, see also Blanpain-Engels (1998) 122, who espouse a different opinion.
- <sup>89</sup> See the Charter art. 12 and Bercusson (2001) 207.
- <sup>90</sup> Lo Faro (2000) 104.
- <sup>91</sup> The social partners submitted a Joint Contribution by the social partners to the Laeken European Council 7 December, 2001.
- <sup>92</sup> Lo Faro (2000), 125.
- <sup>93</sup> Jacobs & Ojeda-Aviles (1999) 75.
- <sup>94</sup> See for instance Blanpain & Windey (1996) and Blanke (1999) for the legal aspects, and for a summary of recent studies Rojot & Le Flanchec & Voynnet-Fourboul (2001) 345–370.
- <sup>95</sup> See Knudsen & Bruun (1998) 131–156.
- <sup>96</sup> See Council Regulation (EC) No 2157/2001 of 8.10.2001 on the Statute for a European Company (SE) L 294, 10.11.2001. 1–21 and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees L 294, 10.11.2001. 22–32.
- <sup>97</sup> This clause is unchanged in the Treaty of Nice, but has changed to number 137.3. The Nice Treaty has not yet been ratified by all Member States.
- <sup>98</sup> See Nielsen (2000) 138.

- <sup>99</sup> For the details, see Bruun (1994) 21–25.
- <sup>100</sup> This concept has been introduced by Sigeman (2001) 22.
- <sup>101</sup> See the Danish Act no. 443 of 7.6.2001.
- <sup>102</sup> See Bruun (2002) 183.
- <sup>103</sup> Directive 93/104/EC, OJ 1993 L 307/18.
- <sup>104</sup> See Scheuer (1997) 39–57.
- <sup>105</sup> On these concepts, see Bercusson (1996) 221 and Maier (2000) 246–249.
- <sup>106</sup> Biagi (1998) 325–336 and Bruun (2001) 324.
- <sup>107</sup> See Nielsen (1996) 243.
- <sup>108</sup> Katz & Darbishire (2000) 263.
- <sup>109</sup> See Directive 96/71/EC (16.12.1996) concerning the posting of workers in the framework of the provision of services.
- <sup>110</sup> Schmidt & Neal (1984) 9.
- <sup>111</sup> Neal (2001) 119.
- <sup>112</sup> Veneziani (1992) 56.
- <sup>113</sup> In the Nordic countries these levels have traditionally been integrated, see Flodgren (1992) 88.
- <sup>114</sup> See Blanpain (2000) 428 and Bercusson (1999) 153. On the other hand, several critics contest the relevance of autonomous collective bargaining at European level, see Sciarra (1996) 196, Bernard (2000) 286, Lo Faro (2000) 156 and Neal (2001) 122.
- <sup>115</sup> See Joint contribution by the social partners to the Laeken European Council 7.12.2001 (UNICE; ETUC and CEEP) in which the parties consider it necessary “to reaffirm their wish to develop a work programme for a more autonomous social dialogue”.
- <sup>116</sup> See the discussion of the relationship between EU competition law and national collective bargaining, above chapter 3.3.

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