WORKING PAPER

Industrial relations

Transposition of EU labour law directives through collective agreements at national level

EU labour law and national collective agreements: A clash of cultures?

Disclaimer: This working paper has not been subject to the full Eurofound evaluation, editorial and publication process.

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Eurofound reference number: WPEF20009

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The European Foundation for the Improvement of Living and Working Conditions (Eurofound) is a tripartite European Union Agency established in 1975. Its role is to provide knowledge in the area of social, employment and work-related policies according to Regulation (EU) 2019/127.

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1. Introduction

Article 288 of the Treaty on the Functioning of the European Union (TFEU) clearly states:

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

Collective agreements are among the panoply of national measures deemed appropriate mechanism for implementation of EU directives in the fields of social and employment policy and industrial relations. The role of collective agreements in implementing EU directives is further prescribed by Article 153(3) TFEU, which states that a Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2. Article 153(3) TFEU further states that, in that case, it shall ensure that, no later than the date on which a directive must be transposed, management and labour should have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it to be in a position to guarantee the results imposed by that directive.

The transposition of EU labour law by national collective agreements is dubbed as "implementational"[1] by Lo Faro and "transpositional"[2] by Ojeda Avilés and "(…) constitutes a form of collective bargaining which is structurally *national* (emphasis in the original), despite the fact that in functional terms it is linked to the Community dimension (…)."[3]

The vast majority of scholars and practitioners agree that "so long as the basic requirements of Community law are met, a Directive in principle may be implemented by way of collective bargaining."[4]

This form of implementation of international norms via collective agreements has also been recognised by other international organisations, such as the Council of Europe and the ILO[5], as well as by the Community Charter of Fundamental Social Rights of Workers of 1989.[6]

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[1] A. Lo Faro *(2000)*, *Regulating Social Europe. Reality & Myth of Collective Bargaining in the EC Legal Order* 2000*, Oxford, p. 55.*

[2] A. Ojeda Avilés (1993), La negociación colectiva europea, *Relaciones Laborales,* no. 15, p.75.

[3] A. Lo Faro *(2000)*, *Regulating Social Europe. Reality & Myth of Collective Bargaining in the EC Legal Order* 2000*, Oxford, p. 55.*

[4] C. Docksey (1986), Information and Consultation of Employees: The United Kingdom and the Vredeling Directive, *The Modern Law Review, v*ol. 49, no. 3, p. 303.

[5] European Commission (1993), Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM 93(600 final, Brussels, 14 December 1993, p.30 citing Article 35 (I) of the European Social Charter the Council of Europe and, inter alia, ILO Conventions nos. 100, 101, 106, 107, 171, 172 I00, I01, I06III, 171 and 172. Cf. also R. Blanpain (2014), *European labour Law*, 14. ed., Alphen aan den Rijn, Wolters Kluwer, p.215.

[6] In the preamble and article 27 of the Charter; cf. B. Bercusson (2009), *European labour law*, 2. ed., Cambridge, University Press, p. 455 and the European industrial relations dictionary

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2. The application of the European Social Charter and the Community Charter of Fundamental Social Rights by collective agreements

As a number of academics have pointed out, the content of many legal instruments of the European Social Charter has been profoundly inspired by ILO norms and their machinery.[7]

When it comes to the implementation of the rights enshrined in the Charter the possible avenues are clearly stated: law and regulations, collective agreements or a combination of the two methods.[8]

The European Social Charter of the Council of Europe stated in its former Article 33 (1) that:

"In member States where the provisions of paragraphs 1, 2, 3, 4 and 5 of Article 2, paragraphs 4, 6 and 7 of Article 7 and paragraphs 1, 2, 3 and 4 of Article 10 of Part II of this Charter are matters normally left to agreements between employers or employers' organisations and workers' organisations, or are normally carried out otherwise than by law, the undertakings of those paragraphs may be given and compliance with them shall be treated as effective if their provisions are applied through such agreements or other means to the great majority of the workers concerned." [9]

This formula was retained after long discussions, i.e. the former Article 33 enumerated the cases (e.g. working time, annual leave, protection of young workers) when the application of the Charter may be left to agreements negotiated between the two sides of industry. Wolf considers the Charter as one of the clearest and most direct projections of ILO norms into the legal framework of another international organisation. Nevertheless, the question of whether or not collective agreements were an adequate legal instrument to transpose norms of the Charter was not uncontroversial. It was especially the issues around the cases what should happen if collective agreements were modified or seized to exist which were raised by the employers. The legal service of the ILO, which was called in by the Council of Europe for advice, responded to this question that the problem could be solved if the governments secured the application by statute in a subsidiary and residual manner. Representatives of the workers, on the contrary, proposed that the application of the Charter via

https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/community-charter-of-the-fundamental-social-rights-of-workers.

[7] Cf. N. Valticos (1979), *International Labour Law*, Amsterdam, Springer, p.65, A. Adinolfi, (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.298 and P. Davies, M. Freedland (eds.) (1983), *Kahn-Freund's Labour and the Law*, 3.ed., London, Stevens, p.55. Kahn-Freund pointed out that article 33 of the Charter had been influenced by the ILO representatives participating in the drafting process of the Charter, cf. Kahn-Freund (1976), The European Social Charter, in: F.G. Jacobs, *European Law and the Individual,* Amsterdam; New York, North-Holland Publishing Company, p.191.

[8] Cf. B. Veneziani (2017), Article 21: The Right to Information and Consultation, in: N. Brunn, K. Lörcher, I. Schömann, S. Clauwaert (2017), *The European Social Charter and the Employment Relation*, Oxford, Hart, p.393.

[9] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035 accessed on 13.04.2020.

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collective agreements should only have been deemed satisfactory if both sides of industry could have proven that the collective agreement in cause covered at least 80% of the workers.[10]

The Committee of Independent Experts of the Council of Europe had also taken the view that it sufficed for an adequate transposition if "a great majority of workers"[11] were covered by collective agreements. According to Swiatowski, the Committee of Independent Experts claimed that the above rule was met "(…) when the national regulations and the practice of the application protect(ed) at least 80 per cent if those covered by the law."[12] Lord Wedderburn also assumed that this "great majority of workers" could "possibly" equate to 80% of workers covered by a collective agreement[13] and Kahn-Freund stressed the possibility that collective agreements may obviate legislation in the implementation process of international norms," if sufficiently comprehensive". [14] This proposal, however, which mirrored a similar discussion within the ILO was not upheld and as we will see later on, the CJEU is more exigent in this respect.

The Social Charter was fundamentally revised in 1996. With regard to the implementation of the relevant basic provisions of the Charter (Articles 1-31) Part V, Article I now reads as follows:

"1. Without prejudice to the methods of implementation foreseen in these articles the relevant provisions of Articles 1 to 31 of Part II of this Charter shall be implemented by:

a) laws or regulations;
b) agreements between employers or employers' organisations and workers' organisations;
c) a combination of those two methods;
d) other appropriate means.

2. Compliance with the undertakings deriving from the provisions of paragraphs 1, 2, 3, 4, 5 and 7 of Article 2, paragraphs 4, 6 and 7 of Article 7, paragraphs 1, 2, 3 and 5 of Article 10 and Articles 21 and 22 of Part II of this Charter shall be regarded as effective if the provisions are applied, in accordance with paragraph 1 of this article, to the great majority of the workers concerned."[15]

Collective agreements as a means of implementation are also mentioned in a number of specific provisions, such as Art. 4§5, 6§§2 and 4, 27§2. Since the Charter does not define the notion of

[10] F. Wolf (1974), L'application des Conventions internationales du Travail par voie de conventions collectives, *Annuaire Français de Droit International*, vol. 20, p.112/113. Cf. also N. Valticos (1970), *Droit International du Travail*, Paris, Dalloz, p.159/170.

[11] Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.219.

[12] A.M. Swiatkowski (2007), *Charter of Social Rights of the Council of Europe*, Alphen aan den Rijn, Kluwer, p. 15.

[13] Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.219.

[14] O. Kahn-Freund (1976), The European Social Charter, in: F.G. Jacobs, *European Law and the Individual,* Amsterdam ; New York, North-Holland Publishing Company, p.191.

[15] https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93 accessed on 13.04.2020.

collective agreements, their concept, scope and coverage, i.e. the effectiveness of the application both the Charter's provisions, depends on the national legal and industrial relations system.[16]

As already mentioned above, already the 1961 version of the Charter had introduced the so-called 'great majority rule'. Due to the consistent case law of the European Committee of Social Rights (ECSR) it had become commonly accepted that the great majority rule had to be interpreted in the sense that an effective implementation of a provision of the Charter through collective agreements was assured if 80% of the workers were covered. Yet, important questions with regard to the personal scope of this presumed coverage remained. How was 'worker' to be defined in this context? Did the definition cover self-employed, atypical forms of work. According to the constant case law of the ECSR, the majority rule had to be applied to the number of workers as a whole. *E contrario*, this reasoning implies that as long the percentage of specific categories of workers not covered by collective agreements does not exceed 20 percent, then there is no conflict with the Charter. If an implementation of a provision of the Charter via collective agreement is not conform with the requirements of the great majority rule, then the State is under the obligation to protect the rights of those workers not covered by way of legislation.[17]

The Community Charter of Fundamental Social Rights of Workers evokes collective agreements and the principle of subsidiarity first in its Preamble:

"Whereas, by virtue of the principle of subsidiarity, responsibility for the initiatives to be taken with regard to I the implementation of these social rights lies with the Member States or their constituent parts and, within the limits of its powers, with the European Community; whereas such implementation may take the form of laws, collective agreements or existing practices at the various appropriate levels and whereas it requires in many spheres the active involvement of the two sides of industry."

In article 27 the Community Charter then lists collective agreements as a source of law to guarantee the Charter's rights:

"It is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights in this Charter and to implement the social measures indispensable to the smooth operation of the internal market as part of a strategy of economic and social cohesion."[18]

In contrast to the Council of Europe, the Community Charter of Fundamental Social Rights of Workers and the ILO, the Charter of Fundamental Rights of the European Union does not make similar references.[19]

[16] Cf. T. Japers (2017), Implementation: Article I, in: N. Brunn, K. Lörcher, I. Schömann, S. Clauwaert (2017), *The European Social Charter and the Employment Relation*, Oxford, Hart, p.72.

[17] Cf. T. Japers (2017), Implementation: Article I, in: N. Brunn, K. Lörcher, I. Schömann, S. Clauwaert (2017), *The European Social Charter and the Employment Relation*, Oxford, Hart, p.72.

[18] https://www.eesc.europa.eu/resources/docs/community-charter--en.pdf accessed on 13.04.2020.

[19] Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C326/391 26.10.2012.

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In the following, we will take a closer look at the application of International Labour Conventions by collective agreements, since the issue at stake are somewhat similar to those arising in the context of the transposition of EU labour law directives through collective agreements at national level.

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3. The application of International Labour Conventions by collective agreements

The important role that collective agreements may play in the application of ILO Conventions is regarded as being inherent to the tripartite nature of this international organisation.[20]

Consequently, both the ILO Constitution (Art. 19(5e) and specific Conventions have demonstrated a certain degree of flexibility vis-à-vis the implementation of ILO norms via collective agreements. When it comes to the implementation of ILO instruments via collective agreements Landy draws a parallel between this scenario and their transposition in federal states. In doing so Landy implicitly alludes to similarities between vertical (federation - federal states) and horizontal subsidiarity (state – social partners) which we will discuss later on.

Landy distinguishes three different scopes of application defining the extent to which an ILO Conventions may have recourse to collective agreements for their implementation, either by leaving the it to the discretion of the Member States or by referring explicitly to collective agreements as an avenue of implementation:

- a first category of instruments leaves certain practical issues to the implementation through collective agreements, such as working time (e.g. C 1 , 30, 67), the payment of wages and overtime compensation (e.g. C 43, 49, 95);
- a second category of ILO conventions leaves the discretion to the Member State to choose the "appropriate" method of implementation for a specific ILO instrument;
- finally, the third cluster is the broadest in its scope by envisaging a partial of even entire implementation of an ILO Convention by collective agreements. This is the case for the three Maritime Conventions (C 70, 72, 76), the Workers' Representatives Convention (C135/1971), the Dock Work Convention (C137/1973), and the Nursing Personnel Convention (C149/1977) which states in its article 8: [21]
    - "The provisions of this Convention, in so far as they are not otherwise made effective by means of collective agreements, works rules, arbitration awards, court decisions, or in such other manner consistent with national practice as may be

[20] F. Wolf (1974), L'application des Conventions internationales du Travail par voie de conventions collectives, *Annuaire Français de Droit International*, vol. 20, p.105. For a more sceptical note cf. N. Valticos (1970), *Droit International du Travail*, Paris, Dalloz, p. 572,

[21] Cf. E.A. Land (1966), *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience*, London, Stevens & Sons, p.115 and Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.219 and 231. See also J.M. Servais, (1986), Flexibility and Rigidity in International Labour Standards, *International Labour Review*, vol. 125, no. 2 , p.197 and fn.15 and A. Adinolfi (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.297.

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appropriate under national conditions, shall be given effect by national laws or regulations."[22]

In a similar vein, Article 6 of the Workers' Representatives Convention (C135/1971) advances:

- "Effect may be given to this Convention through national laws or regulations or collective agreements, or in any other manner consistent with national practice."[23]

Article 7 Dock Work Convention (C137/1973) even seems to give priority of collective agreements over national laws and regulations.

- "The provisions of this Convention shall, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations."[24]

Already in 1958 Wilfred G. Jenks, Director-General of the ILO from 1970-73, distinguished nine different categories of applications and derogations of ILO norms through the application of collective agreements: exceptions, higher standards, standards of greater detail, persons to whom different standards apply, no obligation to legislate where satisfactory compliance is secured by collective agreement, devolve certain functions upon the parties to collective agreements, Promotional Conventions, Industrial Relations Conventions and the Seattle Formula.[25]

Two of the categories are of particular interest in the context of this background note. With regard to the eight category, Industrial relations conventions, Jenks noted that (…) certain Conventions regarding industrial relations embody standards which may be regarded as so basic and so well established that no legislative implementation is required to secure their effective application in countries where they are fully accepted by the parties to industry. As an illustration we may take the Right to Organise and Collective Bargaining Convention 1949 (…)."[26] The ninth category is derived from the Seattle Formula, which tried to establish more general and comprehensive terms for the application of collective agreements. The formula which was finally adopted by the Copenhagen Conference contained three important elements for the application of collective agreements in the process of implanting ILO norms in relation to the initial proposal of a preparatory conference : 1)

[22] C149-Nursing Personnel Convention, 1977 (No.149), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C149 accessed on 13.04.2020.

[23] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312280:NO accessed on 14.04.2020.

[24] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312282:NO accessed on 13.04.2020.

[25] Cf. C.W. Jenk (1958), The application of international labour conventions by collective agreements, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht,* vol.19, pp.199-204.

[26] Ibid., p. 203.

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the agreement must apply to not less than three-quarters of the total number of the persons employed in the sector in which the instrument applies (in the concrete case: vessels); 2) it eliminated the requirement of a minimum number of years of validity of an agreement; 3) it upheld the requirement of a minimum number of months for notice of termination of a collective agreement. [27]

In the second part of his analysis Jenks then sketched a number of possible solutions to overcome the difficulties linked to the application off International labour Conventions by means of collective agreements. In the following will focus on those approaches bearing the most similarities with the challenges facing the implementation of EU labour law directives through national collective agreements. The difficulties arising in the context of the application of ILO Conventions are mainly fourfold. First, in a number of countries collective agreements are "free" agreements, concluded for a specific period of time and only binding on the signatory parties and their members. Second, the situation may arise that negotiations break down an no collective agreements are concluded. Third, these two situations may be remedied by legislation, which in turn bears the handicap of restricting the freedom and autonomy of collective bargaining. Fourth, the implementation via collective agreements goes hand in hand with difficulties or assuring adequate enforcement. The solution envisaged by Jenks which bears the most resemblance to the European situation is the one centred around the idea of including in Conventions clauses referring to collective agreements to be made legally binding, i.e. extended *erga omnes*, and being valid for a relatively long time.[28] As we will discuss later, this is an approach very similar to the one taken by the Court of Justice of the European Union.

The conflict mentioned above regarding the possibility of laws restricting the freedom of collective bargaining is illustrated by the ratification process of the ILO Washington Convention of 1919 enshrining the 48-h working week. Already this very first ILO Convention catered in Article 2 for exceptions to the 48-h working week "(…) where by law, custom, or agreement between employers' and workers' organisations, or, where no such organisations exist, between employers' and workers' representatives (...)" this was foreseen.[29] Despite this flexibility the United Kingdom never ratified this first ILO Convention, since legislation on working time would have infringed upon the principle that this topic is traditionally left to collective bargaining in this country.[30] This observation holds also true for other EU Member States, for example the Nordic cluster of corporatist industrial

[27] Ibid., p. 205.

[28] Cf. C.W. Jenk (1958), The application of international labour conventions by collective agreements, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht,* vol.19, pp. 212-216 and N. Valticos (1970), *Droit International du Travail*, Paris, Dalloz, p. 572.

[29] Cf. F. Wolf (1974), L'application des Conventions internationales du Travail par voie de conventions collectives, *Annuaire Français de Droit International*, vol. 20, p.105 and

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312146:NO.

[30]Cf. P. Davies, M. Freedland (eds.) (1983), *Kahn-Freund's Labour and the Law*, 3.ed., London, Stevens, p. 55 and A. Adinolfi, (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.297.

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relations, in which we find a combination of strong autonomous social partners and high levels of collective bargaining coverage.[31]

In 1974 Wolf elaborated four types of ILO standards which recur to collective agreements for application: 1) derogation to the international norm provided that national collective agreement exist in the scope of application; 2) respect of clauses in collective agreements which are more favourable than those of the international norm; 3) referral to national statutes or collective agreements if those are more precise than the international norm; 4) referral to national statutes or collective agreements for the definition of certain categories of persons which may be excluded from the application of the international norm.[32]

In a nutshell, Jenks , Landy and Wolf accepted, from a theoretical and a practitioner's perspective the option that ILO conventions may be transposed by collective agreements, yet Jenks also insisted that this should not be seen as an "(…) axiom of policy as the circumstances to which it can be applied are very limited."[33] This view is also shared by other experts of international law arguing that "(...) collective agreements may, in principle, suffice to give effect to Conventions."[34]

Despite these shared views, there are also downsides to the implementation of ILO instruments via collective agreements. They are mainly linked to the following risks: the question arises about the compulsory nature of a collective agreement and the risks linked to the fact that they may be cancelled and revised; the second risk is their compliance with the obligations as stated in the ILO instruments into question and the enforcement in case of non-compliance; finally, the application to all persons falling within the scope of a specific ILO convention also may pose a problem when this instrument is implemented via collective agreements. Henceforth, in all these cases it may be necessary that that the state steps in. According to Landy, this does not necessarily have to be via legislation, but a more gradual approach is also possible

" While governments must rely primarily on advice and persuasion, their role is by no means passive. They must keep in touch with the course and results of collective bargaining, stimulate co-operative action and help, where appropriate, in setting up machinery for promoting compliance with the Convention."[35]

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[31] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312146:NO accessed on 13.04.2020.

[32] Cf. F. Wolf (1974), L'application des Conventions internationales du Travail par voie de conventions collectives, *Annuaire Français de Droit International*, vol. 20, p.105/106.

[33] C.W. Jenks (1958), The application of international labour conventions by collective agreements, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht,* vol.19, p.199. Cf. also P. Davies, M. Freedland (eds.) (1983), *Kahn-Freund's Labour and the Law*, 3.ed., London, Stevens, p. 55.

[34] N. Valticos (1979), *International Labour Law*, Amsterdam, Springer, p.53 and idem (1970), *Droit International du Travail*, Paris, Dalloz, p.546.

[35] E.A. Landy (1966), *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience*, London, Stevens & Sons, p.115/116. Cf. also N. Valticos (1970), *Droit International du Travail*, Paris, Dalloz, p.572.

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4. EU law and the concept of collective agreements

"Legislation and collective bargaining are not necessarily alternative, indeed they may frequently be supplementary sources of regulation."[36]

EU law does not have a precise legal definition of collective agreements.[37] According to Eurofound collective agreements at national level "(…) are agreements concluded between single employers or their organisations on the one hand, and organisations of workers such as trade unions on the other. These agreements establish the content of individual contracts of employment and regulate relationships between the parties."[38] The process leading to these outcomes is collective bargaining which is the "(…) negotiation between unions and employers regarding the terms and conditions of employment of employees, and about the rights and responsibilities of trade unions. It is a process of rulemaking, leading to joint regulation."[39] According to the recent Commission consultation "all EU Member States have ratified ILO Convention N° 98 on the Right to Organise and Collective Bargaining (...) and fourteen EU countries have ratified ILO Convention N° 154 on Collective Bargaining, which requires the promotion of collective bargaining to all workers and employers adapted to national circumstances."[40]

The role of statutes and collective bargaining in the governance of the employment relationship, in general, and the legal concept of collective agreements, in particular, vary, largely among the Member States of the European Union.[41] The main dividing line is the one between the continental cluster of industrial relations and the Anglo-Saxon one, i.e. Ireland[42] and the UK.[43] Continental

[36] O. Kahn-Freund, in: P. Davies, M. Freedland (eds.) (1983), *Kahn-Freund's Labour and the Law*, 3.ed., London, Stevens, p.58.

[37] Cf. R. Nielsen (2002), Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations,* vol.18, no.3, p. 463.

[38] European industrial relations dictionary, European collective agreements 2013, https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/european-collective-agreements.

[39] European industrial relations dictionary, Collective bargaining 2017, https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/collective-bargaining.

[40] European Commission (2020), Consultation document. First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages, C (2020) 83 final, Brussels, 14.1.2020.

[41] Cf. N. Valticos (1979), *International Labour Law*, Amsterdam, Springer, p.53 and idem (1970), *Droit International du Travail*, Paris, Dalloz, p.545.

[42] Cf. C. Docksey (1986), Information and Consultation of Employees: The United Kingdom and the Vredeling Directive, *The Modern Law Review, v*ol. 49, no. 3, p. 304.

[43] Cf. R. Nielsen (2002), Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations,* vol.18, no.3, p. 464. The United Kingdom has withdrawn from the European Union and is a third

collective agreements tend to have mandatory normative force, whereas in the Anglo-Saxon world they are seen as "extra-legal counsel, custom"[44] or "gentlemen's agreements" only[45] and are not legally binding unless it is stated otherwise.[46]Consequently, in the Anglo-Saxon systems of industrial relations a collective agreement is "(…) only binding in honour, (and) its incorporation into the individual contract of employment makes its terms legally enforceable (…)."[47]

In national law, continental collective agreements fulfil two distinct objectives: they have a contractual/procedural and normative function. The contractual function regulates the relationship between employers (single employer bargaining) and employers' organisations (multi-employer bargaining) and trade unions, i.e. their rights and obligations. The normative functions regulates terms and conditions of the individual employment relationship, such as pay, working time, holidays and leave, health and safety, skills, etc.[48]

O. Kahn-Freund summarised the different functions of collective agreements very lucidly as of below:

"A collective agreement is an industrial peace treaty and at the same time a source of rules for terms and conditions of employment, for the distribution of work and for the stability of jobs. (…) To the two social functions of collective agreements correspond two actual or potential legal characteristics. The agreement may be, and in many counties is, a contract between those who made it, i.e. between an employer or employers or their association or associations on the one side and a trade union or unions on the other. At the same time the agreement is also potentially, and in many countries actually, a legal code. In this country it is generally neither a legally enforceable contract, nor (exceptions apart) a legally enforceable code."[49]

country as of 1 February 2020. The background note follows the guidelines as issued by EUROSTAT; cf. European Commission/EUROSTAT (2020), Guidelines for the production and dissemination of statistical data by Commission services after the UK leaves the EU, Ref. Ares(2020)440467 - 23/01/2020 : "As of 1 February 2020, the new aggregate of the EU with 27 Member States should be prioritised in all statistical data; however, depending on the reference period, the EU28 aggregate may also be published (i.e. for reference periods when the UK was still a Member State)."

[44] R. Nielsen (2002), idem (2013), *EU Labour Law*, 2.ed., Copenhagen, p. 82; Cf. also S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.71

[45] Cf. *A*.M. Swiatkowski (2002), Implementation of European Union Labour Legislation via Collective Bargaining in Poland, *Jurisprudencija*, vol. 25, no.17, p.116 and Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.212.

[46] Lord Wedderburn (1992), Inderogabilty, Collective Agreements, and Community Law and, *Industrial Law Journal*, vol. 21, no.4, pp. 245. Cf. C. Docksey (1986), Information and Consultation of Employees: The United Kingdom and the Vredeling Directive, *The Modern Law Review, v*ol. 49, no. 3, p. 304 making the precise point that in the UK since the Trade Unions and Labour Relations Act of 1974 "(…) an agreement is legally binding (…) if it is expressed in writing and declares that it is intended to be a legally enforceable contract."

[47] J. Carby-Hall (1985), Legal Notions on the Collective Agreement, *Managerial Law*, vol. 27, no.4, p.1.

[48] Cf. S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.6 and Eurofound (Manfred Weiss) (1992), European Employment and Industrial Relations Glossary: Germany, London, Sweet & Maxwell, pp. 304-306.

[49] O. Kahn-Freund, in: P. Davies, M. Freedland (eds.) (1983), *Kahn-Freund's Labour and the Law*, 3.ed., London, Stevens, p.154.

In European Union law, national collective agreements may have a double role:

1. as tools of implementation of other EU legal sources, such as directives;
2. as mechanisms to derogate, under certain circumstances from EU standards laid down by directives.

The first role will be examined as a case of 'first degree' implementation, whereas the second role will be dubbed as 'second degree' implementation in line with the revised ad hoc request of the European Commission services.[50]

When it comes to the first role which is at the centre of our analysis, Ruth Nielsen distinguishes four modes of implementation of EU directives into national legislation.

1. ordinary statutory legislation;
2. a combination of statutory legislation and collective agreements;
3. collective agreements with mandatory effect extended *erga omnes*;
4. collective agreements with mandatory effect which are only applicable *inter partes*.[51]

According to Ruth Nielsen, only the second and the third category are a suitable avenue for the implementation of directives via collective agreements. Collective agreements with mandatory effect which are only applicable *inter partes* or mere gentlemen's agreements, as in the UK without any mandatory normative effect, are to be considered as not appropriate instruments for transposing EU directives into national law.[52]

This debate is perhaps most relevant in Denmark, where the industrial relations model is characterised by the use of collective agreements as a means of implementing both EU directives and national policies which fall within the scope of their domain. The philosophy behind the Danish model is simple: if the responsibility to implement a policy is in the hands of the social partners, then the social partners will ensure that implementing collective agreements will be applied in an efficient and practical manner. According to Nielsen "collective agreements are thus, in the Danish context, the key both to the legislative and the adjudicative function of the social partners. They typically prefer this means of implementing directives in order to maintain their roles as legislators and judges in Danish labour law."[53] We will examine the Danish model in more detail in chapter 10.2 of this report.

[50] The EC services draw on the draft report from Catherine Barnard and Andrea Peripoli (2020),Transposition of EU labour law through collective agreements, University of Cambridge.

[51] R. Nielsen (2013), *EU Labour Law*, 2.ed., Copenhagen, p.155.

[52] Ibid., p.82. Cf. also A.M. Swiatkowski (2002), Implementation of European Union Labour Legislation via Collective Bargaining in Poland, *Jurisprudencij*a 2002, vol. 25, no.17, p.116 and S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.73. In the same A. Adinolfi (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.309/310.

[53] R. Nielsen (2002), Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations,* vol.18, no.3, p. 461.

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A clause concerning implementation by collective agreements is now contained in all directives where the issues may fall under the bargaining power of the social partners.

5. Collective agreements and horizontal subsidiarity[54]

Collective agreements provide an industrial relations mechanism for the enforcement of EU law. In comparison to administrative officials or judges, the social partners are much closer to the issues involved in the enforcement of labour law.

According to O. Kahn-Freund collective agreements bear a certain amount of advantages vis-à-vis legislation. At first, collective agreements tend to be more flexible:

"Legislation is generally more rigid than collective bargaining, and obviously much less responsive to economic change. Collective agreements are concluded for a year, sometimes for two or three, sometimes (and in this country normally) without a time limit."[55]

Second, collective agreements have the potential to be effective guarantors of the application of rules.

Due to their strong roots in the principle of subsidiarity[56] and proportionality social dialogue and collective bargaining are often in a better position than the normal legislative route to conciliate between economic and social objectives.[57] In the context of the EU treaties, the principle of subsidiarity is intended to ensure that decisions are taken at a level as close as possible to the citizen, whilst checking that any action to be undertaken at European level is justified compared with the options available at national level. That is, in concrete terms, checking that the objectives of the proposed action cannot be sufficiently achieved by Member States in the framework of their national constitutional systems and that they can therefore be better achieved by actions on the part of the European Union (vertical subsidiarity – Art. 5(3) TEU). Some scholars and the and European Economic and Social Committee prefer to speak in the context of collective bargaining and

[54] European industrial relations dictionary, Collective agreements as a mechanism for enforcement of EU law,

2010 https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/collective-agreements-as-a-mechanism-for-enforcement-of-eu-lawb.

[55] O. Kahn-Freund, in: P. Davies, M. Freedland (eds.) (1983), *Kahn-Freund's Labour and the Law*, 3.ed., London, Stevens, p.58.

[56] Being tagged as a "barbarous" term by Lord Wedderburn who prefers to introduce the doctrine of "inderogability" into the UK system, meaning that an employer may not contract with workers in individual contracts working conditions less favourable than those set in higher level collective agreements; cf. Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.215/216.

[57] C. Welz (2008), *The European social dialogue under Articles 138 and 139 of the EC Treaty,* Alphen aan den Rijn, Kluwer, p.190-194.

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the European social dialogue of 'horizontal subsidiarity'.[58] Horizontal subsidiarity applies in the context of social partnership, i.e. the exercise of competences between the EU and the European social partners. Horizontal subsidiarity addresses the specific question of choices at the same level: whether the exercise of prerogatives by the EU institutions or by the European social partners is preferable. The same test is applicable at Member State level: whether action by the State or the social partners at national level is preferable. In its 1993 Communication concerning the application of the agreement on social policy the EC acknowledged "a dual form of subsidiarity in the social field: on the one hand, subsidiarity regarding regulation at national and Community level; on the other, subsidiarity as regards the choice, at Community level, between the legislative approach and the agreement-based approach."[59]

The principle of proportionality means that to achieve an aim only the necessary action are taken and no more.[60] Article 5(4) TEU stipulates that: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[61]

Davies summarises the advantages of social dialogue based on the principle of subsidiarity as follows:

"it allows those concerned with labour law, management and trade unions, to participate in the legislative process, and its reflexive, allowing them to adapt the law to their particular needs."[62]

The same arguments of horizontal subsidiarity and proportionality also hold true for the implementation of EU labour law directives through national collective agreements. The principle of subsidiarity also played an important role in national industrial relations after the ratification of the Maastricht Treaty in 1993:

"In Denmark the so-called 'subsidiarity principle' played a major role in employers' organisations', trade unions' and various governments' recommendation of further EU integration as a result of the

[58] B. Bercusson, J.J. van Dijk (1995), The implementation of the protocol and agreement on social policy of the Treaty of the European Union, *International Journal of Comparative Labour Law and Industrial Relations,* vol. 11, no. 1, pp.3–30 and European Economic and Social Committee (1994), Opinion of the Economic and Social Committee on the communication concerning the application of the agreement of social policy presented by the Commission to the Council and the European Parliament, COM(93)600 final, Brussels.

[59] European Commission (1993), Communication from the Commission concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM 93(600 final, Brussels, 14 December 1993.

[60] https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality accessed on 12.4.2020.

[61] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN accessed on 12.4.2020. Cf. also C. Welz (2008), *The European social dialogue under Articles 138 and 139 of the EC Treaty,* Alphen aan den Rijn, Kluwer, p.125/126.

[62] A.C.L. Davies (2012), *EU Labour Law*, Cheltenham, Elgar, p.36.

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Maastricht Treaty because this principle is supposed to guarantee that directives from the EU can be implemented in Denmark as collective agreements."[63]

However, the recent EPSU case depicts a somewhat different reading. On 23 May 2019 EPSU brought a claim before the General Court of the European Union against the European Commission for breaching rules on social dialogue (article 155(2) TFEU) by refusing to make a proposal to Council for implementation of the central government social partners' agreement on information and consultation rights adopted on 21 December 2015. The EC had rejected social partners request to transpose the collective agreement into EU legislation stating that "a directive transposing the Agreement into EU law would result in significantly different levels of protection depending on whether the Member State has a more centralised administration and therefore a wider coverage of central government, or a more decentralised or federal administration, which would leave a larger proportion of the public sector excluded from the scope of such EU legislation (EC letter of 5 March 2018). "

With regard to the principle of subsidiarity in the context of the case the Court stated in its decision of 24 October 2019 that:

"(…) the applicants rely on a principle of 'horizontal subsidiarity', meaning that the social partners are best placed to assess whether an agreement must be implemented at the level of management and labour and the Member States or at EU level.

In that regard, it must be observed that, as is laid down in Article 5(3) TEU, the principle of subsidiarity governs the exercise by the EU of the competences that it shares with Member States. Therefore, that principle is understood as having a 'vertical' dimension, in the sense that it governs the relationship between the European Union on the one hand and Member States on the other. By contrast, contrary to what the applicants suggest, that principle does not have a horizontal dimension in EU law, since it is not intended to govern the relationship between the European Union, on the one hand, and management and labour at EU level on the other. Furthermore, the principle of subsidiarity cannot be relied on in order to alter the institutional balance."[64]

Thus, the CJEU seems to negate the existence of a horizontal dimension of the principle of subsidiarity. Nevertheless, by assessing whether or not the Commission had infringed the principles of proportionality and subsidiarity in the course of the case the CJEU seems to be not entirely opposed to such an assumption.

"Furthermore, (…) the Commission announced the effect of the contested decision, stating that it was 'strong on subsidiarity', and that it considered that it was better for the Agreement to be implemented by the social partners at national level. Thus, the Commission considered considerations of subsidiarity and proportionality at the time of determining the appropriateness of EU action, rather than when it determined the possibility of such action. It follows from what has

[63] H. Knudsen, J. Lind (1999), The implementation of EU directives in national systems - lessons from the Danish case, *Transfer*, vol.5, no.1-2, p.137.

[64] Case T-310/18, EPSU vs European Commission, 24 October 2019, http://curia.europa.eu/juris/document/document.jsf?text=&docid=219448&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1646500.

been stated in paragraph 133 above that the Commission did not make a manifest error of assessment in finding that it was not appropriate to implement the Agreement at EU level. (...) It follows that, even on the assumption that a plea alleging that the principle of subsidiarity may be effective in circumstances such as those in the present case, the complaint that the principles of subsidiarity and proportionality were infringed must be rejected as unfounded."[65]

[65] Case T-310/18, EPSU vs European Commission, 24 October 2019, http://curia.europa.eu/juris/document/document.jsf?text=&docid=219448&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1646500.

6. Position of the European Commission

Already in its first Communication on the new social dialogue on the basis of the Agreement on social policy annexed to the Treaty of Maastricht from 1993 via a protocol the European Commission acknowledges that EU directives may be transposed by collective agreements at national level.[66]

"Article 2(4) of the Agreement (now article 153(3) TFEU) states that a signatory Member State "may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3". However, the Member State remains responsible for ensuring that "management and labour have introduced the necessary measures by agreement" and for taking "any necessary measures enabling it at any time to be in a position to guarantee the results imposed by that directive". This implementation of a directive by agreement must take place "no later than the date on which a directive must be transposed in accordance with Article 189 (now article 288 TFEU)"."[67]

Thus, Commission places the responsibility on the Member States when it comes to guaranteeing the results to be achieved by the directive:

"(…) the Member State concerned remains responsible for ensuring that, no later than the date on which a directive must be transposed in accordance with Article 189 (now article 288 TFEU), the social partners have introduced the necessary measures by agreement and for taking "any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive"."[68]

The view that legally binding collective agreements may be considered as an adequate means to transpose directives, as long as all obligations imposed on the Member States were met, had also been expressed by the legal service of the Commission.[69]

The Commission then puts the onus on Member State concerned which "(…) must provide for procedures to deal, where appropriate, with any shortcomings in the agreement implementing the directive, the purpose being to ensure that the workers concerned are in practice afforded their rights under the directive. "[70]

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[66] Cf. R. Blanpain (2014), *European labour Law*, 14. ed., Alphen aan den Rijn, Wolters Kluwer, p.215 and C. Welz (2008), *The European social dialogue under Articles 138 and 139 of the EC Treaty,* Alphen aan den Rijn, Kluwer, p.277.

[67] European Commission (1993), Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM 93(600 final, Brussels, 14 December 1993, p.30.

[68] Ibid.

[69] Cf. A. Adinolfi (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.303.

[70] European Commission (1993), Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM 93(600 final, Brussels, 14 December 1993, p.31.

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The Commissions insists that the Member State must "guarantee the results imposed by that directive", although it may entrust management and labour with its implementation. In this connection, the reference in Article l of the Agreement to measures which "take account of the diverse forms of national practices, in particular in the field of contractual relations" is relevant."[71]

In its Medium-Term Social Action Programme (1995-1997) the Commission even announces a specific Communication on the transposition of European directives through collective agreements at national level and a collective agreement clause to be inserted in future directives falling into the prerogative of management and labour.

"11.1.9- implementation of directives by collective agreements: in the light of the European Court of Justice case law and the Agreement on Social Policy, and taking into account diverse national practices, the Commission will present a Communication addressing the entire area of implementation of Community directives by collective agreements. The Communication will also consider and reflect on ways and procedures to involve the social partners in the process of control of transposition and enforcement of Community law (1996).

11.1.10 A clause concerning implementation by collective agreements will be inserted in all future directives, where the issues concerned may fall under the bargaining power of the social partners."[72]

In the Industrial relations in Europe report from 2000 the European Commission states that "(…) the social partners at national level play a role in their implementation (i.e. directives), either because they are associated with the legislative work (…), or because they themselves take on the task introducing by collective agreement, the aims set out in the Community directives." The Commission further specifies that "this practice, validated over the years by the Court of Justice of the European Communities and enshrined in Article 137(4) of the EC Treaty, is more frequent in those countries with a strong tradition of agreement-based regulation such as Belgium, Denmark or Italy (…). Nevertheless, it raises the question of general coverage, continuity and appropriate publicity for agreement-based transposal measures. Moreover, action by the social partners does not exempt the Member State from the requirement to 'take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive' (Article quoted, in fine). Such is the case when the Member States, supplementing collective agreements on transposal, pass legislative measures for extension *erga omnes* or adopt legislative measures supplementing the agreement on those items not dealt with by the social partners (penalties, means of appeal, etc.). [73]

[71] Ibid.

[72] European Commission (1995), Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Medium Term Social Action Programme 1995-1997, COM(95)134 final, 12.04.95, p.32. Cf. also B. Bercusson (2009), *European labour law,* 2. ed., Cambridge, University Press, p. 455.

[73] European Commission (2000), *Industrial relations in Europe*, Luxembourg, Office for Official Publications of the European Community, p.37.

In its 2004 Communication, the Commission again draws the attention to the responsibility of Member States in ensuring effective implementation of directives when national collective agreements are used in this process.

"The responsibility for ensuring that agreements implemented by Council decision are transposed and implemented lies with the Member States, even in cases where the provisions are implemented through collective bargaining by the social partners. Responsibility for monitoring these agreements lies with the Commission, although the social partners are systematically consulted on the implementation reports." [74]

[74] European Commission (2004), Communication from the Commission - Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue, COM(2004)557 final, Brussels, 12.8.2004, p.16.

7. Position of the Council

In 1984, the Legal Service of the Council was asked by an ad hoc group for an opinion on the application of directives by way of collective agreements. It came in the context of the draft directive on the information and consultation of workers (the so-called Vredeling directive).[75] In the first part of the document the legal service cites an earlier opinion from 1974[76] stating that "(…) a collective agreement could be accepted as an instrument implementing a directive only in so far as a provision laid down by law, regulation of administrative action confers upon it a binding effect or if it is recognised as possessing such an effect by national jurisprudence."[77]

The 1984 opinion the legal service further elaborated that it was

"(…) of the opinion that collective agreements that are not binding at law clearly cannot give effect to directives. Collective agreements which are binding at law, either inherently or by virtue of a general legal act conferring binding force erga omnes on them, or by virtue of separate legal acts giving them the same binding force in certain sectors or undertakings, can be considered as a satisfactory means of giving effect to directives. The Member State should not, however, confine itself to inviting the social partners to adopt collective agreements giving effect to the directive; it must ensure that the collective agreements adopted do in fact give effect to the directive and that any subsequent modifications of a collective agreement are also compatible with the directive. It follows, for example, that where the collective agreements do not cover all employers and all workers to whom the provisions of the directive are meant to apply, the Member State must ensure that the necessary measures are adopted to achieve the result required by the directive in their regard."[78]

Thus, in a nutshell the Legal Service of the Council took a critical stance and argued that collective agreements which are not "legally binding" cannot be regarded as adequate forms of transposing directives into national law, since they lacked enforceability in courts. On the other hand, the Legal Service of the Council conceded that legally binding collective agreements were adequate national instruments of transposition, provided that full compliance with the obligations as set in the

[75] Council of the European Communities, Opinion of the Legal Service: Application of directives by way of collective agreements – Draft directive on the information and consultation of workers (Vredeling directive), Brussels, 23 November 1984, Doc. 10550/84,) (SOC 323) (JUR 14).

[76] Doc. R/661/74, (SOC 54) (JUR 46).

[77] Council of the European Communities, Opinion of the Legal Service: Application of directives by way of collective agreements – Draft directive on the information and consultation of workers (Vredeling directive), Brussels, 23 November 1984, Doc. 10550/84,) (SOC 323) (JUR 14).

[78] Ibid.

directive is guaranteed.[79]

In the 1993 Communication of the Commission points to the fact that Article 2(4) of the Agreement (now article 153(3) TFEU) "(…) implies that the Member State concerned must provide for procedures to deal, where appropriate, with any shortcomings in the agreement implementing the directive, the purpose being to ensure that the workers concerned are in practice afforded their rights under the directive."[80] This very wording is also to be found in a number of subsequent Council directives, such as 91/533/EEC and Directive 92/56/EEC, which where tabled by the Commission in the early 1990s under the Social Action Programme.

Directive 91/533/EEC (conditions applicable to the contract or employment relationship)

Art. 9 (1): Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 June 1993 or shall ensure by that date that the employers' and workers' representatives introduce the required provisions by way of agreement, the Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.[81]

Directive 92/56/EEC (collective redundancies)

Art. 2(1): Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest two years after its adoption or shall ensure, at the latest two years after adoption, that the employers' and workers' representatives introduce the required provisions by way of agreement, the Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.[82]

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies which repeals Directive 92/56EEC mentions the application of more favourable collective agreements in the contexts of the implementation of the Directive in article 5, but it does not mention the implementation of the directive, as such, by the social partners any longer:

"This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the

[79] Cf. also A. Adinolfi (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.303, 310, Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.229, fn. 36 and H. Knudsen, J. Lind (1999), The implementation of EU directives in national systems - lessons from the Danish case, *Transfer*, vol.5, no.1-2, p.144.

[80] European Commission (1993), Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM 93(600 final, Brussels, 14 December 1993, p.30.

[81] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, L 288/32, 14.10.1991. p.33/34.

[82] Council Directive 92 / 56 / EEC of 24 June 1992 amending Directive 75 / 129 / EEC on the approximation of the laws of the Member States relating to collective redundancies, L 245/3, 26.8.1992, p.5.

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application of collective agreements more favourable to workers. [83]

In its resolution from 1995 the Council takes position in favour of the possibility of transposing EU labour law directives through collective agreements and encourages the social partners to avail of their prerogatives, yet similar to the Commission, the Council puts the onus on the Member States to ensure that, at all times, the outcomes of the relevant directives are guaranteed by the Member State. In the resolution, the Council emphasises the principle that "(…) consultation of management and labour at Community level provides a firmer foundation for Community social legislation and must therefore be stepped up." In order to achieve this, aim the Council continues that "(…) Directives should allow management and labour, in accordance with national legislation and/or practices, to be involved in the transposition of Community social legislation through collective bargaining agreements or agreements concluded at national level."[84]

A precondition, however, for involvement of the social partners in the implementation of directives is that the Member States "take whatever steps are necessary to ensure that at all times the outcome required by the relevant Directive can be guaranteed."[85] This guarantee is in practice only given, if, when it comes to implementation of directives via collective agreements, the modes 2 and 3 above are chosen, i.e. a combination of statutory legislation and collective agreements or collective agreements with mandatory effect extended *erga omnes*.

The most recent and clearest example in this context is

Directive 2019/152/EU (transparent and predictable working condition)

Art. 22(5): 5. Member States may entrust the social partners with the implementation of this Directive, where the social partners jointly request to do so and provided that Member States take all necessary steps to ensure that they can at all times guarantee the results sought under this Directive.[86]

[83] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, Official Journal of the European Communities, L 225/16, 12. 8. 98, p.18.

[84] Council of the European Union (1995), Council Resolution of 27 March 1995 on the transposition and application of Community social legislation (95/C168/01), Official Journal C 168, 04 July 1995, p.2.

[85] Ibid. Cf. also A.M. Swiatkowski (2002), Implementation of European Union Labour Legislation via Collective Bargaining in Poland, *Jurisprudencija*, vol. 25, no.17, p.116 and R. Nielsen (2013), *EU Labour Law*, 2.ed., Copenhagen, p. 156.

[86] Directive (EU) 2019/1152 of the European Parliament and the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, Official Journal of the European Communities, L 186, 11.7.2019, p.105-121.

8. Case law of the Court of Justice of the European Union

8.1 Infringement procedures

The recognition of the role of collective agreements in implementing directives emerged slowly from the case law of the Court of Justice of the European Union (CJEU)[87]. In an early complaint from 1981 the Commission alleged that Italy (C 91/81) was not adequately implementing Directive 75/129 on collective dismissals, the Italian Government argued 'in substance' that legislation, regulatory provisions and collective agreements combined to achieve implementation and that the Commission point of view was purely formalist by not ascertaining that the objectives of the directives were already achieved in the Italian legal system.

The view of the Advocates-General at the outset of the issue was rather critical, and some have argued (…) that collective agreements are *never* available as a 'method' of implementation to reach the 'result to be achieved' under Article 189 of the Treaty'".[88] Advocate General Verloren Van Themaat was more specific on the transposition of directives by collective agreements, and in particular their need to be applied *erga omnes* in order to achieve the aims of a directive.

"(…) that the inter-union agreements on which Italy relied first do not apply to all the employers covered by the directive or contain all the obligations contained in the directive. Secondly, with regard to Article 100 of the EEC Treaty and Article 6 of the directive, they cannot be regarded as "methods" within the meaning of Article 189 of the Treaty or as "laws, regulations of administrative provisions" within the meaning of Article 6 of the directive."[89]

The CJEU, however, did not follow this strict line. In upholding the Commission's complaint, the CJEU pointed out that certain sectors were not covered by agreements, and that the agreements did not include all the provisions required by Community law. The CJEU also argued that the Italian transposition did not meet the requirements of the directive, since the Italian collective agreement fell short of procedural requirements. Yet, in focussing only on this procedural shortfall the CJEU seemed to accept the principle that national collective agreements were *per se* an adequate means of transposing directives into national legal orders.

"(…) It is furthermore common ground that Italian collective agreements do not require the notification in writing on the part of the employer which is provided for by the directive and that the Italian system does not provide, as is required by the directive, that the competent public authority must be notified of any collective redundancy and that the competent public authority is not

[87] Cf. also https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/european-court-of-justice.

[88] Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.219. Cf. also J.M. Miranda Boto (2002), El papel de la autonomía colectiva en la transposición de Directivas, *Revista Doctrinal Aranzadi Social*, no.21, p.2.

[89] Case 91/81, [1982], ECR, 2145.

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compelled to intervene in order to seek solutions to the problems raised by the projected collective redundancies."[90]

While initially critical, the CJEU was appreciative of the effects of collective agreements in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, C 165/82). The CJEU held that the failure of the UK Government to enact legislation providing for the nullification of collective agreements violating the provisions of Directive 76/207 on equal treatment of women and men, constituted non-fulfilment of its obligations under Article 249 EC.

However, although collective agreements in the UK lacked legal effect, the CJEU stated that:

"The directive thus covers all collective agreements without distinction as to the nature of the legal effects which they do or do not produce. The reason for that generality lies in the fact that, even if they are not legally binding as between the parties who sign them or with regard to the employment relationships which they govern, collective agreements nevertheless have important *de facto* consequences for the employment relationships to which they refer, particularly in so far as they determine the rights of the workers and, in the interests of industrial harmony, give undertakings satisfy or need not satisfy. The need to ensure that the directive is completely effective therefore requires that any clauses in such agreements which are incompatible with the obligations imposed by the directive upon the Member States may be rendered inoperative, eliminated or amended by appropriate means."[91]

A similar view was expressed in the Opinion of Advocate-General Rozès in the case:

"Moreover, a situation in which possibly discriminatory provisions continue to exist in documents such as collective agreements (…) is just as ambiguous (…) as the situation created by the implementation of a directive merely by means of administrative practices. It should also be noted that workers have easier access to collective agreements (…) than to Directive 76/207 or to the United Kingdom laws (…). (…) In order to avoid such risks of confusion, the best course is to make it possible for such discriminatory provisions to be removed from those documents, as required by the directive."[92]

The CJEU again considered the issue in *Commission of the European Communities v. Kingdom of Denmark* (C 143/83) and according to Bercusson "a definitive step towards the formal recognition of collective agreements was taken (…)[93] in that case.

The Danish government asserted that collective agreements were its choice of form and method for implementation of the obligations of Council Directive 75/117/EEC on equal pay. It was argued that

[90] Case 91/81, [1982], ECR, 2140. Cf. also B. Bercusson (2009), *European labour law,* 2. ed., Cambridge, University Press, p. 451, R. Nielsen *(2013)*, *EU Labour Law*, 2.ed., Copenhagen, p.158/159 and R. Blanpain (2014), *European labour Law*, 14. ed., Alphen aan den Rijn, Wolters Kluwer, p. 215.

[91] Case 165/82, [1983], ECR, 3447.

[92] Case 165/82, [1983], ECR, 3454. Cf. also B. Bercusson (2009), *European labour law,* 2. ed., Cambridge, University Press, p. 4551/452.

[93] B. Bercusson (2009), *European labour law,* 2. ed., Cambridge, University Press, p. 452.

the Danish legislation was but a secondary guarantee of the equality principle in the event that this principle was not guaranteed by collective agreements. An agreement of 1971 created such a provision and covered most employment relations in Denmark. The CJEU ruled that while Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour, this does not discharge them from the obligation of ensuring, by appropriate legislative and administrative provisions, that all workers are afforded the full protection provided for in the directive. That state guarantee must cover all cases where effective protection is not ensured by other means, for whatever reason, and in particular cases where the workers in question are not union members, where the sector in question is not covered by a collective agreement or where such an agreement does not fully guarantee the principle of equal pay. The main issue in this case resulted from the *inter partes* effect of Danish collective agreements which "(…) cannot grant rights to all workers and are therefore not sufficient as the sole means of implementing"[94] EU labour law directives into national law. Despite this restriction, also Advocate General Verloren Van Themaat was less critical in this case than in the previous one against Italy (C 91/81) with regard to the transposition of directives by collective agreements.

"From the point of view of legal certainty it would undoubtedly have been preferable had Denmark simply incorporated in its legislation the interpretation of the principle of equal pay laid down in Article 1 of the directive, in accordance with the view of the Commission. The infringement of Community law of which I have just spoken would also have been avoided."[95]

In the infringement case against Belgium from 1983 (C 215/83) the CJEU accepted the transposition of Directive 75/129/EEC on collective redundancies into Belgium law through collective agreements which were extended *erga omnes* by Royal Decree on procedural grounds, yet disputed the content of the implementation. Advocate-General Sir Gordon Slynn argued that

"The Royal Decree of 26 March 1984 and Collective Labour Agreement No 24 bis of 6 December 1983 amend, respectively, Royal Decree of 24 May 1976 and Collective Labour Agreement No. 24 of 2 October 1974, and by adopting verbatim the directive's definition of collective redundancies as dismissals 'for one or more reasons not related to the individual workers concerned'. On the face of it, this looks like a compliance with the directive. The problem is that Belgium has left in force parallel legislation specifically governing the case of collective redundancies arising from closures."[96]

In a second case against Italy (**C 235/84**) the then Advocate-General Sir Gordon Slynn was again very critical towards the implementation of EU directives through national collective agreements. Sir Slynn argued that

[94] R. Nielsen *(2013)*, *EU Labour Law*, 2.ed., Copenhagen, p.155.

[95] Case 143/83, [1985], ECR, 430.

[96] Case C 215/83, [1985], ECR, 1042. Cf. also R. Nielsen *(2013)*, *EU Labour Law*, 2.ed., Copenhagen, p.157 and A.M. Swiatkowski (2002), Implementation of European Union Labour Legislation via Collective Bargaining in Poland, *Jurisprudencija*, vol. 25, no.17, p.117.

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"As Advocate General Verloren van Themaat said in Case 91/81 (…) a collective bargaining agreement is not a 'method' for implementing a directive under Article 189 of the Treaty. Similarly, in Case 96/81 (…) the Court held that the provisions of a directive must be implemented by 'national provisions of a binding nature'. What is more, collective bargaining agreements are not 'laws', 'regulations' or 'administrative provisions' within the meaning of Article 8 of Directive 77/187."[97]

Despite the Advocate-General's opinion, which in EU law is not binding upon the Court, the CJEU ruled that

"(…) Member States may leave the implementation of the social policy objectives pursued by a directive in this area in the first instance to management and labour. That possibility does not, however, discharge them from the obligation of ensuring that all workers in the Community are afforded the full protection provided for in the directive. The State guarantee must cover all cases where effective protection is not ensured by other means."[98]

In case C 312/86 against France both the Advocate-General again insisted on the necessity that the State guaranteed the effective enforcement of collective agreements transposing EU directives. Advocate-General Sir Gordon Slynn argued in his opinion that "(…) it does not effectively ensure that such provisions are amended in accordance with the latter article since it leaves it to management and labour to bring the provisions into line without imposing a time-limit or any effective sanction or machinery if the provisions are not brought into line within a fixed or reasonable time."[99]

In a nutshell, despite the sometimes critical approach by both the Advocate-General and the Court, in principle, collective agreements are today formally acceptable to the CJEU as a mechanism for the enforcement of EU law.[100] Yet, the effectiveness of this industrial relations mechanism is closely scrutinised by the CJEU. Member States that rely on implementation through collective agreements must demonstrate that they allow for effective enforcement of the directive's provisions.

8.2 Andersen and Holst Cases

In the Andersen case[101] the CJEU had to assess whether "(…) Article 8(1) of Directive 91/533 is to be interpreted as meaning that it prohibits national rules which provide that a collective agreement

[97] Case C 235/84, [1986], ECR, 2295. Cf. also J.M. Miranda Boto, (2002), El papel de la autonomía colectiva en la transposición de Directivas, *Revista Doctrinal Aranzadi Social*, no.21, p.2.

[98] Case C 235/84, [1986], ECR, 2302. Cf. also B. Bercusson (2009), *European labour law,* 2. ed., Cambridge, University Press, p. 453.

[99] Case C 312/86, [1988], ECR, 6326. Cf. also B. Bercusson (2009), *European labour law,* 2. ed., Cambridge, University Press, p. 453.

[100] Cf. Lord Wedderburn (1995), *Labour Law and Freedom. Further Essays in Labour Law*, London, Lawrence & Wishart, p.219.

[101] Case C-306/07 [2008], C:2008:743

transposing the provisions of that directive into national law applies to an employee even if he is not a member of any union which is a party to the collective agreement."[102]

The CJEU first recalled the mode of transposition of Directive 91/533/EC into Danish law which was a combination of national statute with collective agreements, i.e. a case described as second degree implementation later on.

"Directive 91/533 was transposed into Danish law, on the one hand, by Consolidating Law No 385 of 11 May 1994 concerning the employer's obligation to inform employees of the conditions applicable to the employment relationship ('Law on proof of appointment') and, on the other, by collective agreements, among which is the collective agreement concerning the employer's obligation to inform employees of the conditions applicable to the employment relationship (letter of engagement) of 9 June 1993 between the Amtsråtsforeningen (Federation of Provincial Councils), the Kommunernes Landsforening, the municipal councils of Copenhagen and Frederiksberg, and the Kommunale Tjenestemænd og Overenskomstansatte (Union of Public Employees and Municipal Contractual Workers) ('the KTO Agreement')."[103]

The Danish law only applied in a subsidiary manner, if the worker was not covered by a collective agreement that contained rules which correspond at least to the provisions in Directive 91/533'. The collective agreement in place was the KTO Agreement' signed between the Federation of Provincial Councils, the municipal councils of Copenhagen and Frederiksberg, and the Union of Public Employees and Municipal Contractual Workers).

Mr. Andersen, however, was not a union member, so the question arose "(…) , in so far as a collective agreement which correctly transposes the directive into national law may, in accordance with the provisions of national law, be relied upon by all workers to whom it applies, regardless of whether or not they are members of a union which is a party to the agreement."[104] The CJEU responded this important question in the context of our background note in the affirmative.

"Where the category of persons who may be covered by a collective agreement – as, in particular, in the case of an agreement which has been declared to be of general application – can be completely independent of whether or not those persons are members of a union which is a party to that agreement, the fact that a person is not a member of such a union does not in itself deprive that person of the legal protection conferred by the agreement in question."[105]

The Holst case[106] concerning the wording of Article 11(1) of Directive 2002/14 on establishing a general framework for informing and consulting employees in the European Community.

[102] Para. 11.

[103] Para. 12.

[104] Para. 36.

[105] Para. 34.

[106] Case C 405/08, [2010], C:2010:69.

"Under Article 11(1) of Directive 2002/14, Member States were required to adopt the laws, regulations and administrative provisions necessary to comply with that directive not later than 23 March 2005 or to ensure that management and labour had introduced by that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them to guarantee the results imposed by the directive at all times. The Member States were also required to inform forthwith the Commission of the European Communities of the adoption or implementation of those provisions."[107]

On the one hand, the CJEU continued in the sense of his previous jurisprudence in the above infringement cases on stressing the importance of the state guarantee which must protect all those cases not covered by collective agreements:

"Article 11(1) of Directive 2002/14 states that Member States may leave it to management and labour to introduce the provisions necessary to ensure transposition of that directive, it being understood that the Member States are required to be at all times in a position to guarantee the results imposed by the directive."[108]

On the other hand, the CJEU argued in favour of a large degree of discretion of the social partners when it comes to implement Article 11(1) into practice.

"The role of management and labour in defining and implementing the practical arrangements for information and consultation provided for in Directive 2002/14, and therefore in the transposition of that directive, is not restricted to the task conferred on them by Article 11(1). Recital 23 in the preamble to Directive 2002/14 states that the Member States may allow management and labour to have a leading role by allowing them to define freely, by agreement, the arrangements for informing and consulting employees which they consider to be best suited to their needs and wishes"[109]

In light of the principle of subsidiarity as discussed above, the CJEU then continues that the transposition of the social partners is "(…) to be defined and implemented in accordance, not only with national law, but also with industrial-relations practices in individual Member States."[110]

As a conclusion, the CJEU summarises the current case in line with its previous jurisprudence on the transposition of EU directives by national collective agreements:

"The power thus granted to the Member States by Directive 2002/14 is in accordance with the Court's case-law that Member States may leave the implementation of the social-policy objectives envisaged by a directive in this area in the first instance to management and labour (…). That possibility does not discharge the Member States from the obligation of ensuring (…) that all workers are afforded the full protection provided for in Directive 2002/14; that State guarantee must cover

[107] Para. 22.

[108] Para. 35.

[109] Para. 36.

[110] Para. 37.

all cases where protection is not ensured by other means, and, in particular, where the workers in question are not protected because they are not union members (…).[111]

8.3 Laval case: 'culture of clash'[112]

On 18 December 2008, the CJEU ruled in the Laval case that the right to industrial action can sometimes be justified under EU law to protect against social dumping. However, the Court also pointed out that 'the exercise of that right may be subject to certain restrictions'. The Laval case had its origin in a Latvian company, Laval un Partneri, being awarded a public tender in Sweden to renovate a school near Stockholm. The Riga-based company posted workers from Latvia to work on the building site in Sweden.

The workers were employed to work through a subsidiary of Laval and negotiations began between it and the Swedish building and public works trade union, Svenska Byggnadsarbetareförbundet. However, these negotiations broke down and Laval subsequently signed collective agreements with the Latvian building sector trade union, to which 65 per cent of the posted workers were affiliated.

The Swedish trade union then took collective action by means of a blockade of all Laval sites in Sweden and this action was supported by other Swedish trade unions. Laval brought proceedings in the Swedish courts for a declaration that the trade union action was unlawful in that it conflicted with rights established under Art 49 EC (now Article 56 TFEU). The Laval case went to the CJEU, where it was considered in the context also of the Viking case which similarly dealt with the lawfulness of industrial action which had the effect of placing restrictions on the freedom to provide services.

The freedom to provide cross-border services is set out in Article 56 TFEU and, along with the freedom of establishment, is acknowledged as a 'fundamental freedom' central to the effective functioning of the EU Internal Market. The principle of the freedom to provide services enables an economic operator providing services in one Member State to offer services on a temporary basis in another Member State, without having to be established. Furthermore, these Treaty provisions have direct effect so that Member States must modify national laws that restrict this freedom or otherwise is not compatible with the Treaty's principles.

Directive 96/71 on posted workers sets out minimum standards that must apply in the case of workers posted from one Member State to work in another. Article 3 of the directive states that Member States should ensure that terms and conditions established by law, or by universally applicable collective agreements, apply to posted workers, in particular in relation to minimum work periods, breaks, annual holidays and rates of pay.

The CJEU in Laval held that the right to take collective action must be recognised as a fundamental right forming an integral part of the general principles of Community law. Additionally, the right to

[111] Paras. 39 and 40.

[112] A.C.L. Davies (2012), *EU Labour Law*, Cheltenham, Elgar, p.41.

take such action against possible social dumping may constitute an overriding reason of public interest. However, this does not mean that Community law does not apply in relation to such action.

The CJEU noted that industrial action aimed at obtaining terms and conditions which went beyond the minimum established by law made it less attractive for undertakings such as Laval to carry out its business in the Member State and therefore constituted a restriction on the freedom to provide services, guaranteed under the Treaty. The CJEU noted that while Article 3 of the posted workers' directive gave a right to minimum terms and conditions to posted workers, these rights had to have been underpinned either by law or universally applicable collective agreements.

In Sweden, there was no statutory minimum wage nor were collective agreements universally applicable. The Swedish government had accepted the solution that wage bargaining was left to the autonomy of the social partners on the basis of collective agreements with an *inter partes* effect only. Consequently, industrial action to impose terms, in the absence of legally enforceable national provisions, could not be justified under EU law.

In the context of the present analysis, especially under section 10.1, it is important to highlight with Maier Söderberg[113] that a "(…) system of universal applicability of collective agreements also entails a deviation from the Swedish system of collective bargaining with autonomous collective agreements. For Saco, the freedom and right to collective bargaining, reciprocity and accountable social partners are cornerstones of the Swedish model."[114] Nevertheless, Maier Söderberg acknowledges that "more and more Swedish actors, trade unions and researchers believe that Sweden should consider the possibility of introducing a system which includes the universal applicability of collective agreements.[115]

According to Davies the Laval case "(…) highlights the 'culture clash' when collective bargaining is employed for legislative purposes."[116]

8.4 Rüffert case

On 3 April 2008, the CJEU, in the Rüffert case[117], ruled that Member States may not adopt legislative measures which limit contractors for public works contracts to those undertakings which, within their tender submission, agree to pay their employees at least the rate set by a collective agreement. The court ruled that such action would be in breach of the freedom to provide cross-border services, interpreted in the light of Article 49 EC (now Article 56 TFEU). This ruling, along with those of Viking

[113] Chief Legal Advisor at Saco, the Swedish Confederation of Professional Associations.

[114] L. Maier Söderberg (2015), Laval, the Swedish System of Collective Bargaining and Professionals J. Kristiansen (ed.) (2015a), *Europe and the Nordic Collective-Bargaining Mode. The Complex Interaction between Nordic and European Labour Law*, Copenhagen, Nordic Council of Ministers, p.101.

[115] Ibid., p.105/106.

[116] A.C.L. Davies (2012), *EU Labour Law*, Cheltenham, Elgar, p.41.

[117] Based on European industrial relations dictionary, Laval case and Rüffert cases, 2010 https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/laval-case; https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/ruffert-case

and Laval, represents a significant development in relation to the exercise of conflicting rights and potentially a weakening of the rights of trade unions and workers.

The freedom to provide cross-border services is guaranteed under Article 56 TFEU and, together with the freedom of establishment, is acknowledged as a 'fundamental freedom' central to the effective functioning of the EU Internal Market. Directive 96/71/EC on posted workers provides that Member States should ensure that the terms and conditions established by law or by universally applicable collective agreements apply to workers who are called upon to work for a limited period in another Member State. However, as the Laval case made clear, the absence of a law or a universally applicable collective agreement means that there is no term that must be applied.

8.5. Other cases

Subsequently, there has been a series of other decisions of the European Court reinforcing the critical scrutiny of collective agreements in the area of equal pay and equal treatment. Collective agreements are condemned if they make unequal provision for women and men (*Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*,Case 170/84] ECR 1607; *Maria Kowalska v. Freie und Hansestadt Hamburg*, Case 33/89, [1990] ECR 3199), provide for discriminatory criteria for pay calculations and lack transparency as regards pay determination (*Handels og Kontorfunkionaerenes Forbund i Danmark v. Dansk Arbejdsgiverforening*, Case 109/88, [1989] ECR 3199). Each case involved the Court making a close examination of the practical workings of a collective agreement. In each case, it was the substance of the agreement that was condemned.

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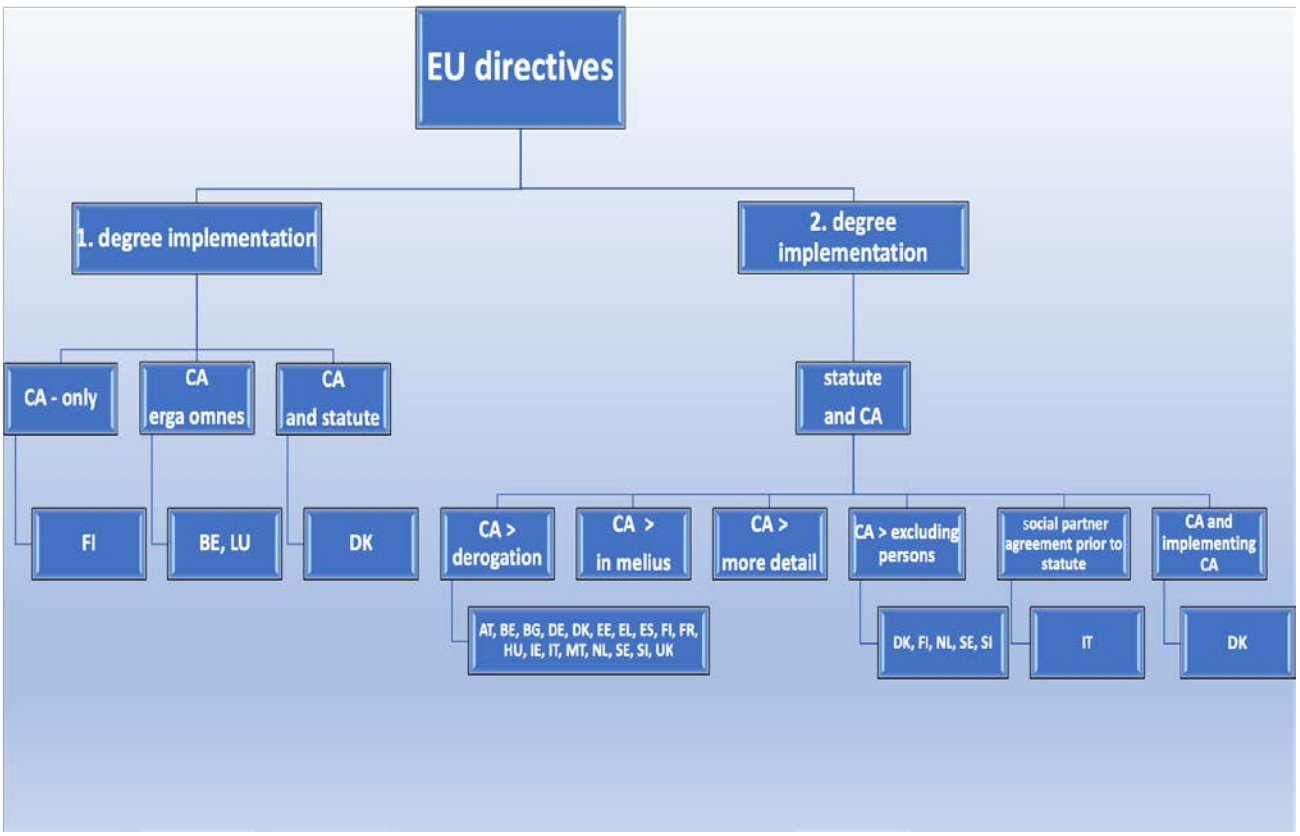
9. Extent to which EU labour law directives have been transposed by collective agreements

The annex to the Commission's ad hoc requests lists a total of 25 genuine EU labour law directives as well as their modifications and recasts. The following analysis assesses the transposition of these 25 labour law directives mainly on the basis of the EUR-Lex database, case law of the CJEU and selected academic literature and policy documents, and in as far as possible along the distinction made above. The present background note mainly focusses on forms of first degree implementation and only assesses second degree implementation in a subsidiary. Unfortunately, second degree implementation cases are not fully covered by the EUR-Lex database limiting the scope of the analysis to academic literature, the case law of the CJEU and the six country reports of the Eurofound network of correspondents from Belgium, Denmark, Finland, Luxembourg, Italy and Spain. These countries were identified as the most pertinent ones when it comes to the transposition of EU labour law directives by national collective agreements.

Graph 1. EU labour law directives transposed by collective agreement: first degree vs second implementation



As a preliminary, it needs to be stressed that in its revised ad hoc request from 11 February 2020 the European Commission clearly distinguishes between '**first and 'second degree' implementation** of EU directives by national collective agreements:

- **'first degree' implementation** refers to a mode of implementation which transposes a directive as a whole via a collective agreement;
- '**second degree' implementation** refers to a mode of implementation of a directive by national law / and or collective agreements but when that implementation leaves space for (further) collective bargaining over, for example, exceptions/derogations to the directive.[118]

'**First degree' implementation** concerns the wholesale transposition of an EU labour law directive through collective agreements which are negotiated by the social partners at the appropriate national level.

'**Second degree' implementation** mainly arises when directives open up space for provision being spelt out in more detail by collective agreements (e.g. working time directive) or cater for derogations via collective bargaining to some of the principles stipulated in the EU directive (e.g. temporary agency work directive).[119]

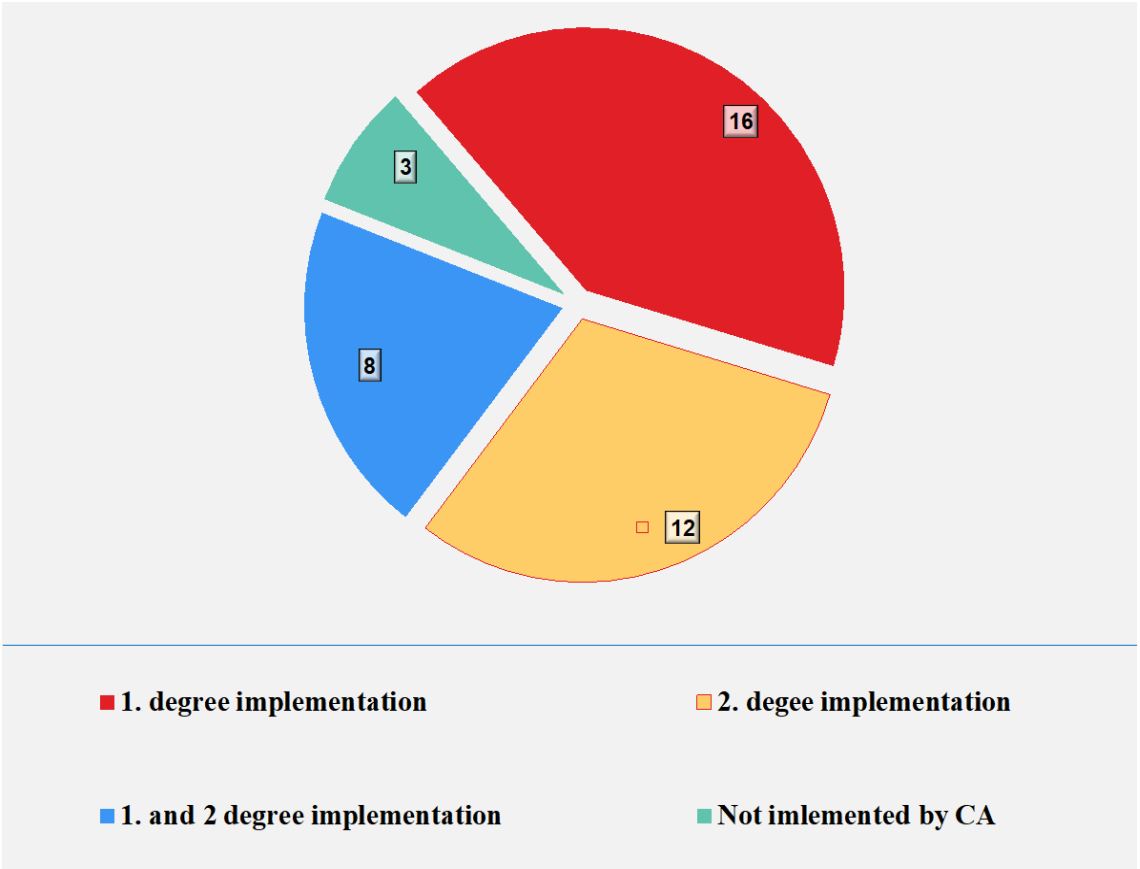
9.1 First degree implementation

At present a total of 25 genuine EU labour law directives as well as their modifications and recasts are in force. As a preliminary, it is important to stress that for two of the 25 EU labour law directives under scrutiny the transposition deadlines have only very recently elapsed (19.11.2019 for Directive 2017/159/EU and 16.2.2020 for Directive 2018/131/EU) and one deadline is still running (1.8.2022 for Directive 2019/1152/EU). Of the 25 EU labour law directives 20 directives have been transposed by collective agreements (first and/or second degree) in at least one Member State, some in more than one Member State. Three directives have not been transposed by collective agreement at all; as mentioned above for two directives the transposition deadline has either only recently expired or is still running (cf. above).

[118] The EC services draw on the draft report from Catherine Barnard and Andrea Peripoli (2020),Transposition of EU labour law through collective agreements, University of Cambridge.

[119] Cf. A.C.L. Davies (2012), *EU Labour Law*, Cheltenham, Elgar, p.41.

Graph 2. Number of EU labour law directives transposed by collective agreement: first degree vs second implementation



Out of the 25 EU labour law directives under scrutiny, 16 directives have been mainly transposed by the first degree and 12 directives were implemented by the second degree route. Eight directives have been implemented by first and second degree avenues and three directives have not been transposed by any collective agreement at all.

Table 1. Transposition EU labour law directives through collective agreements by Member State[120]

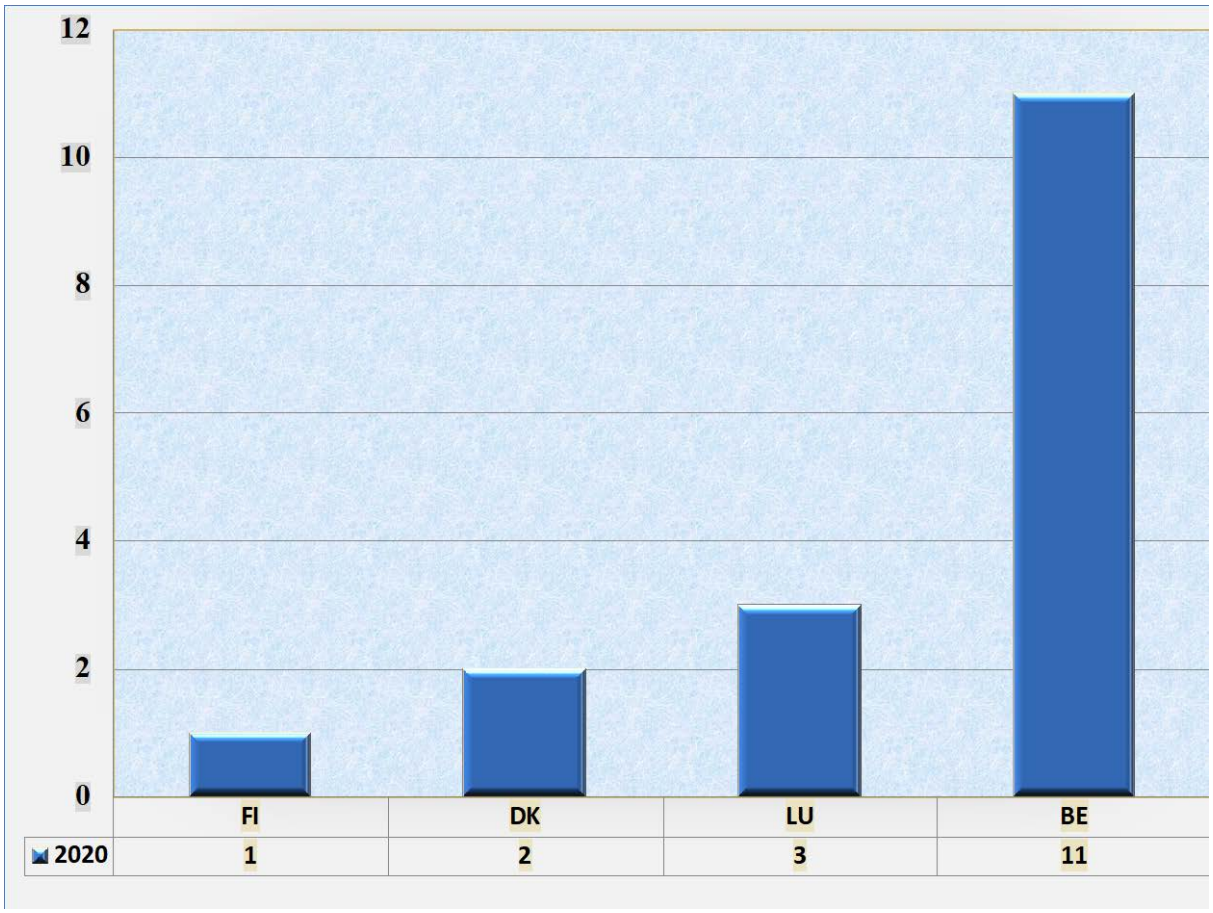
EU Directive	transposition by Member State	
	first degree	second degree
98/59/EC: **collective redundancies**	BE	DK
2009/38/EC: **European Works Councils**	BE	DK, IT
2002/14/EC: **information and consultation**	BE	DK
2001/23/EC: **transfers of undertakings**	BE	DK
2001/86/EC: **European company - involvement of employees**	BE	none
2003/72/EC: **European cooperative society - involvement of employees**	BE	none
2005/56/EC: **cross-border mergers**	BE	none
2015/1794/EU: **seafarers**	BE	none
2003/88/EC: **working time**	BE	BE, DE, DK, EL, ES, FI, FR, IE, IT, NL, SE
1999/63/EC: **working time of seafarers**	none	DK, LU
2014/112/EU: **working time in inland waterway transport**	LU	BE, DK
2009/79/EC: **working time of mobile workers in civil aviation**	BE	DK
2005/47/EC: **working conditions of mobile workers in interoperable cross-border services in the railway sector**	FI	DK

[120] Based on EUR-Lex database as of 28.4.2020 and on six national reports (BE, DK, ES, FI, IT and LU) commissioned by Eurofound.

EU Directive	Transposition by Member State	
2002/15/EC: **working time of persons performing mobile road transport activities**	**none**	**DK**
1994/33/EC: **young people at work**	**none**	**DK**
1991/533/EEC: **conditions applicable to the contract or employment relationship**	**none**	**none**
1999/70/EC: **fixed-term work**	**DK**	**none**
1997/81/EC: **part-time work**	**BE, DK**	**none**
2008/104/EC: **temporary agency work**	**none**	**AT, BG, DE, DK, EE, FI, HU, IE, IT, MT, NL, SE, SI, UK**
2009/13/EC: **Maritime Labour Convention**	**LU**	
2017/159/EU: **Work in Fishing Convention**	**transposition deadline: 19 November 2019**	
1991/383/EEC: **safety and health of workers** with a **fixed-duration employment**	**none**	**none**
2008/94/EC: **insolvency of the employer**	**none**	**none**
2019/1152/EU: **transparent and predictable working conditions**	**transposition deadline: 1 August 2022**	
2018/131/EU implementing the **agreement concluded by ECSA and ETF**	**LU**	
	transposition deadline: 16 February 2020	

The Member State which have used the first degree implementation route the most are Belgium (11), Luxembourg (3), Denmark (2) and Finland (1). The Member State which has implemented EU labour law directives via second degree implementation the most often is Denmark (12).

Graph 3. Number of EU labour law directives transposed by collective agreement: first degree implementation[121]



9.2 Second degree implementation

The directives that according to Commission implementation reports, have been transposed the most often by second degree implementation route are the temporary agency work Directive (2008/104/EC: 14 Member States) and the working time Directive (2003/88/EC: 11 Member States).[122]

[121] Based on EUR-Lex database as of 28.4.2020 and on six national reports (BE, DK, ES, FI, IT and LU) commissioned by Eurofound.

[122] European Commission (2010), Commission Staff Working Document. Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, COM(2010)802 final, Brussels, 21.12.2010 and (2014), Report from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 106 final, Brussels, 21.03.2014.

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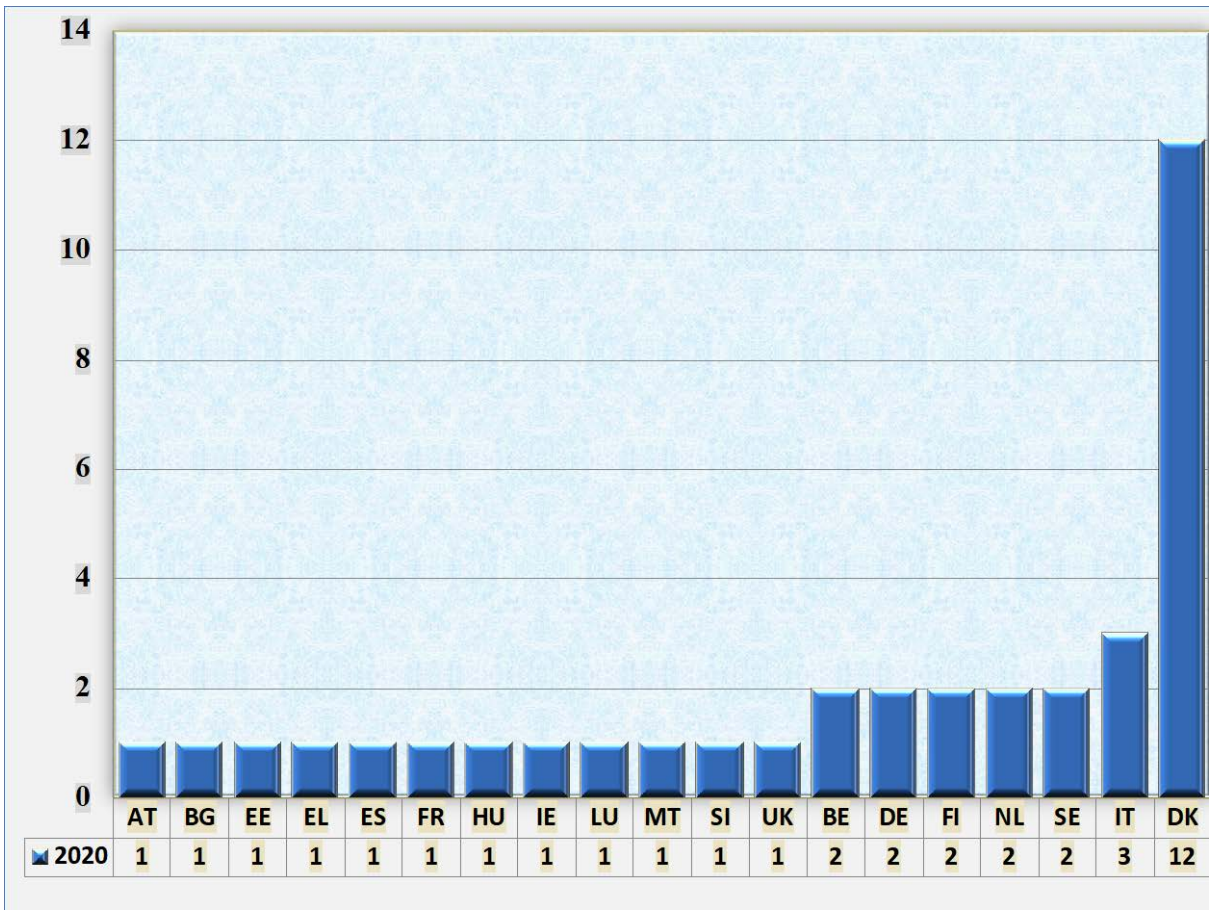
The first degree implementation route was never used by more than two Member States per directive, whereas the second degree approach was used by 14 Member States for the temporary agency directive and 11 Member States for the working time directive. The numbers in graph 4 below refer to second degree implementation mechanisms by Member State: they mainly derive from the application of the temporary agency and working time directives. Only the bars for Belgium, Denmark, Italy and Luxembourg also cover other EU labour law directives. The Member State with the highest incidence of second degree transpositions is Denmark (12), followed by Italy (3) and Belgium, Finland, Germany, the Netherlands and Sweden (each 2).

Graph 4. Second degree implementation mechanisms per Member State[123]



[123] Based on EUR-Lex database as of 28.4.2020 and on six national reports (BE, DK, ES, FI, IT and LU) commissioned by Eurofound.

According to the **Italian** national report collective agreements are not at all used in the transposition of EU labour law directives in the first degree implementation scenario.[124] The reason for this is the fact that collective agreements are not generally binding and there are no legal extension mechanisms to extend the provisions *erga omnes*. Article 39 of the Italian Constitution caters for the possibility that sectoral collective agreements may be declared generally binding under certain circumstances, but this mechanism has never been implemented in practice. One of the reasons for not doing so was the wish of the Italian social partners to preserve their autonomy. Consequently, the transposition of EU labour law directives usually takes place through legislative decrees, i.e. via legal instruments by means of which the regulatory capacity is transferred from the parliament to the government, whereby the parliament sets a number of principles that the government has to follow when drafting the delegated decrees.

The implementing legislative decrees, which often strictly reproduce the wording of the EU directives, may leave scope for collective bargaining to (partly) modify or integrate the provisions set in the directives. This could be regarded as a form of second degree implementation. Yet if this happens, the core of regulation lies with the legislative decree, while collective bargaining only plays a secondary and supplementary role. However, this regulatory practice is not limited to the transposition of EU directives, but it also takes place in the context of the setting of national labour law which allows collective agreements to partly deviate from or further specify provisions set in legislation.

In some cases, the transposition of EU labour law directives via legislative decree was preceded by a joint statement by the most representative employer and trade union organisations (i.e. Confindustria for the employers, and Cgil, Cisl and Uil for the trade union confederations), which was then reflected in the legislative decree. This mechanism may, to some extent, be assimilated to an extension mechanism, yet, contrary to the latter, a legislative decree can always modify or supplement the joint statement of the social partners. Finally, a joint statement may cover only some of the provisions of a directive, so that it can be regarded more as a coordinated joint opinion. In two occasions, the most representatives social partners (Confindustria, Cgil, Cisl and Uil) signed a joint statement on a EU labour law directives: the joint statement (avviso comune) of 12 November 1997 on the implementation of the working time directive 93/104/EC (considered in the legislative decree no. 66 of 8 April 2003 transposing EU directives 93/104/EC and 2000/34/EC) and the joint statement of 12 April 2011 on the recast EWC Directive 2009/38/EC (transposed by legislative decree no. 113 of 22 June 2012).

The evidence collected by the **Spanish** report suggests that the extent to which collective agreements have been used to transpose EU labour law directives is very limited and also restricted to second degree implementation of a small number of directives. A succinct academic literature reveals a consensus amongst labour lawyers about the possibility and desirability of using collective agreements to transpose EU directives.[125] Academia and the case law coincide in pointing out that collective

[124] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Italy (author: Roberto Pedersini).

[125] Cf. X. Arzoz (2013), Métodos de transposición y requisitos jurídicos europeos e internos, in: *Transposición de directivas y autogobierno: el desarrollo normativo del derecho de la Unión Europea en el Estado autonómico*, Institut d'Estudis Autonòmics, pp.75-146, M.L. Luque, (2018), Subrogación convencional y STJUE 11.7. 2018 (Somoza Hermo): entre aplicar el artículo 44.3 ET o transitar el-hasta ahora-inerte camino del convenio colectivo como norma de transposición, *IUSLabor*,

bargaining in Spain is meeting all the formal requirements for adequate and effective first degree implementation. It is a conundrum why this has not happened to date. This fact is even more surprising, since according to Spanish legal scholars there is a legal instrument meeting all the efficiency requirements as stated by the CJEU, i.e. the statutory collective agreement ('convenio colectivo estatutario'). Furthermore, sectoral collective agreements could be used to transpose sectoral EU labour law directives. The only precondition needed to be that these collective agreements applied to the entire Spanish territory. Finally, academia agrees that the extra-statutory collective agreements are ruled out as a means of transposing EU labour law directives, as they lack the effectiveness as required by the CJEU, since there are only binding upon the signatory parties and cannot be extended *erga omnes*.

In a nutshell, one of the reasons put forward by the scholars is the legalist tradition of Spanish industrial relations in leaving collective bargaining in a subordinate position in relation to statutes, despite the fact that collective agreements do have normative force in Spain. [126] There also seems to be a lack of political will to put these procedures into practice, both on the side of the government and of the Spanish social partners.[127]

no.2, pp. 234-243 and J.M. Miranda Boto (2002), El papel de la autonomía colectiva en la transposición de Directivas, *Aranzadi social*, no. 5, pp. 1-6.

[126] Cf. J.M. Miranda Boto (2002), El papel de la autonomía colectiva en la transposición de Directivas, *Revista Doctrinal Aranzadi Social*, no.21, p.4 and J.M Galiana Moreno (2003), *La eficacia de los convenios colectivos en el derecho español del trabajo*, Murcia, Congreso Nacional de Derecho del Trabajo y de la Seguridad Social, p.19.

[127] J.M. Miranda Boto (2002), El papel de la autonomía colectiva en la transposición de Directivas, *Aranzadi social*, no. 5, p.6.

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10. Extent to which extension mechanisms and or statutes have been used in combination with collective agreements

Out of the 25 EU labour law directives in the annex (1) 16 directives have been transposed by national collective agreements. A total of 13 directives, i.e. the vast majority, has been transposed by a combination of collective agreements and extension. The Member States where this happened are Belgium (Royal Decree) and Luxembourg (Grand Ducal Regulation).

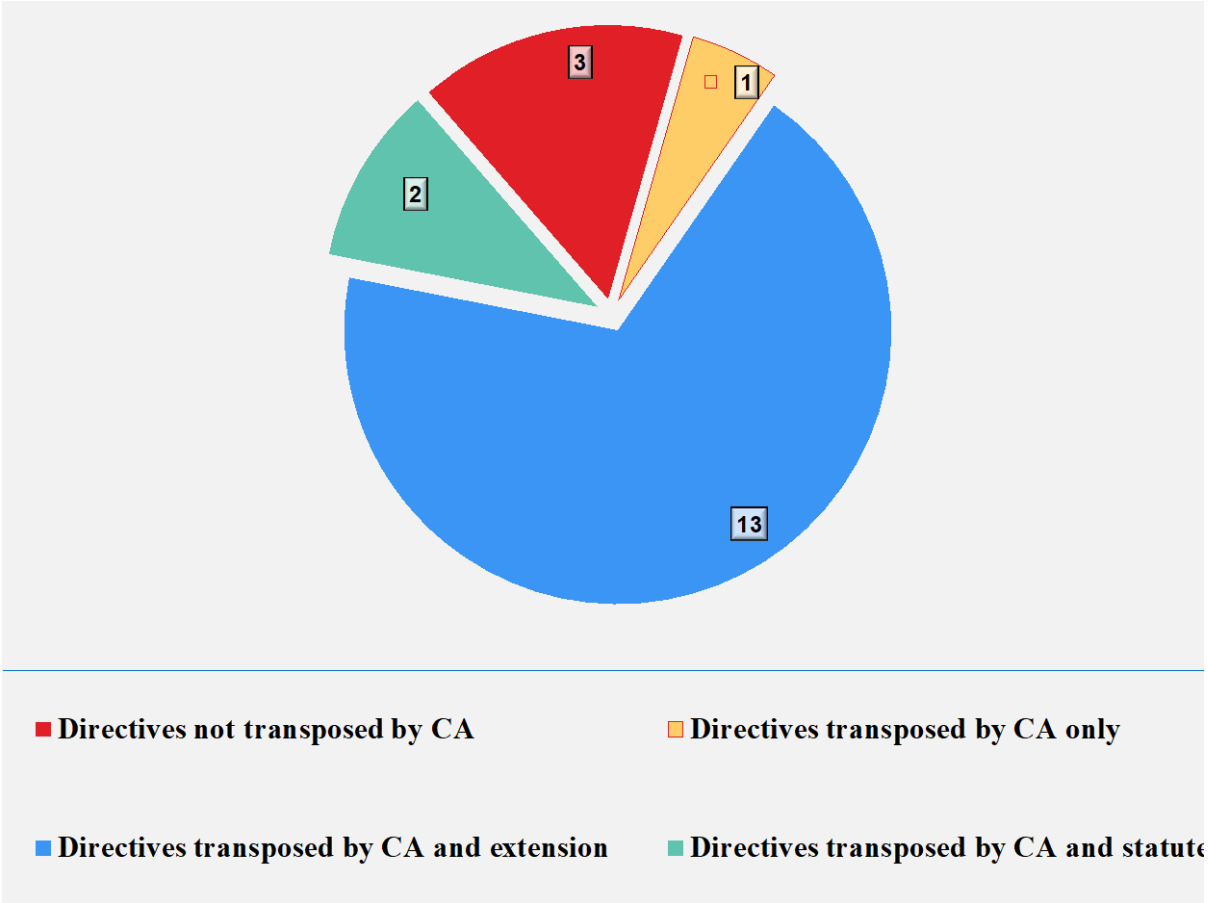
Two EU labour law directives were transposed by collective agreements in combination with subsidiary legislation. This happened for two directives transposed in Denmark only. One directive has been transposed by collective agreements only without extension nor supplementary legislation: Council Directive 2005/47/EC on certain aspects of the working conditions of mobile workers in interoperable cross-border services in the railway sector (Finland). The working time directive was transposed in Denmark by legislation, a collective agreement and an "implementation agreement" between the Danish social partners LO and DA: this is to date the only example of a directive transposed by a collective agreement and "extended" by another collective agreement.

In more concrete terms the transposition at Member State level was the following:

- **Belgium**: a) first degree implementation: all 11 directives transposed by collective agreement were also accompanied by Royal Decrees; b) second degree implementation: two EU directives were transposed via this mechanism.
- **Luxembourg**: a) first degree implementation: all three directives were also transposed by Grand Ducal Regulation (Directive 1999/63/EC - working time of seafarers, directive 2014/112/EU - working time in inland waterway transport) and directive 2009/13/EC - Maritime Labour Convention); b) second degree implementation: one EU directive was transposed via this mechanism.
- **Denmark:** a) first degree implementation: two out of three directives transposed by collective agreement were also accompanied by subsidiary legislation; one directive (2003/88/EC - working time) was transposed by legislation, a collective agreement and an "implementation agreement" between the Danish social partners LO and DA (cf. below); b) second degree implementation: 12 EU directives were implemented via this mechanism.
- **Finland**: a) first degree implementation: Council Directive 2005/47/EC on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector was transposed by collective agreement. This is the only case identified on the basis of the EUR-Lex database in which a Member State used a collective agreement only to transpose an EU labour law directive. According to the legal advisor of the Central Organisation of Finnish Trade Unions (SAK) this is also the only case of first degree implementation of EU labour law directives In Finland. As mentioned above, this is legally acceptable from an EU law perspective, since Finland is the only EU Member State in which

extensions are quasi-automatic. [128] b) second degree implementation: two EU directives were transposed via this mechanism.

Graph 5. EU labour law directives transposed by collective agreements (CA) only and in combination with statutes or extensions (first degree implementation only)



According to academia, the Commission and the Council, as well as the established jurisprudence of the CJEU only two procedures are suitable avenues for the implementation of directives via collective agreements: collective agreements with mandatory effect extended *erga omnes* and a combination of statutory legislation and collective agreements. Yet, as we have argued above the legal concept of collective agreements varies largely among the Member States of the European Union. The main dividing line is the one between the continental cluster of industrial relations and the Anglo-Saxon one, i.e. Ireland and the UK. Continental collective agreements tend to have

[128] Cf. J. Saloheimo (2006), Collective agreements – Finland, *XIVth Meeting of European Labour Court Judges 4 September 2006 Cour de cassation Paris (ILO meeting document*), p. 4.

mandatory normative force, whereas in the Anglo-Saxon world they are seen as "extra-legal counsel or custom"[129] or "gentlemen's agreements" only.[130]

10.1 Use of extension mechanisms

There are mainly three different models in European industrial relations when it comes to national collective agreements and the legal basis and scope of extension mechanisms.

Table 2. Legal basis and scope of extensions of collective agreements (CA)

legal basis and scope of extensions	Member States and the UK
1. extensions of CA not possible by law	**CY, DK, IT, MT, SE and UK**
2. extensions of CA catered for by law under certain conditions	**AT, BE, BG, CZ, DE, FR, EE, EL, ES, HR, HU, IE, LT, LU, LV, NL, PL, PT, RO, SK and SI**
3. extensions of CA are quasi automatic	**FI**

1. At the one end, there are five Member States and the UK in which collective agreements are strictly concluded *inter partes* and extensions mechanisms are legally not catered for. This is the case in Cyprus, Denmark[131], Italy, Malta, Sweden and the UK. Italy, however, has a regime which is functionally equivalent. The UK is a case of its own, since here collective agreements are mere gentlemen's agreements without any normative force. According to Deakin and Morris, collective agreements in Britain are "neither a contract nor a Code."[132]
2. A second cluster, representing the vast majority of countries in the EU, consists of those Member States in which a collective agreement may be extended by administrative decision or decree if certain normative criteria are met (e.g. percentage of the employees/companies/turnover in a sector covered by the collective agreement) or if they are deemed to be in the public interest. These 21 Member States are: Austria, Belgium, Bulgaria, Croatia, Czechia, France, Estonia, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Greece, Slovenia and Spain.

[129] R. Nielsen (2013), *EU Labour Law*, 2.ed., Copenhagen, p. 82; cf. also S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.71.

[130] Cf. A.M. Swiatkowski (2002), Implementation of European Union Labour Legislation via Collective Bargaining in Poland, *Jurisprudencija*, vol. 25, no.17, p.116.

[131] However, in Denmark and Sweden trade unions may sign "accession agreements" with employers nor organised in employers' organisations; cf. JK. Kristiansen (ed.) (2015b), European Challenges of the Nordic Collective-Agreement Model, in: idem (2015a), *Europe and the Nordic Collective-Bargaining Mode. The Complex Interaction between Nordic and European Labour Law*, Copenhagen, Nordic Council of Ministers, p.17.

[132] S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.73.

3. The third category is composed of only one Member State in which extensions are quasi-automatic, i.e. in Finland. The principle of general applicability of collective agreements has been in effect in Finland since 1971.[133]

The modalities and the use of extension mechanism also vary considerably across the EU Member States. Annexes 13.2 - 13.4 give a more elaborate picture. Suffice it here to give a short summary in the context of our analysis of the transposition of EU labour laws. In line with the classification of Hayter and Visser we might want to start our typology by examining the degree to which the national industrial relations regimes are supportive or not towards extension mechanisms.[134]

Table 3. Regime clusters and use of extension mechanisms[135]

extension regime	Member States
(semi) automatic	**AT, BE**(ICTWSS, Eurofound), **ES, FI** (automatic), **FR, IT**(ICTWSS), **LU**
supportive	**BE**(Hayter/Visser), **DE**(Hayter/Visser), **HR, IT**(Hayter/Visser), **NL, PT, SI**
restrictive / exceptional	**BG, CZ, DE**(ICTWSS; Eurofound), **EE, IE**(Eurofound), **LT**(ICTWSS), **LV, RO, SK**
not used / suspended	**CY, DK, EL, HU, IE, LT**(Hayter/Visser; Eurofound), **MT, PL, SE, (UK)**

For this cluster analysis of table 2 above we draw on Hayter/Visser (2018), the ICYWSS database and the Eurofound working life country profiles which are the only qualitative data source of the three. Whenever a Member State in shown in the table above without any brackets this means that all three sources coincide in the assessment. By and large, there is a large degree of congruence (22 Member States) when it comes to the assessment of the extension regimes. The discrepancy between Hayter/Visser and the ICTWSS database with regard to some of the Member States may stem from the fact that Hayter/Visser cluster more along the legal basis and procedures, whereas the ICTWSS database puts a stronger focus on practical use. For the purpose of simplification, in the following narrative we will only count the Member State in one specific regime which according either corresponds to the majority of the sources of to the most recent Eurofound data available.

[133] Collective agreements in Finland may also be extended by a public body to apply to all employers; cf. JK. Kristiansen, (ed.) (2015b), European Challenges of the Nordic Collective-Agreement Model, in: idem (2015a), *Europe and the Nordic Collective-Bargaining Mode. The Complex Interaction between Nordic and European Labour Law*, Copenhagen, Nordic Council of Ministers, p.17 and Eurofound (2011), Extension of collective bargaining agreements in the EU - Background paper, Dublin, p.5-8.

[134] S. Hayter, J. Visser (2018), *Collective Agreements: Extending Labour Prot*ection, Geneva, ILO, passim.

[135] On the basis of S. Hayter, J. Visser (2018), *Collective Agreements: Extending Labour Prot*ection, Geneva, ILO, J. Visser (2019), ICTWSS Database. version 6.0. Amsterdam: Amsterdam Institute for Advanced Labour Studies (AIAS), Amsterdam Institute for Advanced Labour Studies (AIAS), University of Amsterdam- http://uva-aias.net/en/ictwss accessed on 21.02.2020 and Eurofound/EURwork (2019), Working life country profiles (https://www.eurofound.europa.eu/country).

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In the most favourable, i.e. the (semi) automatic cluster we find the following Member States: AT, BE, ES, FI, FR and LU. The cases of Belgium and Luxembourg are clearly supported by the current background paper, since they are the two Member States with the highest degree of first degree implementation via collective agreements and extensions mechanisms (BE: 12; LU: 3). Finland and Italy have used this avenue once. With regard to Italy we need to recall that this country has a regime which is functionally equivalent to extension mechanisms.

In the supportive cluster we find HR, NL, IT[136], PT and SI. In contrast to Hayter/Visser we would see Belgium in the quasi-automatic and Germany in the restrictive cluster.

In the third cluster in which extension rules are more restrictive and practice is more exceptional the following Member States can be found: BG, CZ, DE, IE, RO and SK. In contrast to Hayter/Visser, but in line with the ICTWSS database and the most recent working life country profile we would argue to include Germany in this cluster. According to the profile (cf. excerpt in annex. 12.2) from 2000 to 2016, the number of extended agreements decreased from 551 to 444 despite the fact that extension mechanisms had been simplified by the introduction of the Act on the Promotion of Collective Bargaining Autonomy which now allows this procedure if it is in the 'public interest'. Deviating from the other two sources, but in line with our own working life country profile we would also include Ireland in this cluster. The EurWORK profile states that the Industrial Relations (Amendment) Act 2015 reformed the existing Joint Labour Committee (JLC) wage-setting mechanisms. The Act provides for the Labour Court to adopt an Employment Regulation Order (ERO) drawn up by a JLC. These Orders set down minimum legally binding terms and conditions for the sector and are extended beyond the bargaining parties to all employees/employers in the sector. The ERO is then given statutory effect by the Minister for Business, Enterprise and Innovation.

Finally, there is the cluster in which extension mechanisms are not used or suspended. This is the case for CY, DK, EL, HU, LT, MT, PL, SE and the UK. With nine Member States this is the largest cluster. In line with Hayter/Visser we also count Lithuania in this cluster. Our national correspondent reports that since the Labour Code from 1 July 2017 individual provisions of cross-sectoral, territorial and sectoral collective agreements may be extended by the Minister for Social Security and Labour. Yet, to date this provision has never been applied in practice

As shown in annex 4 the practical use of extension mechanisms also changes over time. In Europe, this was in particular the case during the economic and financial crisis in which a number of countries severely hit by the economic downturn tried to decentralise their collective bargaining system by limiting the access of the two sides of industry to the extension procedures. This initiative aiming at rendering the national system of collective bargaining more flexible, as some have argued, was used in Greece, Portugal, Romania, Slovenia and Spain. In August 2018, after a suspension period (2012–2018), extension mechanisms were re-established in Greece.

[136] IT has a regime which is functionally equivalent to extension mechanisms, cf. annex 2.

10.2 Use of subsidiary statutes: the Danish example

In the following we would like to shed some further light on the Danish example. Since the beginning of the 20th century, industrial relations in Denmark are deeply rooted in the autonomy of the social partners and their role in in co-regulating the employment relationship via collective bargaining.

"Collective agreements are "(…) the key both to the legislative and the adjudicative function of the social partners" and there is very little legislations on "(…) core collective labour law issues in Denmark (…)."[137]

In line with the above, Danish legal scholars would go as far as to argue "(…) that Parliament in reality has delegated some of its powers to the organisations of the labour market."[138] Against this historical background, the Danish social partners prefer the implementation of EU directives by collective agreements to the statutory route. Problems arise, however, first of all from the fact that there is no statutory definition of collective agreements in Denmark: this is a stark contrast to other Member States of the EU, such as Finland, Germany and Finland, in which legal definitions for collective agreements exist, for example , that they have to be in written form. Second, Danish collective agreements are only binding upon employers and trade unions who sign them, and "only to a very limited extent di statutes extend the scope of coverage of a collective agreement to employers who are not parties to that agreement".[139]As graph 6 below shows, there is a high coverage of collective agreements in Denmark, but there is no general applicability (as in Finland) nor extensions of collective agreements (as, for example, in Belgium and France). Consequently, not all workers are covered in the event of EU labour laws being transposed by collective agreements.[140]

Denmark thus exemplifies well the case of a national system of collective bargaining built on *inter partes* collective agreements which need to be complemented by statutes in order to fulfil the legal criterion of effective implementation of EU labour law directives. [141]

Graph 6. Collective bargaining coverage rate and dominant level of bargaining (EC/OECD/ Visser)

[137] R. Nielsen (2002), Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations,* vol.18, no.3, p. 461.

[138] O. Hasselbach (2010), *Labour Law in Denmark*, 2. ed., Alphen aan den Rijn, Kluwer, p.40.

[139] O. Hasselbach (2010), *Labour Law in Denmark*, 2. ed., Alphen aan den Rijn, Kluwer, p. 231. Hasselbach cites the Act on Part-time Employment and the Work Environment Act.

[140] Cf. H. Knudsen, J. Lind (1999), The implementation of EU directives in national systems - lessons from the Danish case, *Transfer*, vol.5, no.1-2, pp.137,138, 141.

[141] Cf. https://www.eurofound.europa.eu/publications/article/2000/danish-model-maintained-by-implementation-of-eu-directives-through-collective-agreements. See also O. Hasselbach (2010), *Labour Law in Denmark*, 2. ed., Alphen aan den Rijn, Kluwer, p.40.

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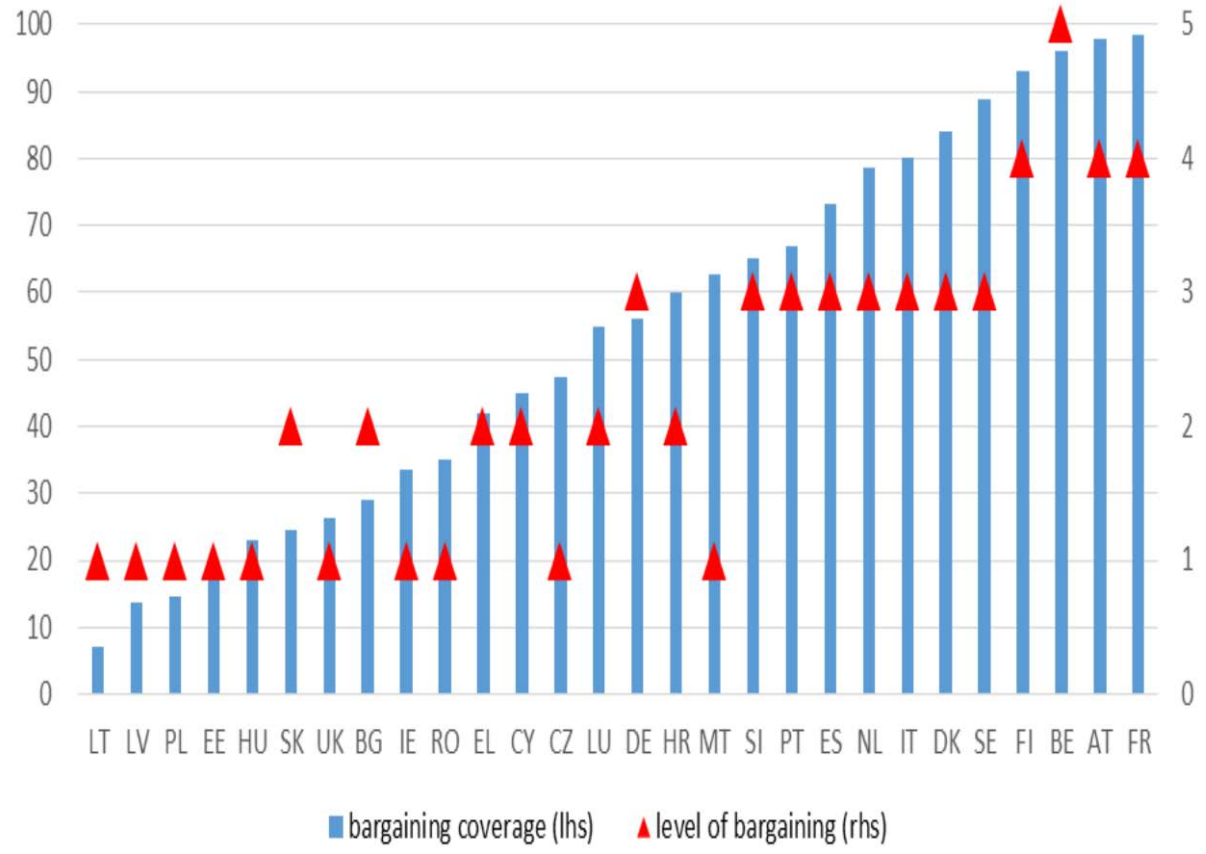

The issue of effective implementation arose prominently when the European Commission sent a formal letter of notice to the Danish government on 22 November 1999 concerning the character and extent of the implementation of Directive (93/104/EC) on certain aspects of the organisation of working time, which was effected in Denmark by means of collective agreements.[142] The Commission questioned whether this type of implementation ensured to a sufficient extent that all Danish employees were guaranteed the rights which were laid down in the directive, including a maximum weekly working time of 48 hours on average over a reference period. The Commission noted that it was clearly stated in the Treaty that collective agreements could be used to implement directives (in accordance with the Danish tradition). However, the Commission pointed out that the case law of the CJEU had specified certain conditions for the implementation of directives. It is the Member States' obligation to ensure that all employees enjoy protection under the directive.

The Commission's formal letter of notice created a debate in Denmark, and it was argued by various parties - including researchers and social partner organisations - that possibly as many as 1 million Danish workers were not covered by any collective agreements, and consequently the working time Directive did not cover this group. From this point of view, it was therefore necessary to adopt supplementary legislation that covers all employees.

[142] Cf. H. Knudsen, J. Lind (1999), The implementation of EU directives in national systems - lessons from the Danish case, *Transfer*, vol.5, no.1-2, pp.147-149.

In July 1999, the government appointed a tripartite advisory body on the implementation of EU directives in the labour field. It is also the task of this implementation committee to ensure that employees and employers receive the necessary information. It seems that agreement coverage has been strengthened and that more workers are now directly covered. In connection with the Danish government's reply to the Commission, the social partner organisations made new calculations of the coverage of agreements. These calculations showed that between 80% and 85% of employees were directly covered by a collective agreement or other agreements implementing the directive. However, this did not solve the outstanding problem that there were groups which were not directly covered by collective agreements.

On 22 January 2000, the Danish government submitted its reply to the Commission, stating that it had been possible to cover all employees by collective agreements and supplementary measures. The Danish Confederation of Trade Unions (LO) and the Danish Employers' Confederation (DA) entered into an "implementation agreement" which took effect on 1 February 2000. The agreement applied to all employees within the LO/DA field who are not covered by collective agreements and to both organised and unorganised employees.

A similar scenario arose in the context of the transposition of the part-time directive (97/81/EC) in 2001. This directive was implemented in Denmark by collective agreements which were “extended” to the whole of the workforce by the Danish Part Time Act which covered all those employees not falling within the scope of the relevant collective agreements.[143] According to Jørgensen this new "dual" implementation method – a collective agreement accompanied by subsidiary legislations involving both law and bargaining – represented a break with Danish industrial relations tradition which was not without problems, in particular because the main social partner organisations had not been consulted in the process.[144] At the outset, the Danish Confederation of Trade Unions (LO) and Danish Employers' Confederation (DA) had intended to implement the part-time work directive by collective agreement only. Since it was feared, however, that a national collective agreement would not have had a sufficient coverage the two sides of industry abandoned this approach. In 2001 Jørgensen noted that this dual approach of implementation could possibly have been the beginning of a "regime-dependent" Danish labour market model.[145] In hindsight, this seems to have happened in an even more acute manner, since all of the 25 EU labour law directives under scrutiny in this analysis, except for two (part-time and fixed-term work) have been transposed by statutes only in the first degree implementation phase.

Finally, there was, for a long time, a lacuna in the Danish system of industrial relations, when it came to the transposition of directives through collective agreements. The *force majeure* clause of the

[143] Cf. R. Nielsen (2002), Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations,* vol.18, no.3, p. 473.

[144] Eurofound (2001), EU part-time work Directive implemented through new dual method (author: Carsten Jørgensen) https://www.eurofound.europa.eu/publications/article/2001/eu-part-time-work-directive-implemented-through-new-dual-method

[145] Eurofound (2001), EU part-time work Directive implemented through new dual method (author: Carsten Jørgensen) https://www.eurofound.europa.eu/publications/article/2001/eu-part-time-work-directive-implemented-through-new-dual-method.

parental leave directive from 1996 (96/34/EC) had been implemented until 2005 via collective agreement only, thus depriving all the workers not covered by collective agreements from an effective protection.[146] The opening letter from the Commission of 2005, which kick-started an infringement procedure, forced the government to incorporate the force *majeure clause* into Danish labour law.[147]

[146] Cf. R. Nielsen (2002), Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations,* vol.18, no.3, p. 475.

[147] Cf. Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

11. Summary and conclusion

Article 288 of the Treaty on the Functioning of the European Union (TFEU) clearly states:

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

Collective agreements are – under certain circumstances - among the panoply of national measures deemed appropriate mechanism for implementation of EU directives in the fields of social and employment policy and industrial relations. The role of collective agreements in implementing EU directives is further prescribed by Article 153(3) TFEU, which states that a Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2. Article 153(3) further states that, in that case, it shall ensure that, no later than the date on which a directive must be transposed, management and labour should have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it to be in a position to guarantee the results imposed by that directive.

This form of implementation of international norms via collective agreements has also been recognised by other international organisations, such as the Council of Europe and the ILO[148], as well as by the Community Charter of Fundamental Social Rights of Workers of 1989.[149]

In contrast to the Council of Europe, the Community Charter of Fundamental Social Rights of Workers and the ILO, the Charter of Fundamental Rights of the European Union does not make similar references.[150]According to the late Brian Bercusson article 153(3) TFEU is the culmination point of a long process, briefly sketched above, in which the Member States, the European Community via the Charter of Fundamental Social Rights of Workers, the Court of Justice of the European Union and the Commission as well as the Council "(…) have formally recognised the role of collective bargaining in the implementation of EC labour law."[151]

The legal concept of collective agreements varies, however, largely among the Member States of the European Union. The main dividing line is the one between the continental cluster of industrial

[148] European Commission (1993), Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM 93(600 final, Brussels, 14 December 1993, p.30 citing Article 35 (I) of the European Social Charter the Council of Europe and, inter alia, ILO Conventions nos. 100, 101, 106, 107, 171, 172 I00, I01, I06Ill, 171 and 172. Cf. also R. Blanpain (2014), *European labour Law*, 14. ed., Alphen aan den Rijn, Wolters Kluwer, p.215.

[149] In the preamble and article 27 of the Charter; cf. B. Bercusson (2009), *European labour law*, 2. ed., Cambridge, University Press, p. 455 and the European industrial relations dictionary https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/community-charter-of-the-fundamental-social-rights-of-workers.

[150] Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C326/391 26.10.2012.
[151] Cf. B. Bercusson (2009), *European labour law*, 2. ed., Cambridge, University Press, p. 457.

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relations and the Anglo-Saxon one, i.e. Ireland and the UK. Continental collective agreements tend to have mandatory normative force, whereas in the Anglo-Saxon world they are seen as "extra-legal counsel or custom"[152] or "gentlemen's agreements" only.[153].

In European Union law, national collective agreements may have a double role:

1. as tools of implementation of other EU legal sources, such as directives;
2. as mechanisms to derogate, under certain circumstances from EU standards laid down by directives.[154]

Academia distinguishes four modes of implementation when it comes to the implementation of EU directives into national law:

1. ordinary statutory legislation;
2. a combination of statutory legislation and collective agreements;
3. collective agreements with mandatory effect extended *erga omnes*;
4. collective agreements with mandatory effect which are only applicable *inter partes*.[155]

Following Ruth Nielsen, only the second and the third category are a suitable avenue for the implementation of directives via collective agreements. Collective agreements with mandatory effect which are only applicable *inter partes* or mere gentlemen's agreements as in the UK without any mandatory normative effect are to be considered as not appropriate instruments for transposing EU directives into national law.[156]

In light of our analysis of the implementation of provisions of the European Social Charter the following policy pointer merits further discussion. As we have seen in chapter 3, when it comes to the transposition via collective agreements the European Social Charter introduced the so-called 'great majority rule'. This rule consists of admitting that an effective implementation of a provision of the Charter through collective agreements is assured if 80% of the workers are covered by the specific collective agreement in question. Yet, important questions with regard to the personal scope of this presumed coverage remain. According to the constant case law of the ECSR, the majority rule is applied to the number of workers as a whole. *E contrario*, this reasoning implies that as long the percentage of specific categories of workers not covered by collective agreements does not exceed

[152] R. Nielsen (2013), *EU Labour Law*, 2.ed., Copenhagen, p. 82; cf. also S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.71

[153] Cf. *A*.M. Swiatkowski (2002), Implementation of European Union Labour Legislation via Collective Bargaining in Poland, *Jurisprudencija*, vol. 25, no.17, p.116.

[154] S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.73.

[155] R. Nielsen *(2013)*, *EU Labour Law*, 2.ed., Copenhagen, p.155.

[156] Ibid. Cf. also A.M. Swiatkowski (2002), Implementation of European Union Labour Legislation via Collective Bargaining in Poland, *Jurisprudencij*a 2002, vol. 25, no.17, p.116 and S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.73. In the same A. Adinolfi (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.310.

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20 percent, then there is no conflict with the Charter. Following on the above example, one might want to discuss the transferability of this rule to the realm of EU labour law. Could it be interpreted as an effective transposition of an EU labour law directive, if a national collective agreement does not have an *erga omnes* effect, is not accompanied by subsidiary legislation, yet covers 80% of the workforce targeted by the directive? As we have seen in graph 6 above, only very few systems of industrial relations come close or surpass this collective bargaining coverage rate of 80% (NL, IT, DK, SE, FI, BE, AT and FR). In light of its constant case law it is, however, very doubtful that the CJEU would accept a 'great majority rule' in the realm of EU law in the context of the transposition of labour law directives being transposed by national collective agreements.

There are mainly three different models in European industrial relations when it comes to national collective agreements and the legal basis and scope of extension mechanisms.

1. At the one end, there are five Member States and the UK in which collective agreements are strictly concluded *inter partes* and extensions mechanisms are legally not catered for. This is the case in Cyprus, Denmark, Italy, Malta, Sweden and the UK. Italy, however, has a regime which is functionally equivalent. The UK is a case of its own, since here collective agreements are mere gentlemen's agreements without any normative force. According to Deakin and Morris, collective agreements in Britain are "neither a contract nor a Code."[157]
2. A second cluster, representing the vast majority of countries in the EU, consists of those Member States in which a collective agreement may be extended by administrative decision or decree if certain normative criteria are met (e.g. percentage of the employees/companies/turnover in a sector covered by the collective agreement) or if they are deemed to be in the public interest. These 21 Member States are: Austria, Belgium, Bulgaria, Croatia, Czechia, France, Estonia, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Greece, Slovenia and Spain.
3. The third category is composed of only two Member State in which extensions are quasi-automatic, i.e. in Finland and Latvia if certain conditions are met. The principle of general applicability of collective agreements has been in effect in Finland since 1971.[158]

As for the quantitative analysis of the transposition of EU labour directives by national collective agreements, it is important to stress that for two of the 25 EU labour law directives under scrutiny the transposition deadlines have only recently elapsed (e.g. 19 November 2019 for Directive 2017/159/EU) or are currently still running (e.g. 1 August 2022 for Directive 2019/1152/EU).

Out of the 25 EU labour law directives in the annex (1) 20 directives have been transposed by national collective agreements (first and/or second degree implementation). A total of 13 directives, i.e. the majority, has been transposed by a combination of collective agreements and extensions.

[157] S. Deakin, G.S. Morris (2012), *Labour Law*, 6. ed., Oxford, Hart, p.73.

[158] Cf. JK. Kristiansen, (ed.) (2015b), European Challenges of the Nordic Collective-Agreement Model, in: idem (2015a), *Europe and the Nordic Collective-Bargaining Mode. The Complex Interaction between Nordic and European Labour Law*, Copenhagen, Nordic Council of Ministers, p.17 and Eurofound (2011), Extension of collective bargaining agreements in the EU - Background paper, Dublin, p.5-8.

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The Member States in which this happened are Belgium (Royal Decree) and Luxembourg (Grand Ducal Regulation).

Two EU labour law directives were transposed by collective agreements in combination with subsidiary legislation. This happened for two directives transposed in Denmark only. One directive has been transposed by collective agreements only without extension nor supplementary legislation: Council Directive 2005/47/EC on certain aspects of the working conditions of mobile workers in interoperable cross-border services in the railway sector (Finland). The working time directive was transposed in Denmark by legislation, a collective agreement and an "implementation agreement" between the Danish social partners LO and DA: this is to date the only example of a directive transposed by a collective agreement and "extended" by another collective agreement.

The Member State which have used the first degree implementation route the most are Belgium (11), Luxembourg (3), Denmark (2) and Finland (1). The Member State which has implemented EU labour law directives via second degree implementation the most often is Denmark (12). In more concrete terms the transposition at Member State level was the following:

- **Belgium**: a) first degree implementation: all 11 directives transposed by collective agreement were also accompanied by Royal Decrees; b) second degree implementation: two EU directives were transposed via this mechanism.
- **Luxembourg**: a) first degree implementation: all three directives were also transposed by Grand Ducal Regulation (Directive 1999/63/EC - working time of seafarers, directive 2014/112/EU - working time in inland waterway transport) and directive 2009/13/EC - Maritime Labour Convention); b) second degree implementation: one EU directive was transposed via this mechanism.
- **Denmark:** a) first degree implementation: two out of three directives transposed by collective agreement were also accompanied by subsidiary legislation; one directive (2003/88/EC - working time) was transposed by legislation, a collective agreement and an "implementation agreement" between the Danish social partners LO and DA (cf. below); b) second degree implementation: 12 EU directives were implemented via this mechanism.
- **Finland**: a) first degree implementation: Council Directive 2005/47/EC on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector was transposed by collective agreement. This is the only case identified on the basis of the EUR-Lex database in which a Member State used a collective agreement only to transpose an EU labour law directive. According to the legal advisor of the Central Organisation of Finnish Trade Unions (SAK) this is also the only case of first degree implementation of EU labour law directives In Finland. As mentioned above, this is legally acceptable from an EU law perspective, since Finland is the only EU Member State in which extensions are quasi-automatic. [159] b) second degree implementation: two EU directives were transposed via this mechanism.

[159] Cf. J. Saloheimo (2006), Collective agreements – Finland, *XIVth Meeting of European Labour Court Judges 4 September 2006 Cour de cassation Paris (ILO meeting document*), p. 4.

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The first degree implementation route was never used by more than two Member States per directive, whereas the second degree approach was used by 14 Member States for the temporary agency directive and 11 Member States for the working time directive. The Member State with the highest incidence of second degree transpositions is Denmark (12), followed by Italy (3) and Belgium, Finland, Germany, the Netherlands and Sweden (each 2).

What are the advantages and disadvantages of implementing EU labour law directives through collective agreements?[160]

As we have seen in chapter 5, from a reflexive law perspective the transposition of EU labour law directives through national collective agreements offers, above all, advantages based on the principles of horizontal subsidiarity and proportionality.

Due to their strong roots in the principle of subsidiarity and proportionality social dialogue and collective bargaining are often in a better position than the normal legislative route to conciliate between economic efficiency and social objectives. The principle of vertical subsidiarity is intended to ensure that decisions are taken at a the most appropriate level and as close as possible to the citizens. That is, in concrete terms, checking that the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and that they can therefore be better achieved by action on the part of the European Union (Art. 5(3) TEU). Horizontal subsidiarity, on the other hand, addresses the specific question of choices at the same level: whether the exercise of prerogatives by the EU institutions or by the European social partners is preferable. The same test is applicable at Member State level: whether action by the State or the social partners at national level is preferable. Davies summarises the advantages of social dialogue and collective bargaining based on the principle of subsidiarity as follows:

"(…) it allows those concerned with labour law, management and trade unions, to participate in the legislative process, and its reflexive, allowing them to adapt the law to their particular needs."[161]

The principle of proportionality means that to achieve an aim only the necessary action are taken and no more.[162] Article 5(4) TEU stipulates that: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[163] Following on the above, the transposition of EU labour law directives through collective agreements is likely to increase compliance on the side of all actors involved and to avoid one-size-fits-all solutions.[164]

[160] A.C.L. Davies (2012), *EU Labour Law*, Cheltenham, Elgar, p.41.

[161] Ibid., p.36.

[162] https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality accessed on 12.4.2020.

[163] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN accessed on 12.4.2020.

[164] Cf. A.C.L. Davies (2012), *EU Labour Law*, Cheltenham, Elgar, p.42.

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Questions, on the other hand may be raised with regard to the efficiency of this mode of implementation and to the standards of regulation achieved. First, the limited duration of collective agreements, which lack the indefinite permanence of statutory regulation may be problematic.[165] Similar risks might be linked to the revision or cancellation of collective agreement implementing EU directives.[166] Second, limited personal scope of collective agreements in some systems of industrial relations, especially in those in which the collective bargaining coverage is low and/or where collective agreements are concluded *inter partes* and legal extension mechanisms are not in place, may leave parts of the workforce deprived of the rights which are catered for by the EU directives. Third, depending on the balance of power of the social partners at national level, minimum standards as foreseen in some labour law directives may not be implemented in practice due powerful employer organisations which are in a position to negotiate less favourable terms for the workers.[167] Finally, collective agreements, by and large, do not dispose of the same degree of transparency and publicity as statutes do. This limited transparency became evident in the course if the present research when while checking on the transposition of EU labour law directives on the basis of the EUR-Lex database the national modes of transposition based on collective agreements seemed to be less well documented than those rooted in national legislation.

At present, the transposition of EU labour law through national collective agreements is not a common avenue of implementation. It is mainly used in three Member States: above all and foremost in Belgium, then in Luxembourg and Denmark. In Denmark it is above all the second degree implementation route which prevails. A mentioned above, the recognition of the role of collective agreements in implementing directives emerged only slowly from the case law of the CJEU. Despite the sometimes critical approach of the Advocate-General and the CJEU, collective agreements are deemed formally acceptable as mechanism for the enforcement of EU law today. Yet, the effectiveness of this industrial relations mechanism is closely scrutinised by the CJEU. Member States that rely on the implementation of directives through collective agreements must demonstrate that they allow for effective enforcement of the directive's provisions. In order to comply with the requirements of effective implementation of EU law, as postulated by the Commission, the Council and the jurisprudence of the CJEU, the transposition through collective agreement needs to be either accompanied by administrative extension mechanisms (Belgium and Luxembourg), unless extensions are quasi-automatic (Finland), or accompanied by supplementary legislation (Denmark).

E contrario, Adinolfi rightly stressed that '(…) if collective agreements which have a non-binding effect were used in order to implement the directive, serious problems would arise concerning the

[165] Ultra-activity clauses might be a remedy to this, cf. J.M. Miranda Boto (2002), El papel de la autonomía colectiva en la transposición de Directivas, *Revista Doctrinal Aranzadi Social*, no.21, p.5.

[166] Cf. A. Landy (1966), *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience*, London, Stevens & Sons, p.115/116

[167] Ibid.

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control of the actual implementation of the directive."[168] Despite these difficulties and restrictions Adinolfi summarised that

"in order (…) not to hinder recent trends toward a greater development of collective bargaining, collective agreements should play a role in the implementation of directives. This would diminish the risk, outlined above, both of the non-implementation of existing Council directives and of the prevention of further Community developments in the labour law and industrial relations fields."[169]

[168] A. Adinolfi, (1988), The Implementation of Social-Policy Directives Through Collective Agreements, *Common Market Law Review*, vol. 25, no.2, p.310.

[169] Ibid., p.316.

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Annex

Annex 1 Extent to which EU labour law directives have been transposed by collective agreements [170]

1. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to **collective redundancies**, OJ L 225, 12.08.1998, p. 16, modified by Directive 2015/1794

a*) *first degree implementation:

Belgium

- Royal Decree of 21/01/1976 making compulsory the collective agreement of employment no. 24 concluded on 02/10/1975 in the National Labour Council concerning the procedure for informing and consulting employees' representatives in the field of collective redundancies, Belgian Official Gazette of 17/02/1976, p. 1716.
- Royal Decree of 20/12/1985 making compulsory the collective labour agreement no. 24b, concluded on 08/10/1985 in the National Labour Council, amending the collective labour agreement no. 24 of 02/10/1975 concerning the procedure for informing and consulting employees' representatives in the area of collective redundancies, Belgian Official Gazette of 15/01/1986, p. 446.

b*) *second degree implementation

Denmark

- Various co-determiantion agreements of the social partners have been used complement legislation (Samarbejdsaftaler; MED-aftalen).[171]

2. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a **European Works Council** or a procedure in Community-scale undertakings and

[170] This annex is mainly based on an analysis of the EUR-Lex database, selected academic literature, policy documents and the six Eurofound country reports from BE (preliminary draft), DK, ES, FI, IT and LU.

[171] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

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Community-scale groups of undertakings for the purposes of informing and consulting employees (recast) (text with EEA relevance), *OJ L 122, 16.5.2009, pp. 28–44.*

(recasts Directives 94/45/EC and 97/74/EC and modified by Directive 2015/1794)

a*) *first degree implementation:

Belgium

- Directive 94/45/EC partially transposed by collective agreement (Blanpain 2014, p.
- 130).
- FEDERAL PUBLIC SERVICE FOR EMPLOYMENT, LABOUR AND SOCIAL CONSULTATION - 24 MARCH 2011. - Royal Decree declaring the Collective Labour Agreement no. 62d of 21 December 2010, concluded in the National Labour Council of, amending Collective Agreement no. 62 of 6 February 1996 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended by Collective Agreements no. 62a of 6 October 1998, no. 62ter of 6 October 2004 and no. 62C of 30 January 2007.
    - Official publication: Staatsblad; publication date: 2011-04-08; pp. 22813-22816
- FEDERAL PUBLIC SERVICE FOR EMPLOYMENT, LABOUR AND SOCIAL CONSULTATION – 24 MARCH 2011. - Royal Decree declaring Collective Labour Agreement no. 84A of 21 December 2010, concluded in the National Labour Council, amending Collective Agreement no. 84 of 6 October 2004 on the involvement of employees in the European company.
    - Official publication: Staatsblad; publication date: 2011-04-08; pp. 22818-22820.
- FEDERAL PUBLIC SERVICE FOR EMPLOYMENT, LABOUR AND SOCIAL CONSULTATION –
- 24 MARCH 2011. - Royal Decree declaring Collective Labour Agreement no. 88A of 21 December 2010, concluded in the National Labour Council, amending Collective Agreement no. 88 of 30 January 2007 on the involvement of employees in the European cooperative society.
    - Official publication: Staatsblad; publication date: 2011-04-08; pp. 22820-22823.
- FEDERAL PUBLIC SERVICE FOR EMPLOYMENT, LABOUR AND SOCIAL CONSULTATION – 24 MARCH 2011. - Royal Decree declaring the collective agreement no. 101 of 21 December 2010, concluded in the National Labour Council, on informing and consulting employees in Community-scale undertakings and Community-scale groups of undertakings.
    - Official publication: Staatsblad; publication date: 2011-04-08; pp. 22826-22842.

b*) *second degree implementation

Denmark

- Collective agreements have been used to complement legislation where the clauses of the directive typically form part of co-determination agreements of the social partners (Samarbejdsaftaler; MED-aftalen).[172]

Italy

- joint statement (avviso comune) of 12 April 2011 on the recast EWC Directive 2009/38/EC by the most representatives social partners (Confindustria, Cgil, Cisl and Uil)
- transposed by legislative decree no. 113 of 22 June 2012).[173]

3. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a **general framework for informing and consulting employees** in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, *OJ L 080, 23.03.2002, p. 29* (modified by Directive 2015/1794)

a*) *first degree implementation:

Belgium

- Collective labour agreement no. 5 of 24 May 1971 concerning the status of trade union delegations for staff of undertakings, as amended and supplemented by collective labour agreements no. 5a of 30 June 1971 and no. 5b of 21 December 1978 (no. ratification requested).
    - Official publication: Moniteur Belge; publication date: 1971-07-01.
- Collective labour agreement no. 9 of 9 March 1972 coordinating national agreements and collective labour agreements relating to company councils concluded within the National Labour Council, as amended by collective labour agreements no. 15 of 25 July 1974, no. 34 of 27 February 1981, no. 37 of 27 November 1981 and no. 9a of 29 October 1991 (ratified by the Royal Decrees of 12 September 1972 and 17 December 1991 published in the MB of 25 November 1972 and 10 January 1992).
    - Official publication: Moniteur Belge; publication date: 1972-11-25.

[172] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen). Cf. also H. Knudsen, J. Lind (1999), The implementation of EU directives in national systems - lessons from the Danish case, *Transfer*, vol.5, no.1-2, p.147.

[173] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Italy (author: Roberto Pedersini). Cf. also European Commission (2016), Evaluation study on the implementation of Directive 2009/38/EC on the establishment of the European Works Council, Brussels, Directorate-General for Employment, Social Affairs and Inclusion, Labour law Unit, p.78.

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- Royal Decree of 27/11/1973 on the regulation of economic and financial information to be provided to the business council.
    - Official publication: Moniteur Belge; publication date: 1973-11-28.
- Convention Collective de travail no. 24 du 2 octobre 1975 concernant la procédure d'information et de consultation des représentants des travailleurs en matière de licenciements collectifs, modifiée par les conventions collectives de travail no 24a du 6 décembre 1983, 24ter du 8 octobre 1985 et 24c du 21 décembre 1993 (ratifiées par les AR des 21 janvier 1976, 3 février 1984, 20 décembre 1985 et 28 février 1994 parus au MB des 17 février 1976, 22 février 1984, 15 janvier 1986 et 15 mars 1994.
    - Official publication: Staatsblad; publication date: 1976-02-17.
- Collective Labour Agreement no. 39 of 13 December 1983 on information and consultation on the social consequences of the introduction of new technologies (ratified by the Royal Decree of 25 January 1984 (Articles 1 to 7), published in the MB on 8 February 1984).
    - Official publication: Moniteur Belge; publication date: 1984-02-08.
- Convention collective de travail no. 32a du 7 juin 1985 concernant le maintien des droits des travailleurs repris des travailleurs repris des travailleurs repris des travailleurs repris en cas de reprise de l'actif du fait des travailleurs repris en cas de reprise de l'action après registrée d'action après faillite de l'action, modifiée par les conventions de travail no. 32 ter du 2 décembre 1986, 32c du 19 décembre 1989 et 32d du 13 mars 2002 (ratifiées par les AR des 25 juillet 1985, 19 janvier 1987 et 6 mars 1990 parus au MB des 9 août 1985, 28 janvier 1987 et 21 mars 1990).
    - Official publication: Staatsblad; publication date: 1985-08-09.
- Collective labour agreement no. 42 of 2 June 1987 on the introduction of new working arrangements in undertakings, as amended by Collective Labour Agreement no. 42a of 10 November 1987 (ratified by the Royal Decrees of 18 June 1987 and 14 January 1988, published in the MB on 26 June 1987 and 3 February 1988).

b) second degree implementation:

Denmark

- The cooperation Agreement (Samarbejdsaftaler) is an agreement concluded between the two principal labour and employer organisations in Denmark, namely the Danish Confederation of Trade Unions (Landsorganisationen i Danmark) ('LO') and DA. The 1986 cooperation agreement was amended in 2003 to meet the directive's requirements.[174]

[174] Case C-306/07 [2008], C:2008:743.Cf.also European Commission (2008a), Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the application of Directive 2002/14/EC in the EU, COM/2008/0146 final, Brussels, 17.3.2008 and European Commission (2008b), Commission staff working document accompanying the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the application of Directive 2002/14/EC in the EU {COM (2008) 146 final, 17.3.2008.

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4. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of **transfers of undertakings**, businesses or parts of undertakings or businesses, *OJ L 082, 22.03.2001, p. 16*

(modified Directive 2015/1794)

- According to the EUR-Lex database this directive was not transposed by national collective agreement. The predecessor of this directive Council 77/187/EC of 14 February 1977 regarding the transfer of enterprises was transposed in by

a*) *first degree implementation:

Belgium

- by nation-wide collective agreement no.32 bis
- extended by Royal Decree (Blanpain 2014, p. 129) - Royal Decree of 19/04/1978 making compulsory the Collective Labour Agreement no. 32 of 28/02/1978 concluded within the National Labour Council relating to the safeguarding of employees' rights in the event of a change of employer as a result of a contractual transfer of an undertaking;
    - Official publication: Moniteur Belge; publication date: 1978-08-25; p. 9470.

b*) *second degree implementation

Denmark

- This directive was implemented primarily through labour law, but in the public sector some clauses of the directive were also transposed via collaboration agreements in the local governments and Danish regions (MED-aftalen).[175]

5. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a **European company** with regard to the involvement of employees, *OJ L 294, 10.11.2001, p. 22.*

a*) *first degree implementation:

Belgium

[175] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

- Royal Decree rendering compulsory the Collective Labour Agreement No 84 of 6 October 2004 within the National Labour Council concerning the involvement of employees in the European company
    - Official publication: Moniteur Belge; publication date: 2005-01-19; pp. 1476-1498.

6. **Council Directive 2003/72/**EC of 22 July 2003 supplementing the Statute for a **European Cooperative Society** with regard to the involvement of employees
OJ L 207, 18.08.2003, p. 25.

a) ***first degree implementation:***

Belgium

- FEDERAL EMPLOYMENT, LABOUR AND SOCIAL DIALOGUE 16 MARCH 2007. — Royal Decree making compulsory the Collective Labour Agreement no. 62c of 30 January 2007, concluded within the National Labour Council, amending Collective Labour Agreement no. 62 of 6 February 1996 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended by collective labour agreements no. 62a of 6 October 1998 and no. 62b of 6 October 2004.

Official publication: Moniteur Belge; no. 2007/200857; publication date: 2007-04-04; p. 19075.

- FEDERAL EMPLOYMENT, LABOUR AND SOCIAL DIALOGUE 16 MARCH 2007. — Royal Decree making compulsory the Collective Labour Agreement no. 88 of 30 January 2007, concluded within the National Labour Council, concerning the involvement of employees in the European cooperative society.

7. **Council Directive 2005/56/EC** of the European Parliament and of the Council of 26 October 2005 on **cross-border mergers** of limited liability companies, *OJ L 310, 25.11.2005, p.1.*

a) ***first degree implementation:***

Belgium

- SERVICE PUBLIC FEDERAL EMPLOYMENT, LABOUR AND CONCERTATION SOCIALE — 12 JUNE 2008. — Arrêté lawfully royal obligatoire la convention collective de travail no. 94 du 29 avril 2008, conclusion au sein du Conseil national du Travail, concernant la participation des travailleurs dans les sociétés ses de la fusion transfrontalière de sociétés de capitaux.
    - Official publication: Staatsblad; publication date: 2008-07-02; pp. 33628-33646

8. **Council Directive (EU) 2015/1794** of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and

of the Council, and Council Directives 98/59/EC and 2001/23/EC, **as regards seafarers,** *OJ L 263, 8.10.2015, pp. 1–5.*

a*) *first degree implementation:

Belgium

- FEDERAL PUBLIC SERVICE FOR EMPLOYMENT, LABOUR AND SOCIAL CONSULTATION — 13 MAY 2016. Royal Decree amending the Royal Decree of 24 May 1976 on collective redundancies and transposing Directive (EU) 2015/1794 of 6 October 2015.
    - Official publication: Staatsblad; publication date: 2016-05-25; pp. 33221-33222.
- Collective Labour Agreement No 32e of 27 September 2016 amending Collective labour agreement no. 32a of 7 June 1985 on the safeguarding of employees' rights in the event of a change of employer following the transfer of an undertaking by virtue of the transfer of an undertaking and regulating the rights of workers taken over in the event of the takeover of assets after bankruptcy, as amended by Collective Agreement no. 32ter of 2 December 1986, no. 32c of 19 December 1989 and no. 32d of 13 March 2002.
- Collective Labour Agreement no. 24d of 27 September 2016 amending Collective labour agreement no. 24 of 2 October 1975 on the procedure for informing and consulting employee representatives with regard to collective redundancies, as amended by Collective Labour Agreements no. 24a of 6 December 1983, no. 24b of 8 October 1985 and no. 24c of 21 December 1993.
- Collective Labour Agreement no. 102a of 27 September 2016 amending Collective labour agreement no. 102 of 5 October 2011 concerning the retention of employees' rights in the event of change of employer as a result of judicial reorganisation by transfer under judicial authority

9. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of **working time**, *OJ L 299, 18.11.2003, p. 9* ***(consolidates Directives 2000/34/EC and 93/104/EC)***

a*) *first degree implementation:

Belgium

- Royal Decree rendering compulsory the Collective Labour Agreement no. 76 of 18/07/2000, concluded within the National Labour Council implementing Article 27 (4) (2) of the Law of 16/03/1971 on work MB of 27/09/2000, page 32986, SG (2002) A/6900 of 09/07/2002,[176]

[176] http://www.cnt-nar.be/CAO-COORD/cao-076.pdf.

- Official publication: Moniteur Belge; publication date: 2000-09-27; p. 32986.

b) ***second degree implementation***

The working time directive is one of the two paradigms cases (*next to temporary agency work*) of ***second degree implementation***, i.e. the mode of implementation which leaves space for (further) collective bargaining over exceptions/derogations to the directive. Exceptions/derogations to the directive by collective agreement have been made in the following areas:

- **Weekly working time average**
  - Collective agreements may provide for flexibility on organisation of working time, for instance by allowing weekly working time to be averaged over periods of up to 12 months. **Germany, Hungary, Poland,** and **Spain** allow a 12-month reference period without a collective agreement.
- **On-call time**
  - **Inactive' on-call time** at the workplace is, as a general rule, *not* fully counted as working time by the applicable national law or collective agreements in **Denmark, Greece and Ireland**; this is also the case (except in specific sectors) in Poland.[177]
  - In **Belgium, Finland** and **Sweden**, national law generally treats inactive on-call time as working time but has allowed derogations from this principle through collective agreements, which often do not comply with the Court's decisions. In **France**, it is common for sectoral collective agreements to provide for 'équivalence' (meaning that inactive periods of on-call time at the workplace will be only partially counted). The French authorities have called on the social partners to review their agreements, but it is not clear that they all comply fully.
- **Compensatory rest**
  - **Germany** and **Denmark** allow derogation by collective agreement.
- **Opt-out**
  - Two Member States (**Germany** and the **Netherlands***)* require a collective agreement, as well as the consent of the individual worker, for an opt-out to be valid.
- **Night work**

[177] With the exception of health services and professional soldiers.

- Derogations are possible, either by legislation or by collective agreement, on condition that the night worker receives equivalent compensatory rest.[178]

Denmark

- the working time directive has been implemented in Danish labour law and collective agreements.[179]

Italy

- joint statement (avviso comune) of 12 November 1997 on the implementation of the working time directive 93/104/EC by the most representatives social partners (Confindustria, Cgil, Cisl and Uil)
- transposed in the legislative decree no. 66 of 8 April 2003.[180]

10. Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation **of working time of seafarers** concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) – Annex: European Agreement on the organisation of working time of seafarers, *OJ L 167, 02.07.1999, p. 33;*

a*) *first degree implementation:

none

b) second degree implementation

Luxembourg

- Collective labour agreement relating to the organisation of working time of seafarers concluded on 21 June 2002 between the trade unions OGB-L and LCGB, FNCTTFEL and FCPTS/Syprolux and the Union des Armateurs Luxembourgeoise and l'Association Luxembourgeoise des Interest Maritimes:

[178] European Commission, Commission Staff Working Document. Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time ('The Working Time Directive'), COM(2010) 802 final, pp.3-8.

[179] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

[180] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Italy (author: Roberto Pedersini).

- declared of generally binding by Grand-Ducal Regulation of 6 June 2003 (Mémorial A no. 97, 15th July 2003, p. 1966).[181]

Denmark

- Collective agreements have been used to complement legislation.[182]

(amended by):

Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC, *OJ L 124, 20.5.2009, p. 30–50.*

a*) *first degree implementation:

Luxembourg

- Collective agreement on working conditions for seafarers concluded on 29 July 2014;
- declared of general binding by Grand-Ducal Regulation of 21 November 2014 (Mémorial A no. 218, 4th December 2014, p. 4200).
    - Official publication: Mesures administratives; publication date: 2014-07-29; pp. 1-7.

(amended by):

Council Directive (EU) 2018/131 of 23 January 2018 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) to amend Directive 2009/13/EC in accordance with the amendments of 2014 to the Maritime Labour Convention, 2006, as approved by the International Labour Conference on 11 June 2014 (text with EEA relevance), *OJ L 22, 26.1.2018, pp. 28–33.*

[181] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Luxembourg (author: Fanny Robert). According to the LU national report the mode of implementation is be qualified as 'second degree' implementation, since the content of the agreement only concerns clause 5 (1) of the European agreement.

[182] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

- The transposition deadline for Directive (EU) 2018/131 was 12 February 2020.

a*) *first degree implementation:

Luxembourg

- Collective agreement concluded on 14 February 2020;
- to be expected to be declared generally binding by Grand-Ducal Regulation.[183]

11. **Council Directive 2014/112/EU** of 19 December 2014 implementing the European Agreement concerning certain aspects of the organisation of **working time in inland waterway transport**, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF), *OJ L 367, 23.12.2014, pp. 86–95.*

a*) *first degree implementation:

Luxemburg

- Agreement interprofessional of 22 March 2017 on the organisation of working time in the sector of inland waterway transport between FEDIL Barging and the trade unions OGB-L and LCGB.
- Grand-Ducal Regulation of 31 May 2017 declaring a generally binding the Agreement interprofessional of 22 March 2017 on the organisation of working time in the sector of inland waterway transport between FEDIL and OGB-L and LCGB.
    - Official publication: Mémorial Luxembourgeois A; no. 556; publication date: 2017-06-08; pp.1-9.

b) second degree implementation

Belgium

[183] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Luxembourg (author: Fanny Robert).

- MINISTRY OF EMPLOYMENT AND LABOUR - 23 MARCH 1990. Collective labour agreement no. 46 of 23 March 1990 on measures for the management of work in teams involving night work and other forms of work involving night services.
    - Official publication: Moniteur Belge; publication date: 1990-06-13
- FEDERAL EMPLOYMENT, LABOUR AND SOCIAL DIALOGUE - 23 MAY 2013. - Royal Decree making compulsory the collective labour agreement of 3 October 2012 concluded within the Joint Committee on Inland Waterways, concerning the possibility of introducing a system for navigation into the system.

Official publication: Moniteur Belge; publication date: 2013-09-25; pp. 67892-67898

Denmark

- Collective agreements have been used to complement legislation.[184]

12. Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of **Working Time of Mobile Workers in Civil Aviation** concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), *OJ L 302, 01.12.2000, p. 57.*

a*) *first degree implementation:

Belgium

- Collective labour agreement of 18/02/2004 concerning the transposition of Directive 2000/79 on the organisation of working time of mobile staff in commercial aviation Convention collection 18/02/2004. [185]
- extended by arrêté royal rendant obligatoire la convention collective de travail du 18 février 2004, conclue au sein de la Sous-commission paritaire des compagnies aériennes autres que a S.A. SABENA, concernant la transposition de la directive européenne 2000/79/EG

[184] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

[185] https://public-search.werk.belgie.be/website-download-service/joint-work-convention/31502/31502-2006-001719.pdf.

concernant l'organisation du temps de travail du personnel mobile dans l'aviation commerciale. [186]

b) second degree implementation

Denmark

- Collective agreements have been used to complement legislation.[187]

13. Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the **working conditions of mobile workers engaged in interoperable cross-border services in the railway sector** - Agreement concluded by the European Transport Workers' Federation (ETF) and the Community of European Railways (CER) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services, *OJ L 195, 27.07.2005, p. 15.*

a*) *first degree implementation:

Finland

- Collective agreement for rail transport activities from 1.10.2007 to 30.4.2010.
    - Official publication: Hallinnolliset toimet; publication date: 2007-11-05.

b) second degree implementation

Denmark

- Collective agreements have been used to complement legislation.[188]

[186] https://www.etaamb.be/fr/arrete-royal-du-01-septembre-2004_n2004202556.html; Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Belgium (preliminary draft) (author: Dries Van Herreweghe),

[187] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

[188] Ibid.

14. Directive 2002/15/EC Save item Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of **the working time of persons performing mobile road transport activities**, *OJ L 80, 23.3.2002, pp. 35–39.*

a*) *first degree implementation:

- According to the EUR-Lex database this directive was not transposed by national collective agreement when it comes to first degree implementation.

b*) second degree *implementation:

Denmark

- The directive was transposed by collective agreement in the pace-setting agreement for the private sector, the Industrial Agreement, in a protocol to the agreement (annex 16).[189]

15. **Council Directive 94/33/EC** of 22 June 1994 on the protection of **young people at work,** *OJ L 216, 20.08.1994, p. 12.*

a*) *first degree implementation:

- According to the EUR-Lex database this directive was not transposed by national collective agreement when it comes to first degree implementation.

b*) second degree *implementation:

Denmark

- The directive was transposed by collective agreement in the pace-setting agreement for the private sector, the Industrial Agreement, in a protocol to the agreement (annex 11).[190]

[189] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

[190] Ibid.

16. Council Directive 91/533/EEC of 14 October 1991 on an employer's **obligation to inform employees of the conditions applicable to the contract or employment relationship,** *OJ L 288, 18.10.1991, p. 32.*

- According to the EUR-Lex database this directive was not transposed by national collective agreement.

17. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on **fixed-term work** concluded by ETUC, UNICE and CEEP, *OJ L 175, 10.07.1999, p. 43.*

a*) *first degree implementation:

Denmark

- "In order to transpose the directive (fill the gaps not covered by collective agreements) Denmark adopted in May 2003 a new Act on Employment of Limited Duration (Law no. 370 of 28. May 2003 om tidsbegrænset ansættelse). Amendments were also made to the Act on White-Collar Workers from 1938 (Funktionærsloven)."[191]
    - The Law on the amendment of the legal relationship between employers and employees law no. 203 of 20/05/2003.
        - Official publication: Administrative measures; publication date: 2003-05-20.
    - Law on a time limit; Law no. 202 of 20/05/2003.
        - Official publication: Administrative measures

18. Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on **part-time work** concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, *OJ L 014, 20.01.1998, p. 9.*

a*) *first degree implementation:

Belgium

[191] European Commission (2006), Commission Staff Working Document. Report by the Commission services on the implementation of Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP (EU-15), SEC(2006) 1074, Brussels, 11.08.2006, p.4.

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- Implemented through national CA 35bis and the Royal Decree of 28th of January 2002 http://www.cnt-nar.be/CAO-ORIG/cao-035-bis-(09.02.2000).pdf and extended *erga omnes* by Royal Decree: this implementation does not show up in the database EUR-Lex.[192]
- The Directive has been transposed by the following legislation:
    - The Act relating to the principle of non-discrimination against part-time workers, which entered into force on 23 March 2002;
    - Collective Labour Agreement no. 35a of 9 February 2000 entered into force on 2 February 2000.
    - Opinion no. 1302 of the National Labour Council "Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Transposition into Belgian law" was issued on 9 February 2000.
    - Opinion no. 1317 of the National Labour Council "Implementation of the intersectoral agreement of 8 December 1998: part-time work" was issued on 18 July 2000.
    - Opinion no. 1334 of the National Labour Council "Paid training leave – Draft Royal Decrees extending this to part-time workers" was issued on 19 December 2000.
    - The Royal Decree of 27 March 2001 "amending various financial provisions" entered into force on 1 May 2001.
    - Opinion no. 1367 of the National Labour Council "Implementation of the inter-sectoral agreement of 22 December 2000: paid training leave" was issued on 17 July 2001.
    - Some provisions transposing the Directive, including Collective Labour Agreement no. 35a came into force before 20 January 2000 or 20 January 2001, taking into account the additional year requested.[193]

Denmark

- Collective Agreement of 9 January 2001 concluded by LO (General Confederation of Danish Workers) and DA (Danish Employers' Confederation).
    - The directive was implemented through collective agreements at confederal and decentralised/sectoral level and by law for workers not covered by collective agreements. In the past, EU employment and social directives have been implemented exclusively through collective agreements in Denmark. However, in June 2001, parliament adopted legislation transposing the Directive on part-time work, essentially extending the provisions of an agreement concluded by the LO trade union confederation and DA employers' confederation to those areas without their own agreements on the matter. This new "dual" implementation method - involving both law and bargaining - represents a break with tradition, and is not without problems. The other main social partner organisations on both the union

[192] Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Belgium (preliminary draft) (author: Dries Van Herreweghe).

[193] European Commission (2003), Report by the Commission Services on the implementation of Council Directive 97/81/EC of 17 December 1997 concerning the framework agreement by UNICE, CEEP and the ETUC, Brussels, 21.01.2003, p.4

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and employer sides complained to the Ministry of Labour that they had not been consulted.[194]

- Act no. 443 of 7 June 2001 on the implementation of the Part-Time Directive
  - Official publication: Administrative measures.
- Act no. 444 of 7 June 2001 amending the Act on the legal relationship between employers and employees and the Act on the duty leave and on leave for the UN service, etc.
  - Official publication: Administrative measures.

19. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on **temporary agency work,** *OJ L 327, 5.12.2008, pp. 9–14.*

a) According to the EUR-Lex database and the implementation report this directive was not directly transposed by national collective agreement, so there is no case of ***first degree implementation.***

b) The temporary agency work directive is, however, the second paradigm case of ***second degree implementation***, i.e. the mode of implementation which leaves space for (further) collective bargaining over exceptions/derogations to the directive.

Exceptions/derogations to the directive by collective agreement have been made in the following areas.

- **Comparable employee**
  - In **Estonia**, the implementation of the principle of equal treatment is based on

    the notion of 'comparable employee' in the user undertaking. If there is no comparable employee, the comparison should be made by reference to the applicable collective agreement. If there is no collective agreement, an employee engaged in the same work or similar work in the same region is deemed to be a comparable employee.

- **Derogation provided for on article 5(3)**
  - Under Article 5(3), Member States may, after consulting the social partners, enable them to conclude or uphold collective agreements on the working and employment conditions of temporary agency workers derogating from the principle of equal treatment, providing the overall protection of agency workers is respected.
  - Ten Member States **(Austria, Bulgaria, Denmark, Finland, Germany, Hungary, Ireland, Italy, the Netherlands** and **Sweden**) have adopted provisions allowing collective labour agreements deviating from equal treatment of agency workers. Austria, Ireland and Sweden refer to the need for these collective agreements to be

[194]https://www.eurofound.europa.eu/publications/article/2001/eu-part-time-work-directive-implemented-through-new-dual-method, European Commission (2003), Report by the Commission Services on the implementation of Council Directive 97/81/EC of 17 December 1997 concerning the framework agreement by UNICE, CEEP and the ETUC, Brussels, 21.01.2003, p.5 and H. Knudsen, J. Lind (2012), Is the Danish model still a sacred cow? Danish unions and European integration, *Transfer*, vol.18, no.4, p.387.

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appropriately balanced to ensure that they do not prejudice the overall protection of temporary agency workers.

- **Derogation provided for on article 5(4)**
  - According to Article 5(4), Member States in which there is no system for declaring collective agreements universally applicable or no system for extending their provisions to all similar undertakings in a certain sector or geographical area may, on the basis of an agreement concluded by the national social partners, derogate from equal treatment as regards the basic working and employment conditions of temporary agency workers, provided that they enjoy an adequate level of protection. This may include a qualifying period for equal treatment. Only the **United Kingdom** and **Malta** have resorted to Article 5(4).
- **Review of restrictions and prohibitions of temporary agency work (article 4)**
  - Prohibitions and restrictions laid down by collective agreements could be reviewed by the social partners who had negotiated the agreement**.**
  - In **Slovenia,** where a branch collective agreement could prohibit the use of temporary agency workers, the possibility of providing for such a ban has been restricted to cases in which the purpose of the prohibition is to guarantee greater protection for workers or the health and safety of workers.
  - Several Member States (…) justified certain prohibitions or restrictions on the use of agency work by 'the need to ensure that abuses are prevented'. This justification has been resorted to with respect to (…) the possibility for national collective agreements to set quantitative limits on the use of fixed-term contracts for agency work (**Italy**) (…).
  - The Member States which reviewed the prohibitions and restrictions in place involved the social partners in various ways, reflecting the diversity of labour markets and industrial relations across the EU. Group 2 consisted of Member States where the review was mostly carried out by the social partners themselves, given that most prohibitions and restrictions are laid down by collective agreements (**Denmark, Finland, Netherlands** and **Sweden**); Finland and Sweden have informed the Commission of the views of the social partners. [195]

20. **Council Directive 2009/13/EC** of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the **Maritime Labour Convention**, 2006, and amending Directive 1999/63/EC, *OJ L 124, 20.5.2009, pp. 30–50.*

a) ***first degree implementation:***

[195]European Commission (2014), Report from the European Commission to the European Parliament, The Council, the European Economic and Social Committee, the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 106 final, Brussels, 21.03.2014, pp.6-9, 11,13.

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Luxemburg

- Collective labour agreement on working conditions for seafarers
    - Official publication: Mesures administratives; publication date: 2014-07-29; pp. 1-7.

21. **Council Directive (EU) 2017/159** of 19 December 2016 implementing the Agreement concerning the **implementation of the Work in Fishing Convention**, 2007 of the International Labour Organisation, concluded on 21 May 2012 between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche), *OJ L 25, 31.1.2017, pp. 12–35.*

- The transposition deadline for Directive (EU) 2017/159 was 19 November 2019.

22. Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the **safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship,** *OJ L 206, 29.07.1991, p. 19.*

- According to the EUR-Lex database this directive was not transposed by national collective agreement.

23. **Directive 2008/94/EC** of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of **the insolvency of their employer** (codified version) (text with EEA relevance), *OJ L 283, 28.10.2008, p. 36–42; (**consolidates Directives 80/987/EEC and 2002/74/EC /see also modification by Directive 2015/1794)***

    - According to the EUR-Lex database this directive was not transposed by national collective agreement.

24. Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on **transparent and predictable working conditions** in the European Union, *OJ L 186, 11.7.2019, pp. 105–121.*

- The transposition deadline for Directive (EU) 2019/1152 is 1 August 2020.

- The predecessor of this directive **Directive 91/533/EEC (conditions applicable to the contract or employment relationship)** was transposed in

Denmark

- ***by secondary implementation***.
    - directive was transposed by Consolidating Law no. 385 of 11 May 1994 ('Law on proof of appointment') and by the collective agreement concerning the employer's

obligation to inform employees of the conditions applicable to the employment relationship of 9 June 1993 ('the KTO Agreement').[196]

[196] Case C-306/07, [2008], C:2008:743. Cf. in the same sense Eurofound (2020), Transposition of EU labour law directives through collective agreements at national level: national report Denmark (author: Trine Pernille Larsen).

Annex 2 Extent and modalities of extension mechanisms at national level[197]

Austria

- The legislator has provided for an official procedure called an extension order (*Satzungserklärung*), whereby a collective agreement (or part of it) can be extended to include employment relationships of essentially the same nature which are not covered by an agreement. An extension order is issued by the Federal Arbitration Board (*Bundeseinigungsamt*) on application from an employer or employee organisation possessing the capacity to conclude agreements. In practice, such a procedure is relatively unusual, since there are only a few areas of employment which are not covered by a collective agreement.

Belgium

- The obligatory nature of a sectoral collective agreement can be extended by Royal Decree. In this case, the agreement will be binding for all employers covered by the bipartite structure within which the deal has been concluded, and contrary provisions cannot be made in individual employment contracts. This procedure is initiated on request by the sectoral joint committee or by an organisation represented in the committee, and is meanwhile a pervasive and common practice in the Belgian collective bargaining system.

Bulgaria

- According to the Labour Code (Article 54b:4), 'when the collective agreement at sectoral or branch level is concluded between all the representative organisations of workers and employers in the sector or industry, at their joint request the Minister of Labour and Social Policy may extend the application of the contract or of its individual clauses in all enterprises of the sector or industry'. The role of sectoral collective labour agreements (CLA) has become more significant since 2010/2011 when the clause extending them to all companies in the respective sector came into force. In 2010, the Minister of Labour and Social Policy, after consulting the social partners, extended the validity of collective agreements in water supply (2010) and sewerage (2012), brewing (2010, 2011, 2013), cellulose paper (2010, 2012), wood processing and furniture (2010), mining (2011) and metallurgy (2011). The CLA register of the General Labour Inspectorate includes information about the extended, ongoing and expired CLAs. Since 2012, there have been no new extending orders by the Minister of Labour and Social Policy and after 2014 there have been no additional extended CLAs.

Croatia

- The extension of the application of a collective agreement is stipulated in the Labour Act (OG 93/14, 127/17) in article 203. The Minister may, at the request of all parties to a collective agreement, extend the application of a collective agreement concluded with an employer's

[197] This annex II is mainly based on Eurofound/EURwork (2019), Working life country profiles (https://www.eurofound.europa.eu/country).

association or a higher-level employers' association, to an employer who is not a member of the employer's association or higher-level employers' association that is a signatory of this collective agreement. The Minister will decide if there is a public interest for the extension of a collective agreement and if the collective agreement was concluded by trade unions which have the highest number of members and an employer's association which has the highest number of workers, at the level for which it is extended.

Cyprus

- Collective agreements apply to signatory parties' members only, whereas in Cyprus there is neither a legal provision for mandatory extension of the collective agreements, nor is there a functional equivalent. The previous government submitted in February 2013 a draft law aimed at introducing an extension mechanism for sectoral collective agreements. The new government, which took office in March 2013, revoked the draft law. Thereafter, the president of the Labour Committee of the House of Representatives has resubmitted the draft law with minor essential changes. As of February 2019, the draft law was still in the Labour Committee, but has not yet been taken into the committee's priority agenda. In relation to wage indexation that applies to the outcomes of collective bargaining, all employees are covered, regardless of whether they are a member of a trade union.

Czechia

- The extension of a binding higher-level collective agreement to another employer is possible under the conditions of Act No. 2/1991 Coll. on collective bargaining. The Ministry of Labour and Social Affairs of Czechia possesses the relevant powers to ensure that agreements are extended, based on a proposal made by both contractual parties to the agreement, provided that the conditions determined by law are met. There are no voluntary mechanisms of extension. From a total number of 22 higher-level collective agreements (HLCA) concluded in 2017, 6 were extended. In 2018 from a total number of 23 HLCAs 4 HLCAs were extended.

Denmark

- There are no statutory extension mechanisms in Denmark regarding collective agreements. However, in trade unions may sign "accession agreements" with employers nor organised in employers' organisations.[198]

Estonia

- According to the Collective Agreements Act, extended contracts may be the subject of pay, working time and holiday conditions, and concluded by the association or federation of employers' and workers' union or federation, or employers' and workers' confederation (i.e. multi-employer agreements). In practice, extended contracts are rare in Estonia. Currently there are extended sectoral collective agreements in two sectors (transport and healthcare), but only one is a private sector collective agreement. Several problems have emerged,

[198] Cf. JK. Kristiansen (ed.) (2015b), European Challenges of the Nordic Collective-Agreement Model, in: idem (2015a), *Europe and the Nordic Collective-Bargaining Mode. The Complex Interaction between Nordic and European Labour Law*, Copenhagen, Nordic Council of Ministers, p.17.

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including the lack of employers' and employees' associations representativeness criteria and control mechanisms. In January 2018 the national level social partners concluded a good practice agreement on the extension of collective agreements, which establishes representativeness criteria for the social partners.

Finland

- Since 1971, a principle of general applicability of collective agreements has been in effect in Finland. According to this principle, employers that are unorganised in terms of collective bargaining must comply with the national agreements that concern their field of economic activity. The generally binding nature of a collective agreement depends on various factors, especially the organisation rate of the employers and employees in the sector concerned. Since 2001, a public authority formally decides whether collective agreements are generally binding.[199] The decision of this commission may be appealed at the Labour Court, the decision of which is final. The decision regarding the general validity of the decision is published in the Regulations Collection maintained by the authorities, and agreements confirmed as generally binding are available free of charge on the internet. All collective agreements that can be extended to all employees are documented in the official register by the Ministry of Employment and the Economy. An agreement is generally applicable if it can be considered representative of the field in question. The criteria for representativeness are evaluated based on statistics that measure the general applicability of collective agreements, the established practices of agreements in the field, and the organisation rate of the negotiating parties. The aim of the system of general applicability to guarantee minimum conditions is also taken into consideration.[200]

France

- Extension mechanisms are used extensively. This practice means declaring the terms of a collective agreement, negotiated between the representative organisations within a subsector (*'branche'*), compulsory for all the employees and employers in that subsector. In order to extend a collective agreement, the social partners have to ask the Labour Ministry to issue a ministerial order. A large number of national sectoral wage agreements are extended resulting in very high coverage rates.

Germany

- Collective agreements can be extended either under the Collective Agreements Act or under the Posted Workers Act. Under the former, the federal as well as the regional labour ministers may extend an agreement if the extension is approved by a bipartite wage committee. Under the Posted Workers Act, the federal labour minister may react to a plea by the collective bargaining partners and extend a sectoral agreement to the national level. From 2000 to 2016,

[199] Ibid. See also J. Saloheimo (2006), Collective agreements – Finland, *XIVth Meeting of European Labour Court Judges 4 September 2006 Cour de cassation Paris (ILO meeting document*), p. 4.

[200] Eurofound (2011), Extension of collective bargaining agreements in the EU - Background paper, Dublin, p.5.

the number of extended agreements decreased from 551 to 444. To counteract the trend, the previous government amended both Acts to simplify the extension mechanism (Act on the Promotion of Collective Bargaining Autonomy). Sectoral agreements can now be extended if the extension is 'in the public interest'; previously, they had to cover at least 50% of the sectoral employees to be eligible for extension. Despite this, the number of new extensions declined to 444 in 2016. There are no other voluntary mechanisms of extension/ application of the terms of collective agreements.

Greece

- From 1990 until 2011, according to Law 1876/90, the Minister of Labour was able to extend and declare as generally compulsory a collective agreement for all workers in the industry, in the case that this agreement covered employers who employed 51% of the workforce in the respective sector. The extension could be requested by the competent trade union or the employers ' association. The above extension procedure was suspended as long as Greece was implementing the bail-out agreements (Law no. 4024/2011). With the new Law no. 4472/17, the re-establishment of the extension mechanism came into force after the end of the support programme. In August 2018, after the suspension period (2012–2018), the extension mechanism was re-established. The new legislation introduces the terms and the processes of extension of the sectoral collective agreements. If the member companies of the sectoral employers' association that signs the agreement employ at least 51% of employees in the sector, the agreement becomes obligatory for the whole sector by a ministerial decision. For this reason, the employers' organisations must submit their member register voluntarily. If the employers' organisations do not submit it, the obligatory extension of the collective agreement is not possible.

Hungary

- Collective agreements concluded at sectoral level can be extended by the decision of the Minister for Employment Policy. The extension is regulated by Act LXXIV of 2009 on the Sectoral Dialogue Committees and by its implementation decree (SZMM Decree 22/2009 (IX. 30). According to Article 17 of Act, the Sectoral Dialogue Committees as well as the signing sectoral social partners can initiate the procedure for rendering a binding extension. An extension is an administrative procedure after due consultation with the national social partner confederations and the relevant line minister, as stipulated by Act, and the resolution of the minister can be challenged at the Labour and administrative courts.

Ireland

- The Industrial Relations (Amendment) Act 2015 reformed the existing Joint Labour Committee (JLC) wage-setting mechanisms. The Act provides for the Labour Court to adopt an Employment Regulation Order (ERO) drawn up by a JLC. These Orders set down minimum legally binding terms and conditions for the sector and are extended beyond the bargaining parties to all employees/employers in the sector. The ERO is then given statutory effect by the Minister for Business, Enterprise and Innovation. The Act's provisions include:

  1. JLCs have the power to set a basic adult wage rate and two additional higher rates.

  2. Companies may seek exemption from paying ERO rates due to financial difficulty.

  3. JLCs no longer set Sunday premium rates. A new statutory Code of Practice on Sunday working is to be prepared by the Workplace Relations Commission.

4. When setting wage rates JLCs will have to take into account factors such as competitiveness and rates of employment and unemployment.

New Employment Regulation Orders in the Security and Contract Cleaning sectors have been established since the 2015 legislation was introduced. The IR (Amendment) Act 2015 also provides for Registered Employment Agreements (REAs) on pay and conditions of employment in individual enterprises. The effect of registration with the Labour Court is to make the provisions of an REA binding.

Italy

- There is no formal extension mechanism for collective agreements, as these agreements are generally binding only for the companies and employees affiliated to those associations that sign the collective agreements. However, courts usually refer to collectively agreed minimum pay rates in order to assess the appropriateness of actual wages in individual disputes, according to Article 36 of the Constitution.[201] Employers can apply a collective agreement, even though they are not a member of the employers' association that signed it. Employers' associations and trade unions can join a collective agreement even though they have not agreed upon it. Furthermore, Italy has never had legislation setting up a national minimum wage. The only law which regulates the remuneration of employees is included in the in Italian Civil Code, Art. No. 2099 and in the Italian Constitution (Art.36). NCBAs provide for a minimum wage for employees in the sector they refer to. However, these agreements apply only to enterprises and workers who are members of bargaining social partners.

Latvia

- Under Section 18 of the Labour Law, an employer, a group of employers, an employer organisation or an association of employer organisations, and a trade union or an association of trade unions can enter into a collective agreement in a sector or territory. A general agreement entered into by a large enterprise, an employer organisation or an association of employer organisations is binding on the members of the organisation or the association of organisations. The agreement is almost automatically extended to all employers of the relevant sector if an enterprise or organisation or an association of employers' organisations concluding an agreement employs more than 50% of the employees or provides more than 50% of the turnover in a sector, a general agreement is binding on all employers of the relevant sector and applies to all their employees. A company level collective agreement is binding on the parties and its provisions apply to all employees who are employed by the relevant employer or in a relevant undertaking of the employer, unless provided for otherwise in the collective agreement. It shall be of no consequence whether legal employment relationships with the employee were established prior to or after the coming into effect of the collective agreement. Other voluntary mechanisms of extension do not exist. The agreement comes into effect on the day of its publication in the government's official journal,

[201] Eurofound (2011), Extension of collective bargaining agreements in the EU - Background paper, Dublin, p.7/8.

unless the agreement specifies otherwise. Other voluntary mechanisms of extension do not exist.[202]

Lithuania

- According to the Labour Code, valid since 1 July 2017, the scope of individual provisions of national (cross-sectoral), territorial and sectoral (production, services, profession) collective agreements may be compulsorily extended by an order of the Minister for Social Security and Labour to bind all the employers of the appropriate territory or sector if such a request has been submitted in writing by both parties to the collective agreement. The Minister for Social Security and Labour must take a decision regarding the extension of the scope of the collective agreement within 60 calendar days of receiving the request. The provision has never been applied in practice.

Luxemburg

- Sectoral collective agreements initially cover only those companies that belong to the employers' associations which have signed the agreement. However, the social partners almost always ask the government to extend them to the entire sector. In May 2017, there were 27 sectoral collective agreements that were likely to be extended in this way ('Conventions collectives de travail déclarées d'obligation générale'). There are no other voluntary mechanisms of extension or application of the terms of collective agreements.

Malta

- There are no extension mechanisms relating to collective agreements in the Maltese system.

Netherlands

- Sectoral collective agreements may be declared generally binding for a maximum of two years, or five years if they regulate joint funds (e.g. for pensions or training). Only certain types of provision may be made generally binding. A distinction is made between 'normative' (or substantive) clauses and 'obligational' (or procedural) clauses in collective agreements. Normative clauses regulate issues such as pay, working hours and other terms and conditions of employment, and may be extended by the minister to cover all employers and employees in the sector concerned, whether or not they are members of one of the signatory parties. Obligational clauses, on the other hand, set out the mutual rights and obligations of the contracting parties in relation to the implementation of the agreement and may not be made generally binding. Some companies voluntarily follow sector agreements without being bound by those agreements.

Poland

[202] Cf. also Eurofound (2011), Extension of collective bargaining agreements in the EU - Background paper, Dublin, p.7/8.

- Clause 241/18 of the Labour Code states that multi-employer collective agreements can be extended by a decree of the Ministry of Family, Labour and Social Policy to employers that are not affiliated to the signatory employers' organisations following a joint request of an employers' organisation and a multi-employer trade union. However, this legal possibility is not used in practice as multi-employer collective agreements are very rare in Poland. In addition, Clause 241/10(1) of the Labour Code makes it possible for parties who are entitled to conclude a collective agreement to apply an existing collective agreement (or a part of it) that they did not conclude. There is no information about the scope of such extension procedures in practice. In addition, Clause 241/9(3) of the Labour Code gives the parties of a collective agreement the right to allow a trade union that was not a party of the collective agreement to join it.

Portugal

- Collective agreements can be extended by a decree issued by the Ministry of Labour. Until the crisis, this was a pervasive practice in many sectors. The 2011 MoU required that the extension of collective agreements should be based on representativeness criteria for both trade unions and employer associations. The legal changes in 2012 and in 2014 referred only to the representativeness of employers. In the 2012 version, they had to represent 50% of the employment in the sector which in many sectors was an impossible target. In the 2014 version, their membership had to include 30% of micro, small and medium enterprises, to be allowed to extend the collective agreements. These rules were withdrawn in 2017. In May 2017, Resolution 82/2017 replaced the representativeness criteria of employer associations by new criteria for the extension of collective agreements: the effect on the wage bill and economic impacts; the level of the wage increase; the impact on the wage scale and on the reduction of inequality; the percentage of workers to be covered (in total and by gender); and the proportion of women that will benefit from this extension.

Romania

- There are no voluntary mechanisms of extension of collective agreements. A sectoral collective agreement is automatically applicable to all employees of the sector, but only if the units that are affiliated to the signatory employers' organisation account for more than half of the employees in the sector. Otherwise, the collective agreement is not considered to be a sectoral agreement and is applicable only to the group of units that are affiliated to the signatory employers' organisation.

Slovakia

- The extension of collective agreements is catered for by law. Multi-employer collective agreements can be extended to other employers according to the rules specified by the Act on collective bargaining. A proposal for the extension can be submitted by either contracting social partner, but it is usually done by trade unions. The proposal should be submitted to the Ministry of Labour, Social Affairs and Family and a special working group is dealing with it. Due to frequent changes in the regulation of extension regarding the consent of employers concerned by the extension, extensions are rarely applied. In 2005–2006 there were only four extensions, and there were five extensions in 2009 and no extension took place between 2010–2013. Since 2014, the extension of a collective agreement has been possible without the consent of the employer concerned by the extension. Some trade union associations, particularly OZ Kovo (Metal Union), have utilised this option. In March 2016, the Constitutional

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Court decided that the present form of extensions is not in compliance with the spirit of the Constitution. Since 1 September 2017 the amendments to the legislation introduced the term representative multi-employer collective agreement. Now only such agreements can be extended. The consent of the employer concerned is not required any longer. In 2018, five multi-employer agreements were extended.

Slovenia

- With regard to extension mechanisms, Articles 12 and 13 of the Collective Agreements Act state the following:

  1. If a collective agreement on one or more activities is concluded between one or more representative trade unions and one or more representative associations of employers, one of the parties may propose to the minister responsible for labour to extend the validity of the whole of the collective agreement or a part of it to all employers in an activity or activities for which the collective agreement has been concluded.

  2. The minister recognises an extended validity of the whole or a part of the collective agreement if the collective agreement has been concluded between one or more representative trade unions. The same applies if one or more associations of employers, the members of which employ more than half of all employees at employers for whom an extension of the collective agreement has been proposed.

  3. In his or her decision on extending the validity of the whole or a part of the collective agreement, the minister is bound by the proposal from the proponent from paragraph 1 of this article.

  The Minister for Labour decrees the extension of the complete agreement or parts of the collective agreement with a decision that is published in the Official Journal of the Republic of Slovenia.

Spain

- Collective agreements can be extended to all workers irrespective of whether or not they are affiliated to the unions that signed the collective agreement. The same applies to companies. This has not changed in recent years. Collective agreements can be extended by legislation according to article 92.2 of the Workers Statute and Royal Decree 718/2005. The prerogative to request an extension is one of the social partners and the competent institution is the Ministry of Employment and Social Security (in case of a national level collective agreement or collective agreement affecting more than one Autonomous Community) or the Autonomous Community. Recent labour reforms have introduced the possibility for companies to opt-out from higher collective agreements because of economic, technical or organisational circumstances.

Sweden

- It is not possible to extend collective agreements by decree or legislation. However, voluntary extension of collective agreements is rather common. Unorganised employers can sign

"accession agreements" with trade unions, similar to Denmark (*hängavtal*)[203]. In 2015, 5% of workers in the private sector were covered by a collective agreement under this type of agreement. In addition, employers with collective agreements must apply the provisions of the collective agreements to their employees, even if they are not members of the signatory trade union. Consequently, trade union density in Sweden is approximately 70%, while collective bargaining coverage is approximately 90%.

United Kingdom

- Collective agreements are not subject to extension and so are subsequently never extended by legislation, and there are no voluntary mechanisms for doing so.

[203] Cf. JK. Kristiansen, (ed.) (2015b), European Challenges of the Nordic Collective-Agreement Model, in: idem (2015a), *Europe and the Nordic Collective-Bargaining Mode. The Complex Interaction between Nordic and European Labour Law*, Copenhagen, Nordic Council of Ministers, p.17.

Annex 3 Procedures and use of extension mechanisms in 2018

MS	3. (semi) automatic	2. supportive	1. restrictive/exceptional	0. not used / suspended
AT	X			
BE	X (ICTWSS)[204]	X		
BG			X	
CY				X
CZ			X	
DE		X	X (ICTWSS)	
DK				X
EE			X	
EL				X
ES	X			
FR	X			
FI	X			
HR		X	X (ICTWSS)	
HU				X
IE			X (Eurofound)	X
IT[205]	X (ICTWSS)	X		
LU	X			
LT			X (ICTWSS)	X (Hayter/Visser; Eurofound)

[204] The discrepancy between Hayter/Visser and the ICTWSS database may stem from the fact that Hayter/Visser cluster more along the legal basis and procedures, whereas the ICTWSS database puts a stronger focus on practical use.

[205] IT has a regime which is functionally equivalent to extension mechanisms, cf. annex 2.

LV			**x**	
MT				**x**
NL		**x**		
PL				**x**
PT		**x**		
RO			**x**	
SE				**x**
SI		**x**		
SK			**x**	
UK				**x**

Regimes according to Hayter/Visser (2018) and the ICTWSS database version 6.0 June 2019 (J. Visser 2019)[206]

3. regime

- Hayter/Visser = semi(automatic);

- ICTWSS = extension is virtually automatic and more or less general (including enlargement)

2. regime

- Hayter/Visser = supportive

- ICTWSS = extension is used in many industries, but there are thresholds and Ministers can (and sometimes do) decide not to extend (clauses in) collective agreements

1. regime

[206] On the basis of S. Hayter, J. Visser, J. (2018), *Collective Agreements: Extending Labour Prot*ection, Geneva, ILO and J. Visser (2019), ICTWSS Database. version 6.0. Amsterdam: Amsterdam Institute for Advanced Labour Studies (AIAS), Amsterdam Institute for Advanced Labour Studies (AIAS), University of Amsterdam- http://uva-aias.net/en/ictwss accessed on 21.02.2020.

- Hayter/Visser = restrictive

- ICTWSS = extension is rather exceptional, used in some industries only, because of absence of sector agreements, very high thresholds (supermajorities of 60_ or more, public policy criteria, etc.), and/or veto powers of employers

0. regime

- Hayter/Visser = not used or suspended

- ICTWSS = there are neither legal provisions for mandatory extension, nor is there a functional equivalent

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Annex 4 Variation in the use of extension mechanisms 2008 – 2018

	Use of extension mechanisms 2008 - 2018[207]	
	2008	**2018[208]**
MS		
AT	**3**	**3**
BE	**3**	**3**
BG	**1**	**1**
CY	**0**	**0**
CZ	**1**	**1**
DE	**1**	**1**
DK	**0**	**0**
EE	**1**	**1**
EL	**3**	**0**
ES	**3**	**3**
FR	**3**	**3**
FI	**3**	**3**
HR	**1**	**1**
HU	**1**	**1**
IE	**1**	**1**
IT	**3**	**3**

[207] On the basis of J. Visser, J. (2019), ICTWSS Database. version 6.0. Amsterdam: Amsterdam Institute for Advanced Labour Studies (AIAS), Amsterdam Institute for Advanced Labour Studies (AIAS), University of Amsterdam- http://uva-aias.net/en/ictwss accessed on 21.02.2020.

[208] **2017** for: DE, SE, SI and SK.

LU	**3**	**3**
LT	**1**	**1**
LV	**1**	**1**
MT	**0**	**0**
NL	**2**	**2**
PL	**0**	**0**
PT	**3**	**2**
RO	**3**	**1**
SE	**0**	**0**
SI	**3**	**2**
SK	**2**	**2**
UK	**0**	**0**

3 = extension is virtually automatic and more or less general (including enlargement)

2 = extension is used in many industries, but there are thresholds and Ministers can (and sometimes do) decide not to extend (clauses in) collective agreements

1 = extension is rather exceptional, used in some industries only, because of absence of sector agreements, very high thresholds (supermajorities of 60_ or more, public policy criteria, etc.), and/or veto powers of employers

0 = there are neither legal provisions for mandatory extension, nor is there a functional equivalent.

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