

Edited by Susan Hayter & Jelle Visser



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Collective Agreements: Extending Labour Protection



COLLECTIVE AGREEMENTS: EXTENDING LABOUR PROTECTION

Edited by Susan Hayter and Jelle Visser

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1. The application and extension of collective agreements: Enhancing the inclusiveness of labour protection

Susan Hayter and Jelle Visser

1. Introduction

Collective bargaining involves a process of negotiation between one or more unions and an employer or employers' organization(s). The outcome is a collective agreement that defines terms of employment – typically wages, working hours and in-work benefits. The agreement affords labour protection: minimum wages, regular earnings; limits on working hours and predictable work schedules; safe working environments; parental leave and sick leave; and a fair share in the benefits of increased productivity.

The International Labour Organization (ILO) Collective Agreements Recommendation, 1951 (No. 91) considers, where appropriate and having regard to national practice, that measures should be taken to extend the application of all or some provisions of a collective agreement to all employers and workers included within the domain of the agreement. The extension of a collective agreement generalizes the terms and conditions of employment, agreed between organized firms and workers, represented through their association(s) and union(s), to the non-organized firms within a sector, occupation or territory. The collection of chapters in this volume are about the extension of collective agreements as an act of *public policy*.¹

Many countries make provision for the Minister of Labour, a public agency or the court to extend a collective agreement to all employers and employees that fall within its scope. This is usually demarcated by sector or occupation; sometimes, especially in respect of non-wage issues, agreements are extended nationwide across sectors. Extension creates a level playing field for firms operating in similar markets. It establishes a floor for wages and other working conditions in enterprises operating under similar conditions. The extension of collective agreements is inextricably connected with the establishment and promotion of multi-employer bargaining, usually at the level of industry, nationwide or regionally. It helps to ensure that wages and working conditions set at this level by representative parties will not be undercut by enterprises prepared to pay unacceptably low wages. The extension of collective agreements is also used to support common funds for apprenticeships and training and to safeguard other forms of labour protection that may be created and funded

¹ Extension can also occur through non-statutory means, such as when non-organized employers are persuaded “to follow the agreement” signed by the employers' association(s) in the sector or, when pressured by union action, they adopt the norms set by agreement as the industry's “common standard”.

through these sectoral bargaining institutions. These public goods (training, health and safety, as well as peaceful labour relations and access to mediation) are important for both employees and employers.

The extension of collective agreements to *non-organized firms* is not to be confused with the application of the collective agreement to *non-union members in organized firms*. As a rule, a collective agreement legally binds only the signatory organizations (employers' associations and trade unions) and their members. However, in nearly all countries employers bound by a collective agreement apply similar terms to non-unionized employees. This may even be mandatory, as in the case of the Netherlands under the Collective Agreement Act of 1927, in the United States under the National Labor Relations (NLR) Act of 1935, in Argentina under the Collective Labour Agreements Act of 1953, and in Spain under the Workers' Statute of 1980. In the United States, a collective agreement signed by a union representing the majority of workers, as established through preceding elections, automatically applies to all workers in the bargaining unit.

What makes the extension of collective agreements distinct from other forms of regulation, such as a statutory minimum wage, is that it is based on a *concurrence* – an agreement negotiated by independent, autonomous and representative trade unions and employers' organizations in a particular sector or occupation. This makes it different from other legislation passed by and under the control of Parliaments. Extension has some of the advantages of a contract – *legitimacy*, based on joint participation in its negotiation; *adaptability*, allowing for rapid establishment or renegotiation in case of technological or economic changes; and *customization*, reflecting the particular conditions of an industry or occupation. However, it is a statutory measure, under the responsibility of a public authority. In most cases the legislator requires the collective agreement to fulfil specific conditions before it can be extended – for instance, that it is supported by the majority in the industry, does not conflict with public policy goals, and conforms with the law. As a decision taken by a public authority, usually the Minister, parliamentary control is warranted. Generally, it is the responsibility of the public authority to prevent this policy tool from being misused at the expense of consumers, the general public or private actors, be they newly starting firms or workers seeking employment.

More than just a technical legal tool, extension embodies a legal and political philosophy that is premised on *self-regulation* (Sinzheimer, 1916) and *legislation by accord* (Hamburger, 1939). Through extension, governments and parliaments acknowledge that standards created through voluntary negotiations between private interest organizations, if sufficiently representative, have “the same social function and may be given therefore the same legal status as state-created standards” (Kahn-Freund, 1954a). This enables the State to focus its limited resources on the protection of workers in sectors of the labour market where the interests of employers and workers are not organized.

Like many scholars before him (such as Pirou, 1913, in France; or Webb and Webb, 1920, in Britain), Kahn-Freund (1954b) believed that there would be expanding public recognition of the role of collective agreements in settling “inter-group conflicts” and of the advantages of the extension of voluntarily negotiated standards. Subsequent theories of Reflexive Law elucidate the advantages of a regulatory

strategy that uses collective agreements to afford labour protection. Instead of imposing mandatory substantive legal standards in a top-down (command and control) manner accompanied by sanctions, reflexive regulation devolves rule-making and encourages self-regulation. It advances ‘regulated autonomy’ through norms of organisation, process and procedure (Teubner, 1993). It is embedded in different sub-systems (e.g. the industrial relations system) through procedural law. Substantive standards (e.g. wages and working conditions) are established through consensus-oriented processes involving negotiation and decision making. The objective of a reflexive regulatory strategy is to use discursive decision making processes to create the conditions for responsiveness of regulation - without controlling the substantive outcome (Black, 1996). These new, non-hierarchical modes of governance are supported by traditional hierarchical modes (Rhodes and Visser, 2011). This “shadow of hierarchy”, creates an incentive for self-regulation. It is a necessary condition for self-regulation to succeed. Similarly, provisions for the extension of collective agreements may be instrumental in supporting co-regulation.

Since the 1980s, the standardization of wages and working conditions through collective agreements has received a more critical review. Other concerns, including the international integration of economies, persistent unemployment and the casualization of jobs, have taken centre stage. Decentralization – that is, bringing decision making over wages and working hours closer to individual firms – is advanced by some organizations as the preferred trajectory for industrial relations systems. The extension of collective agreements, it is argued, obstructs the process of decentralization. It allows large enterprises to impose terms of employment on smaller firms, possibly preventing new enterprises from entering their markets. Criticisms of extension come mainly from economists who see extension as imposing “downward wage rigidity”, which from a neoclassical point of view has a negative effect on employment. For example, a study in Portugal argues that extension imposed wage minima which “distorted competition” between firms. In the years following the financial crisis, this had adverse employment effects for firms not affiliated to employers’ organizations. The authors attribute the results to the lack of representativeness of employers’ associations (Hijzen and Martins, 2016). This view is supported by some international organisations, which called for the deregulation of extension procedures and the promotion of enterprise-level bargaining (OECD 2012b: 10). A study on Spain similarly argues that the “downward wage rigidity” created by the extension of collective agreements prevented firms from adjusting to the crises in financial markets in 2008 and amplified the employment effects of the shock (Díez-Catalán and Villanueva, 2016).

At the same time, with the opening of labour markets to migrants and cross-border services, governments are increasingly under pressure to find tools to ensure minimum labour standards and address the hardships associated with low-paid work. It is in this context, that some countries have reinvented, and strengthened, the instrument of extension as an alternative or a complement to setting a statutory minimum wage and legislating limits on working hours.

This volume examines the historic development of the extension of collective agreements as a policy tool, culminating in the adoption by the International Labour Organization of the Collective Agreements Recommendation (No. 91) in 1951. It

traces developments in law and practice across a range of countries. The subsequent chapters examines practices in the use of this policy as a tool for inclusive labour protection in nine countries. This includes five single country case studies: two (Argentina and Brazil) show the history of extension and the role of state and judicial decision making in Latin America; three (Germany, Portugal, and South Africa) show recent adjustments in law and practice to this policy tool. This is followed by two comparative essays: one compares the different origins, objectives and use of extension policies in four highly similar countries (Finland, the Netherlands, Norway and Switzerland); the other offers a legal analysis of mandatory and voluntary extension and the challenges posed by EU law in Northern Europe.

2. Origins and normative principles

The practice of extending the application of collective agreements has existed for more than a century (Hamburger, 1939). It emerged as an instrument of public policy to protect and promote collective bargaining between unions and employers as a means to stop the downward spiral of wage competition, and prevent those organized employers that had invested in better tools, conditions and working morale from being undermined. It was considered desirable that the norms and rules negotiated between organized employers and the union(s) be made generally applicable.²

The introduction of compulsory arbitration in Australia in 1904, following New Zealand's example of ten years earlier and the failure of a voluntary system, was "inseparable from the concerns of citizens and the state in building a new nation (...). Employers would be given protection from cheap producers by a tariff wall as long as they paid 'fair and reasonable' wages to their workers" (Cooper and Ellem, 2008, p. 535). Unions would press their claims on employers; disputes would be resolved by industrial tribunals delivering decisions known as "awards", which could be extended to include employers who were not initially party to the dispute (Mitchell and Scherer, 1993, p. 93). With extremely high levels of conflict at the end of the First World War, Germany and Austria adopted extension as part of their laws on collective agreements (in 1918 and 1919 respectively) following the "peace agreement" between the central union and employers' federations. This agreement ended the resistance of large employers to negotiate with the unions. In the post-war years of prosperity, the only country to adopt the extension of collective agreements was South Africa in 1924, again in response to widespread labour conflicts.

The Great Depression of the 1930s precipitated the spread of extension around the world (Hamburger, 1939). Provisions on extension were adopted during the 1930s and 1940s in Belgium; Brazil; Bulgaria; Canada in the provinces of Quebec, Ontario and Alberta; Columbia; Costa Rica; the former Czechoslovakia (in the textile industry); Ecuador; France; Greece; Guatemala; Hungary; Ireland; Japan; Luxembourg; Mexico; the Netherlands; Panama; Poland; Portugal; Switzerland; Venezuela and Yugoslavia

² Other methods were used to achieve similar results, such as closed shop agreements or the legal obligation for an employer to apply the conditions of a collective agreement when employing non-union labour. Another option was to extend organization to an entire trade or occupation by, for example, making membership of an employers' organization obligatory. However, these methods were usually seen as inferior to extension, as they caused conflict in many countries that constitutionally guaranteed freedom of association, including the freedom not to associate.

(as they then were). Israel, India, Argentina and other Latin American countries followed in the 1950s. Multi-employer bargaining, although promoted in some countries, remained a limited experience in post-colonial Africa, and was restricted to a small formal economy. In the United Kingdom, the Cotton Manufacturing Industry (Temporary Provisions) Act 1934 made provision for the mandatory generalization of wage rates fixed by collective agreement in an industry faced, according to the Board of Inquiry, “with the possible collapse of the whole principle of collective bargaining” (Flanders, 1952, p. 61).

At the international level, the shaping of norms for the extension of collective agreements followed on from the adoption by the ILC of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).³ The topic of collective agreements remained on the Conference agenda in 1950, involving considerations such as the definition, effects, extension and interpretation of collective agreements; the responsibility of the parties; and the supervision of the application of collective agreements (ILO, 1950). Extension was considered an important tool for facilitating the application of collective agreements and included as one of the measures of support. First, it would grant rights to employers as well as to workers (ILO, 1951, p. 492). Second, the principle of extension was already embodied in the legislation of many countries. Third, there was concern over the unequal treatment of wage earners in the same industry.

The absence of any procedure for extension could, and often did result in the co-existence in the same region and in the same industry, of two categories of wage earners, some of them covered by an agreement and others not, and of the two categories of employers, some of them voluntarily assuming certain obligations and others escaping from them and thereby practicing, perhaps unintentionally, a sort of “social dumping” (ILO, 1951, p. 277).

During the discussions of the Conference Committee,⁴ some delegates expressed concern that the extension of collective agreements - by public authorities - would infringe the voluntary nature of collective bargaining. The Committee agreed that the use of this policy tool should be discretionary, rather than mandatory or automatic, and should include a set of conditions to prevent the infringement of these freedoms (ILO, 1951, p. 487). One such condition was that extension should take place “at the request” of the negotiating parties. The Collective Agreements Recommendation (No. 91) was adopted by the ILC in 1951 (ILO, 1952). It sets out a number of normative principles that guide the extension of collective agreements. Part IV of Recommendation No. 91 considers,

³ Art. 4 of Convention No. 98 provides that “measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation ..., with a view to the regulation of terms and conditions of employment by means of collective agreements”.

⁴ There was considerable debate over whether this should take the form of a Convention or a Recommendation. The Committee decided, by a small majority, that a Recommendation was more appropriate as it could take better account of the diversity of national agreements and would be more flexible, more practical, and easier to apply (ILO, 1951, p. 277).

- 5 (1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain provisions of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.
- (2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions:
- (a) that the collective agreement already covers a number of the employers and workers concerned, which is, in the opinion of the competent authority, sufficiently representative;
 - (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;
 - (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

3. Extension regimes

The practice of extension varies considerably across countries. It may be virtually *automatic* – declaring any valid agreement *erga omnes* for both organized and non-organized employers and employees within the agreement’s domain (Traxler and Behrens, 2002). Other extension regimes can be described as *restrictive* in that they limit the extension of collective agreements to certain situations only and set representation thresholds at unrealistic levels. In between, there is an extension policy that is by no means automatic, and is instead a means of encouraging collective bargaining. This is termed a *supportive* extension regime.

The *semi-automatic* extension regime does not require a public authority to make a decision having heard representation from those likely to be affected by the decision. As long as the collective agreement is valid – and this may require a particular representivity threshold being met (e.g. Finland) – the collective agreement will be deemed to be generally applicable in its domain (France,⁵ Spain, Iceland, Finland, Greece under the national general labour agreements until 2010; and Romania until 2011). This can also occur by virtue of mechanisms that are functionally equivalent to extension, such as:

- compulsory membership of the employers’ organization (Austria; Slovenia until 2006);

⁵ As part of the current labour market reforms, the government in France is revisiting the extension system, making it less automatic. New elements are an evaluation of the extension request by an independent committee in the Ministry of Labour. One of the evaluation criteria is whether the agreement considers the special position and interests of small firms.

- compulsory coverage in union bargaining domains by virtue of state or judicial decisions (elements of this are found in Argentina and Brazil, as explained by Cardoso in Chapter 7 and González and Medwid in Chapter 8); or
- the extension of tribunal awards to employers that were not party to the dispute (as in Australia until 1993 and in New Zealand until 1991).

Another feature of the *semi-automatic* regime is that it often allows the Minister to take the initiative rather than wait for the request from the negotiating parties (e.g. in France).

The *supportive* extension regime operates within the boundaries of procedural law with rules and criteria for extension. With very few exceptions, Ministers or public authorities can only extend collective agreements, and only those provisions in such agreements, for which extension has been requested by the signatory unions and employers' associations. This includes standard judicial practice where sectoral agreements may be used as the standard or benchmark to determine a "fair wage" (Italy). The procedure tends to be more demanding when extension must be filed jointly, as in Germany and Switzerland. The collective agreement must cover a 'sufficiently representative' proportion of employees before it can be extended. The count is usually based on the representation of the employers' association, measured by the number of workers employed by their member firms. But there may be additional criteria (such as a minimum number of firms represented, SME representation, union density, etc). In recent years, it has become common practice to give the Minister, or deciding authority, some discretion allowing extension where it is crucial for the survival of training and social funds linked to a collective bargaining council, where there is a high proportion of vulnerable workers (e.g. migrant or contract workers) in a sector, or where representivity criteria cannot be met by virtue of a high proportion of non-standard workers in a sector. These public interest considerations have become more important in recent years with the growing diversity of firms and work arrangements. As a rule, extension decisions are taken only after the firms and workers (or their representing "minority organizations") to whom the agreement is extended are given the opportunity to submit their "observations" or "objections". The Minister or public authority may also be authorized to grant exemptions to certain firms from the extension order, on application.

By 2015 the *supportive* extension regime applied in ten countries: Croatia, Slovenia (and probably also the other former Yugoslav republics), Germany, Switzerland, South Africa, Luxembourg, the Netherlands, Israel, Portugal and Belgium.

The *restrictive* extension regime is different in the use of the criteria that apply in the *supportive* regime. Representivity criteria are more demanding than is the case in the *supportive* regime, and are frequently set at higher levels (requiring supermajorities, for example). A further restriction may be that extension may only be applied in sectors with foreign workers and there is the threat or reality of social dumping (e.g. Norway). We classify ten countries as belonging to the restrictive regime: Albania, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Romania (since 2011), Slovakia, as well as – by virtue of design and using extension not as a means to promote collective bargaining but simply to address issues in particular sectors – Ireland and Norway.

Finally, there are countries where the law provides for the extension of collective agreements, but it has fallen into disuse or has been suspended. This is the case in Canada (with the possible exception of collective agreements in Quebec's public sector), Cambodia, Greece (since 2010), India (with the exception of some states), Japan, Lithuania, Mexico, Poland and Turkey. There are extension laws in Chad, Morocco, Paraguay and Sri Lanka, but we have no information on their application. Also, unfortunately, we have no data for the Russian Republic and the former Soviet Union, with the exception of the three Baltic states; nor for Bolivia, Ecuador, Peru, Uruguay, the Bolivarian Republic of Venezuela, and nearly all African states. There are no (or no longer) legal provisions or functionally equivalent mechanisms providing for extension of collective agreements available in Chile, Colombia, Costa Rica, Cyprus, Denmark, Guatemala, Indonesia, the Republic of Korea, Malaysia, Malta, New Zealand, Panama, Singapore, Sweden, the United Kingdom and the United States. In Australia, unlike New Zealand, arbitration awards have endured, but modern awards are no longer a means to extend and equalize wages and working conditions. Of these countries only Denmark and Sweden have maintained sectoral (multi-employer) bargaining and high bargaining coverage rates. This is based, among other factors, on the continuous involvement of unions and employers' associations in public policy, a supportive legal system, and the ability of the unions to press non-organized employers into signing "adhesion" or "participation" agreements in which they commit to the "going rate" set in the relevant collective agreement.

It is very difficult to establish the direct effect of these extension regimes on the bargaining coverage rate. Only some countries collect statistics on the coverage rate before and after extension; for other countries, we can use the "gap" between the level of employer organizations, calculated as the employment share of the organized firms, and the bargaining coverage rate. The outcome is as expected. The largest coverage effect is seen in the semi-automatic regime – from 30 percentage points in France to 16 points in Finland. In the supportive regime, additional coverage varies from over 20 percentage points in Belgium, 13 points in Switzerland to 9 points in the Netherlands, 6 points in Slovakia (before 2009, but much lower since) and just 1 point in Germany (referring to wage agreements). In the restrictive regime the additional coverage effect is currently in the order of between 1 and 3 percentage points in Bulgaria, the Czech Republic, Estonia and Hungary.

Table 1.1 summarizes the information, showing: (i) who takes the *initiative* for extension orders; (ii) who takes the *decision*, and how; (iii) the *thresholds* and *representivity criteria*; (iv) the consideration of a *public interest*; and (v) the *use* or *frequency* of the extension instrument. The table contains information on *functional equivalents* for extension, such as compulsory membership and judicial decisions. The table also contains the ICTWSS scores for 2008 and 2015.⁶ The most dramatic changes to extension regimes occurred in the southern European countries that were hardest

⁶ The ICTWSS database based on the *use and frequency* of wage agreements:

3 = extension is virtually automatic and more or less general;

2 = extension is used frequently and in many industries;

1 = extension is rather exceptional, used in some industries only;

0 = there are no legal provisions for extension, or the existing provisions are never applied.

hit during the financial crisis and ensuing Great Recession (Visser, 2016). These looked to the International Monetary Fund, the European Commission and the European Central Bank for aid (Greece, Romania and Portugal). They were required to suspend, or deregulate extension provisions. Ireland and Slovakia have also seen legal challenges to extension which, at least temporarily, ended the practice of extending collective agreements until new laws were introduced.

The evolution of the various extension regimes tended to follow the pattern of different state traditions in industrial relations (see Crouch, 1993). The *semi-automatic* regime has its greatest application in countries where the state has a predominant role in formulating the rules. The *supportive* regime tends to arise in countries with a tradition of state-sponsored self-regulation by social partners through collective bargaining. The extension of collective agreements is part of a reflexive regulatory strategy focused on procedural rather than substantive standard setting. Trade unions and employers in the three Scandinavian countries with highly autonomous and voluntaristic traditions of industrial relations resisted the idea of calling in the state to extend their agreements (Chapter 5). Instead, they have relied on “voluntary methods” of extension based on social pressure. Only recently Norway, confronted with the threat of social dumping from firms hiring or posting foreign workers, changed its rules and adopted a limited form of extension in sectors with high numbers of foreign workers. Finland, like Iceland, chose another approach and provided for generally applicable collective agreements as an alternative to a mandatory minimum wage.

By contrast, countries that adopt the *restrictive* regime are often characterised by a strong state tradition with weak institutions for collective interest representation. This applies in most post-Communist countries. In fact, during the 1990s and early 2000s, the post-Communist countries in Central and Eastern Europe adopted new labour laws which permitted sectoral collective bargaining and extension long before they joined the European Union in 2004 and 2007. Effective application of these laws was difficult, because of a limited number of employer organizations and weak or divided unions. A common cause of the decline in the use of the extension mechanism – observed in Central and Eastern Europe even before the recession and much earlier outside Europe, for instance in South-East Asia and Africa (Azam, Alby and Rospabe, 2005) – was the demise of multi-employer bargaining, combined with weak and divided employers’ associations and trade unions.

The two oldest systems of extension - Australia and New Zealand - have disappeared. Mitchell and Scherer (1993, p. 93) consider the system of awards as “similar in purpose to the ‘extension’ laws found in various European jurisdictions”. Legislative changes in 1993, 1996 and 2004, although not fully dispensing with arbitration as did New Zealand in 1991, severely restricted the scope for enlargement through awards. The endurance of the award system until the present day is a remarkable feature of the Australian system, but modern awards no longer generalize the results of negotiation across firms and sectors (Buchanan and Oliver, 2016). Although later reforms restored and encouraged “good faith” bargaining with residual arbitration, collective bargaining now takes place mostly at enterprise level (FWC, 2016).

Table 1.1. Extension of collective agreements (CAs): Procedures, representation, conditions and use

| Country | Procedure | Decision | Representation criteria | Public interest criteria | Use(*) | ICTWSS coding 2008 2015 | |
|-----------------------|--|---|--|---|---|----------------------------|------|
| SEMI-AUTOMATIC REGIME | | | | | | | |
| Argentina | Request of CA parties or initiative Min. | Min., automatic if CA is approved | TU must represent >20% of employees to negotiate valid CA | Subject to budget approval (rarely applied) | Very common | 3(*) | 3(*) |
| Austria | Request of CA parties | Tripartite body | CA must be of “overwhelming importance” (>50% employees) | No | Rare; compulsory EO membership ensures that CA applies to all employers and employees | 3(*) | 3(*) |
| Brazil | Appeal to court, appellant need not to be party to CA | Court decision in dispute procedure or automatic application of CA | Requirement of 3/4 approval of workers and employers affected | Extension must be deemed in “public interest” | Common, but declining | 2 | 2 |
| Finland | Automatic if threshold criteria are met | Tripartite board in Ministry confirms if threshold is passed | CA is nationwide and representative (>50% of employees, or established bargaining tradition) | No | Very common | 3 | 3 |
| France | Request CA parties or initiative Min. Near automatic (ex lege) on registration of CA | Min. after (non-binding) consultation of joint bargaining committee | TU must represent >30% of employees to negotiate valid CA | No | Very common | 3 | 3 |
| Iceland | No formal extension; CAs apply to all employers and employees upon registration of CA | Automatic (ex lege) | | No | General | 3(*) | 3(*) |
| Spain | No formal extension, but 1980 Workers’ Statute guarantees application of CA to all employers and employees | Automatic (ex lege) | Parties to CA must be representative (>50% of employees | No | General | 3(*) | 3(*) |

| Country | Procedure | Decision | Representation criteria | Public interest criteria | Use(*) | ICTWSS coding 2008 2015 |
|--------------------------|--|--|--|--|---------------------------------------|-------------------------|
| SUPPORTIVE REGIME | | | | | | |
| Belgium | Request of the joint industry committee (JIC) or by an organisation represented in the committee. | By Royal Decree upon a formal request from the (JIC). | EO and TU in JIC must be representative | No | Very common | 3 3 |
| Croatia | Request of CA parties | Min., after consultation tripartite board | CA parties must be "most representative" | Extension must be in public interest | Very common, but declining after 2009 | 3 2 |
| Germany | Joint request CA parties (before 2015 one party to CA) | Min., after approval of tripartite committee in Ministry | Since 2015 eased: CA must be "of overriding importance" Before 2015: 50% of employees must be covered by CA. | Extension must be "in public interest" or, since 2015, "respond to social emergency" | Limited use | 1 1 |
| Italy | No formal extension mechanism, but Constitutional obligation (art 36) to pay "fair wage" is used by courts to set wage by reference to relevant CA | Judges | | No | Very common | 3(*) 3(*) |
| Netherlands | Request of CA parties | Min., after non-binding advice bipartite Council | EO must cover >60% of employees, or >55% in special cases; below 55% possible if deemed in public interest by Min. | Extension must not be against "general interest" | Common | 2 2 |

| Country | Procedure | Decision | Representation criteria | Public interest criteria | Use(*) | ICTWSS coding 2008 2015 |
|--------------|---|--|---|--|--|-------------------------|
| Portugal | Request of CA parties | Min. | None until 2011. Since 2012 EO must represent 50% of employees or, since 2014, >30% in sectors dominated by SMEs; none if extension excludes SMEs | Extension must be in “public interest”, to be judged in light of social and economic circumstances | Very common until 2011, followed by near standstill until 2013, recent recovery | 3 2 |
| Slovenia | Request of CA parties | Min. | EO must cover 50% of employees | No | Common; until 2006 compulsory EO membership ensured that CA applied to all employers and employees | 3(*) 2 |
| South Africa | Request of CA parties represented in joint Bargaining Council | Min. | CA parties considered “sufficiently representative”. Special consideration given in sectors with high proportion of workers in non-standard forms of employment. Min. can waive these conditions if not extending the CA is deemed to undermine collective bargaining | No | Common (frequent use in relative small number of industries) | 2 2 |
| Switzerland | Joint request CA parties; tripartite council can initiate procedure in sectors where wages and working conditions are “repeatedly and abusively undercut” | Federal or regional Government (after tripartite consultation) | Triple threshold of >50% employees in EO, 50% firms in EO and 50% employees in unions (not applied). Second threshold is waived if tripartite commission finds substandard wages and CA covers SMEs | Extension must not be against public interest | Common (frequent use in particular sectors) | 2 2 |

| Country | Procedure | Decision | Representation criteria | Public interest criteria | Use(*) | ICTWSS coding 2008 2015 |
|---------------------------|--|--|---|--|---------------------------------------|----------------------------|
| RESTRICTIVE REGIME | | | | | | |
| Albania | Request of CA parties | Min. | CA must cover >50% of employees | No | Rare | 1 1 |
| Bulgaria | Joint request of CA parties | Min. | Since 2012 representation criteria eased | No | Limited to few sectors (none in 2016) | 1 1 |
| Czech Rep. | Request of CA parties | Min. | EO and TU must represent "largest number" of employees in sector | No | Limited use | 1 1 |
| Estonia | Request CA parties, through clause inserted in CA) | Min. (automatic if clause included in CA) | CA must be signed by federation of employers | After 2012 reform: only minimum conditions can be extended | Rare | 1 1 |
| Hungary | Request CA parties | Min. | EO(s) must represent >50% if employees | No | Limited use | 1 1 |
| India | Request CA parties or Labour Officer | Min. | | | Limited use in some states | 1 1 |
| Ireland | Request CA parties | Labour Court can extend only minimum rates | | Must take into consideration "competitiveness" | Rare (only some sectors) | 1 1 |
| Israel | Request of CA parties or initiative Min. | Min. | CA must be "important" and coverage "significant", EO must be "dominant" and TU "most representative" | No | Common in past, currently limited | 2 1 |
| Latvia | Request of CA parties or initiative Min. | Min. | CA must cover >60% of employees | No | Limited use (few sector CLAs) | 1 1 |

| Country | Procedure | Decision | Representation criteria | Public interest criteria | Use(*) | ICTWSS coding | |
|----------|---|---|--|---|--|---------------|------|
| | | | | | | 2008 | 2015 |
| Norway | Request of CA parties, or independent Tariff Board in special cases | Independent Tariff Board with tripartite representation | Only sectors with substantial proportion of foreign workers and below standard wages | No extension if only Norwegian workers involved | Limited but increasing use | 0 until 2004 | 1 |
| Romania | Request of CA parties | Min. after approval from Tripartite National Council | EO must represent 50% of employees (before 2012: 33%) | No | General under national agreements (2005–11), hardly used since | 3 | 1 |
| Slovakia | Request of CA parties | Min., after binding advice of tripartite body in Ministry | 2010–13: employers could veto extension in tripartite body at Ministry | Extension must “abolish disadvantageous situation of employees” | Significant use until 2009; none 2010–13, re-established since, challenged in court. | 2 | 1 |



| Country | Procedure | Decision | Representation criteria | Public interest criteria | Use(*) | ICTWSS coding 2008 2015 |
|------------------------------|--|--|---|--|--|----------------------------|
| NOT USED or SUSPENDED | | | | | | |
| Canada | Only in Quebec, request of CA parties | Government | | | Very limited | 0 0 |
| Cambodia | Request of CA parties or initiative Min. | Min., after non-binding advice of Labour Advisory Committee | | | Not used | 0 0 |
| Greece | Suspended. Until 2010 automatic in case of national general agreement; Request of CA parties or initiative Min. for sectoral or occupational CAs | Min. after non-binding consultation | Employers must employ at least 51% of employees in sector or occupation (waived under national general agreements from 1990 to 2010). | No | Very common before 2010, none since | 3 0 |
| Japan | Request of CA parties | Min., under restrictive veto procedure (approval Ministerial wage committee) | E0 must represent >50 % of employees | No | Very limited | 0 0 |
| Lithuania | Request of CA parties | Min. | Agreement "must be important" | No | Not used (no sectoral CLAs) | 0 0 |
| Mexico | Joint request CA parties | Min. | | No | Rare | 0 0 |
| Poland | Request of CA parties or initiative Min. | Min. | | Extension must satisfy "vital social interest" | Not used since 2009, sectoral bargaining nearly non-existent | 1 0 |
| Turkey | Request of CA parties | Min., after binding advice of tripartite Commission | CA must be signed by "most representative TU" | No | Rare | 0 0 |

(*) = as a result of a mechanism functionally equivalent to extension.

A few countries have tried to shore up collective bargaining by introducing or amending provisions for the extension of collective agreements. These include introducing additional criteria for the extension of agreements; introducing new decision-making mechanisms; addressing new issues; and enhancing the acceptability of the mechanism among employers. This shift to a more *supportive* regime is often part of a policy response to rising inequality, the challenge of migration, fragmentation of labour markets and criticisms of capture by “insider” interests. Some of these countries (Germany, the Netherlands, Norway, South Africa, Switzerland) are discussed in this volume.

4. Practices

Procedural provisions for the extension of collective agreements have evolved with changing labour markets.

Sufficiently representative:

Considerations of what is deemed “sufficiently representative” have changed to reflect the increasingly contingent nature of employment relationships, the preponderance of SMEs, as well as the challenges unions and employers’ organizations face in organizing and representing collective interests.

ILO Recommendation No. 91 states that the collective agreement must be “sufficiently representative” before it can be extended, but it establishes no specific threshold. The quorum should be set in accordance with the conditions of each country. Most countries fix a minimum proportion of workers who are to be covered within the scope of the collective agreement before it can be extended. This is rarely less than 50 per cent (table 1.1). Some countries do not use a defined threshold but require the agreement to be “significant”, “important”, “preponderant”, in order to give the Minister or Board discretion in applying procedural rules. As was noted by Hamburger (1939, p. 171):

[such definitions] have the advantage of making extension possible even when a majority is not reached and cannot be reached either because of the special nature of the industry (a number of scattered small undertakings, agriculture, etc.) or because it is difficult for the workers to organise, although the extension of agreements may be desirable in that particular case on more general grounds.

This may be the case, for example, in sectors where there is great seasonable fluctuation in employment, significant subcontracting and labour leasing, or jobs are contracted by firms operating from abroad. In South Africa, the Minister of Labour is required to consider the proportion of non-standard workers that falls within the scope of a bargaining council in determining whether parties to an agreement can be considered “sufficiently representative”. Some statutes, while operating with thresholds requiring a majority, allow lower quorums (e.g. the Swiss reform of 1998 and the Portuguese amended reform of 2013); introduce additional rules (e.g. the Finnish reform of 2001); and leave room for interpretation in special cases (e.g. the German legislation of 1918 and the reform of 2015, the Canadian Province of Quebec in 1934, the Dutch law of 1937 and decision rules of 1998).

Whether a threshold is high or low typically depends on the membership of the employers' association and on whether it represents large or small firms. If it only (or mainly) represents large firms, the threshold may be easily reached and extension may carry the risk that small or newly established firms are bound by conditions that are too ambitious and threaten their survival or expansion. If, however, the employers' association represents mainly small firms, or operates in a sector of predominantly small firms, a specific numerical threshold of 50 per cent may be too ambitious. A case in point is Portugal, where in 2012 a threshold was set at 50 per cent; this was relaxed a year later for sectors dominated by small enterprises (Chapter 4). In Switzerland, an agreement is required to cover the majority of employees *and* employers before it can be extended. However, under the special legislation of 1998 an agreement signed by a federation of SMEs may be extended if it covers a majority of employees and only a minority of employers, thus reducing the weighting of very small or micro-firms (Chapter 2).

Observations from other workers and employers

While the extension of labour protection afforded by collective agreements uses a widely established “common rule” to establish regulation, different checks and balances need to be in place to safeguard its use as an instrument of public policy. Procedural rules need to allow for a transparent decision-making process in which due consideration is given to the views of outsiders and non-parties to the agreement *before* the extension decision is taken, in line with the principles outlined in ILO Recommendation No. 91. This may involve consultation with non-parties, a limited period for observations and objections (such as in the Netherlands, Switzerland and South Africa), with a right of appeal against decisions and the possibility of obtaining exemption. Bargaining councils in South Africa are required to ensure adequate representation of SMEs on the council. In the Netherlands, in sectors where it is relevant (construction, transport, IT and business services) unions and employers' associations must consider the interests of the self-employed. In both countries, the Labour Minister may take this into consideration in deciding whether to extend the collective agreement.

Public interest considerations

Other legal requirements may apply before a collective agreement can be extended. These vary from formal criteria – such as registration, formalization through joint bargaining councils, joint requests, conformity with the law, non-discrimination clauses – to specific *public interest* tests. In Germany, for instance, extension must be “in the public interest” or “respond to a social emergency”. A similar provision has been adopted in recent legislation in Portugal, where the social and economic situation must be taken into account. In Argentina, the Minister's decision to extend the agreement is subject to the restriction that it must be in line with the budget. Extension of collective agreements in the Netherlands and Switzerland must not go against the general interest. The interpretation and application of such criteria may restrict bargaining autonomy, or could be used for political purposes. It is therefore important that these public interest criteria be specified *ex ante* and be made known to the parties before they start negotiating the agreement and request its extension.

An assessment of how the collective agreement relates to the employment prospects of the sector may well be part of that process. If the agreement is found to contravene the law (on equal treatment, for example) or to be in conflict with public interest considerations, rather than striking out the offending clauses, the agreement should be returned to the social partners with the choice to renegotiate the agreement or not to request its extension.

The possibility to extend collective agreements that levy a contribution for particular (non-wage) funds – for example, to offer training, facilitate pre-retirement, or fund pensions – varies across countries. This practice is common in the Netherlands, albeit not without its critics, and it does not apply to occupational pensions (which are regulated under a different law), whereas in Switzerland the extension of funding arrangements is excluded. In Germany most extended agreements cover aspects other than basic wages (such as general framework agreements, additional pensions, pay structures, holidays and capital-forming benefits). In some sectors (such as construction), the extension of collective agreements is used to secure sectoral social funds that are run jointly by employers' associations and trade unions. In France and Belgium, extended agreements are the basis for the financing of various forms of social insurance that are administered on a parity basis. Similarly, in South Africa bargaining councils play a critical role in securing and administering social funds (such as pensions, medical aid and funeral benefits) and the extension of these provisions in collective agreements serves to provide access to and ensure the continuation and sound financial state of these funds (Budlender, 2007).

Compliance and dispute resolution procedures

A distinction is made between 'normative' (or substantive) clauses and 'obligation' (or procedural) clauses in collective agreements. A difficult legal issue can arise in relation to obligational clauses. Generally, the law excludes the extension of obligational clauses that regulate the relationship between the signatory organizations – for instance, one that specifies particular conflict resolution bodies or procedures to be used. Compliance with contracts in Northern Europe, as in the Netherlands and Switzerland, relies primarily on private (contract law) mechanisms that involve the parties to the agreement. Mediation procedures often play a crucial role. The exclusion of obligational clauses applicable to workers to whom the agreement is extended has therefore raised criticism among employers in Finland. In South Africa, once the collective agreement is extended, non-parties are bound by dispute resolution procedures established in the agreement and administered by a bargaining council. Dispute resolution through mediation outside the court system is standard in collective agreements in Switzerland, but these clauses have typically not been extended. Both Swiss and Dutch law is strict in ensuring that extension does not change the right of access to the courts, exert pressure on workers to join unions or firms to join associations, or discriminate between members and non-members.

The issue of compliance has become very important in relation to the extension of collective agreements to posted workers. In Germany compliance relies primarily on public law. This means that public authorities need to be able to verify documentation for migration and posting to ensure that this complies with the minimum standards

in the extended agreement. The penalty for contravention is a fine. There are additional private law enforcement mechanisms, allowing trade unions to bring an action for unpaid or delayed wages before German labour courts (Slachter, 2013). France, Belgium and Luxembourg follow the same approach. In the Netherlands and Switzerland (as in Scandinavia), a distinction is made in collective agreements between protection under public law (e.g. health and safety) and private law obligations. The control of minimum wages, subcontractors and disguised employment relationship is the responsibility of the social partners, and remains so where the collective agreement has been extended. Changes are under way, and private law mechanisms have been strengthened with public policies and instruments (Houwerzijl, 2013; Chapter 2). Enforcement is given greater prominence, with administrative penalties for infringements, more resources for the public Labour Inspectorate and closer cooperation between the Inspectorate and the unions. It has become mandatory to inform subcontractors of their obligations under extended agreements and the parties to the agreement are charged with monitoring compliance with these obligations. In Norway the 1993 Act on Extension introduced a novel enforcement mechanism enabling workers and unions to institute private criminal proceedings against employers who are found to be in breach of the agreement.

Exemption procedures

One criticism, which has become particularly pervasive in recent years, concerns the impact of these regulations on the ability of an enterprises to adapt to rapidly deteriorating market conditions. The normative provisions in extended agreements are also criticised for preventing the entry of new enterprises. The uniformity created by this device, it is argued, has a negative effect on employment (Villanueva, 2015).

These criticisms appear to be at odds with the manner in which extension mechanisms now function. A growing number of countries encourage the inclusion of an exemption procedure in the collective agreement to be extended. These may take the form of blanket exemptions for enterprises of a particular size, or procedures for exemption from all or part of the extended agreement based on certain criteria. Blanket exemptions for small enterprises are less frequent. In the Czech Republic, enterprises with up to 20 employees are exempt from extended agreements. In Slovakia, during the recent recession, companies experiencing financial hardship could be exempted; Ireland and Spain had similar procedures under the national agreements (which are no longer valid). In Argentina, the law enables SMEs, by way of negotiation with the union, to suspend the applicability of clauses on the length of vacations and payment of bonuses. There are also provisions for exemption in the event of a national financial crisis or if a specific enterprise declares bankruptcy (Chapter 8).

Extended agreements in the Netherlands and South Africa must include transparent provisions of exemption. Enterprises in the Netherlands that apply for exemption in general must have “compelling reasons”, showing that the product and labour markets of a particular firm are at variance with the sector; this can apply both to very large multinationals and to small firms. The exempted firm is required to sign a valid enterprise-level agreement with the union(s). Exemptions are granted by the

social partners or by way of appeal at the Ministry (Chapter 2). In South Africa, the Labour Minister must ensure that a bargaining council has an effective procedure to deal with exemptions, with a provision for an independent body to hear appeals where exemption is refused. Applications for exemptions have increased over time as the criteria have been made more transparent and the procedures have become more efficient. Some bargaining councils provide blanket exemptions for SMEs based on their size and period of operation; others have an expedited exemption procedure for SMEs. The success rate for granting exemptions for SMEs is higher than that for enterprises overall, as is the numbers of applications from non-parties compared with parties to the agreement. A high proportion, over 80 per cent, of exemptions are granted, which suggests that these procedures have been very effective (Chapter 6).

A final criticism directed at the extension of collective agreements is that it makes decentralization – by way of additional bargaining over pay or hours at company level – more difficult. Such multi-level bargaining is now common in many countries in Europe. It has been shaped in some countries by an additional bargaining round with union representatives or works councils at the enterprise level, in other countries by the use of “opening clauses” (that is, clauses which allow for the renegotiation of certain elements of the agreement on the occurrence of a specific event). The criticism in Finland is that the current extension system discriminates against SMEs. While unions concede an increased number of clauses in sectoral collective agreements that allow renegotiation, and derogation from minimum sectoral norms by local parties, this option is often denied to non-organized employers to whom the agreement is extended because there is no union representation (Chapter 5). Trade unions justify this with the argument that there is no real balance in local negotiations in SMEs and the outcome might in practice be dictated by the employers. Similar tensions over decentralization and derogation have arisen in France, Spain and Portugal. The root of the problem is the absence of union representation rather than the extension system as such. In the Netherlands clauses in agreements that delegate all further decision making (over wages or hours) to the company level without setting a minimum cannot be extended; those that specify a minimum and allow for individual choice (in the combination of weekly, monthly or annual hours, and pay) can be extended (Chapter 2).

5. Reinforcing multi-employer bargaining

The administrative extension of collective agreements supports multi-employer bargaining, covering entire sectors or occupations (within a region or nation) and thus increases the bargaining coverage of firms and workers. Where there is no multiemployer bargaining, extension is not applicable. Without multi-employer agreements, in most countries small firms will not be covered, unless there is an exceptionally high level of union organization.

The relationship between extension and multi-employer bargaining is explored using a contingency table in which we cross-tabulate countries based on two variables (multi-employer bargaining and extension), as in table 1.2. The classification is based on whether there is a significant degree of multi-employer bargaining resulting in (local, regional or national) sectoral or occupational agreements, accounting for at

least one third of total bargaining coverage; and whether there is an “active” legal provision for extending such agreements. The data refer to 2014 or 2015 and cover 47 countries from the ICTWSS Database (all except China, India, Indonesia and the Russian Federation as a result of lack of data).

Table 1.2 (panel A) shows that of these 47 countries, 27 used the option of extending collective agreements in 2014 or 2015, whereas 20 did not (vertical axis). In 21 countries there was significant sectoral multi-employer bargaining; in 26 countries enterprise-level bargaining was dominant (horizontal axis). Cross-classification shows that the two variables are not independent. As expected, extension is far more evident in countries with (a significant share of) multi-employer bargaining. This is confirmed by the standard Fisher Test, which yields a value that is significant at the 0.01 level.

There are just two countries (Denmark and Sweden) in which multi-employer bargaining is dominant, but without legal provision for declaring collective agreements to be generally applicable. Bargaining coverage and union density rates in both countries are very high at 87 and 67 per cent respectively (table 1.2, panel B; and figure 1.1). There are eight countries with the possibility of extension but where enterprise-level bargaining predominates. The mean bargaining coverage level in this group is just 23 per cent, and union density 16 per cent. In some of these countries there has been a

Table 1.2. Extension, multi-employer bargaining and bargaining coverage, 2014–15

| A - Contingency table: Extension and bargaining level | | | | |
|--|----------|---------------------------|----------------------------|------|
| Countries | | Multi-employer bargaining | Single-employer bargaining | All |
| No extension | | 2 | 18 | 20 |
| | | | | |
| Extension | | 19 | 8 | 27 |
| | | | | |
| All | | 21 | 26 | 47 |
| B - Bargaining coverage and union density rates, extension and bargaining level | | | | |
| Mean bargaining coverage and union density rates in percentage of wage earners in employment | | Multi-employer bargaining | Single-employer bargaining | All |
| No extension | coverage | 87 | 20 | 26 |
| | density | (67) | (18) | (23) |
| Extension | coverage | 71 | 23 | 57 |
| | density | (31) | (16) | (26) |
| All | coverage | 72 | 19.7 | 44 |
| | density | (34) | (16,5) | (25) |

Note: Fisher exact test = 0.000149, significant at p <.01

very drastic contraction of collective bargaining (see figure 1.1). There is no significant difference in the mean coverage and unionization levels between countries that have enterprise-level bargaining with extension and *without* extension. Finally, in the group of 19 countries with multi-level bargaining and extension, the mean bargaining coverage rate is 71 per cent, more than double the mean union density rate of 31 per cent.

The conclusion is that it is not extension per se but the structure of bargaining that determines a high or low bargaining coverage rate. Extension raises and stabilizes bargaining coverage through its support for multi-employer (mostly sectoral) agreements. Extension makes it less risky for employers to sign a sectoral collective agreement as it prevents employers seeking to ensure decent working conditions from being undermined by below-standard competition.

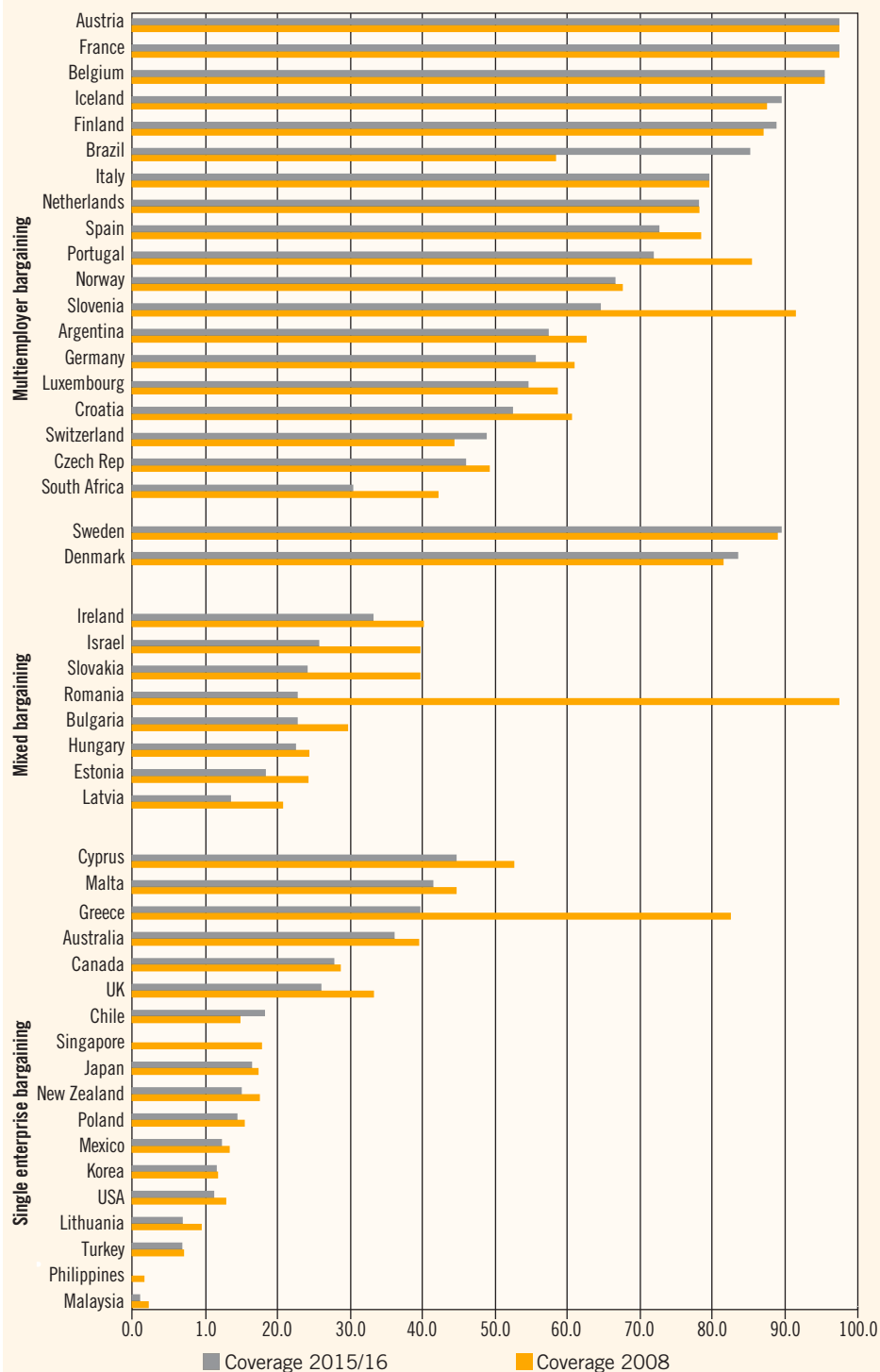
This conclusion is reinforced by developments over time. The original extension laws in Germany, Switzerland and the Netherlands did exactly what they were meant to do: promote and stabilize collective bargaining. After the central agreement of 1918 and the legislation of 1919, bargaining coverage rates in Germany soared from fewer than 5 million workers in 1920 to 10 million in 1929 (the coverage rate increased from under 30 to over 50 per cent), whereas union membership fluctuated at around 7 million workers (Taft, 1952, p. 285; Visser, 1989, p. 95). A similar turnaround in union and coverage rates happened also in the Netherlands and Switzerland after extension was made possible: in both countries coverage rates doubled in the course of a decade mainly through sectoral bargaining, although in Switzerland this occurred in some sectors only. Almost always, extension laws expanded bargaining coverage beyond union membership rates, stabilized the membership of employers' associations and reinforced their mandate for negotiating and signing multi-employer agreements.

The opposite is also true, and we can observe this in the United Kingdom, Australia, New Zealand and, more recently, in Greece and Romania. Where extension has ended and sectoral agreements are disappearing, bargaining coverage rates rapidly drop: in the United Kingdom, from around 70 per cent in 1979 to 40 per cent in 1994 and 26 per cent in 2016; in Australia, from 77 per cent in 1990 to 59 per cent in 2016 (33 per cent without awards); in New Zealand, from 67 per cent in 1990 to 47 per cent two years later and about 15 per cent today; in Greece and Romania, from above 80 per cent before 2010 to perhaps 30 per cent today. This is not to say that extending agreements is always effective and is the only panacea for defending collective bargaining at the sectoral level. The German and South African cases show that the erosion of collective bargaining, as discussed by Schulten and Godfrey (Chapters 3 and 6), can have many reasons.

6 Enhancing inclusion and reducing inequality

Extension is intended to affect outsiders. It is a method for making a collective agreement that already covers the majority of enterprises and workers in a branch or industry the common rule. It extends labour protection in a collective agreement to all workers that fall within the scope of that agreement. It thus supports collective bargaining at the sectoral level and the creation of a safety net of sectoral norms and rules even where additional bargaining and the determination of actual wages takes

Figure 1.1. Multi-employer bargaining, extension and coverage



place at company level. Inclusive wage bargaining systems are those in which the negotiations for workers with strong bargaining power strongly influence the outcome for workers with weaker bargaining power. These are systems in which “centralized and coordinated national collective bargaining agreements (are used) to extend the wage gains of the most powerful, generally unionised, workers to those workers with less bargaining power, especially less-skilled and non-union workers” (Bosch, Mayhew and Gautié, 2010, p. 92).

The “shadow of hierarchy” created by public interest considerations in extension decisions may direct negotiators towards setting differential pay rates and lowering minimum rates in collective agreements in order to prevent any negative effects on the employment of less skilled workers, as has occurred in the Netherlands. The case studies in this volume find no evidence that the extension of collective agreements to migrant and posted workers in Norway and Switzerland, reduced the employment prospects of these and other workers (Chapter 2).

The enforcement of non-discrimination clauses in extended collective agreements, with regard to both mandatory provisions (such as health and safety, maximum working hours) and contractual expectations (such as wages and fringe benefits) has facilitated equality of treatment. In the past, Australian awards, like Dutch collective agreements (to mention just two examples), excluded part-time workers of less than 12 hours per week from training and supplementary benefits in awards or collective agreements. As women were more likely to be in part-time employment, this created sharp gender-based inequalities in pay and treatment, which was exacerbated when these agreements were extended by the Government. Since the 1980s and early 1990s the unequal treatment of full-time and part-time workers is not permitted by law. Public authorities have an additional tool to ensure equal treatment in collective agreements and the extension of such treatment.

The extension of collective agreements has also played a significant role in enforcing minimum standards and rights in the case of posted workers and workers hired through temporary work agencies. The purpose of the European Union Posted Workers Directive (96/71/EC)⁷ is to ensure effective labour protection for workers while they are posted, and fair competition between national undertakings and service providers from other European countries. The implementation of this Directive through national legislation in the various Member States has resulted in the increased use of extension provisions or mechanisms with similar effects (such as labour clauses in public contracts) (Chapter 3).⁸ Until now the scope of the extension of collective agreements to workers posted by service providers from other countries has been restricted to the core minima in agreements (remuneration, paid leave, maximum hours and minimum rest periods, occupational health and safety), as has been sanctioned by the European Court of Justice (Chapter 5; Cremers, Dølvik and Bosch, 2007). In April 2018, the European Council approved the text negotiated with the European Parliament on the revision of the posting of workers directive.

⁷ Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] OJ L 18/1.

⁸ In Germany, for the extension of collective agreements under the Posted Workers Act, the Bargaining Committee has merely an advisory role and thus does not enjoy veto power. A growing number of agreements have been extended under this Act.

The revised directive will widen the scope for the extension of labour protection in collective agreements to posted workers. It aims at “ensuring fair wages and a level playing field between posting and local companies in the host country whilst maintaining the principle of free movement of services” (European Council, Press Release, 186/18, 11 April, 2018).

Of relevance to the issue of inclusion and partly connected with extension policies are government attempts to set minimum standards in industries where there is no or insufficient collective bargaining. The Labour Minister in France, for this purpose, has had since 1957 the authority to enlarge a collective agreement to jurisdictions other than that for which the agreement was negotiated (for instance, to an industry operating in a similar product group). Such enlargement, in practice, takes place in Belgium and Finland, under the central agreements that ensure a coverage of above 90 per cent. In accordance with the United Kingdom’s tradition, governments have set standards in the “sweated trades” on a temporary basis until true collective bargaining emerges. Between 1907 and 1993, when the last one was abolished, trade boards or wage councils with employer and union participation issued minimum standards in industries where there was insufficient coverage through collective bargaining, among others, for home workers, and workers in agriculture, retailing and road haulage. The Joint Labour Committees in Ireland defined minimum rates of pay and employment conditions in specific industries by issuing Employment Regulation Orders; these orders were declared unconstitutional in 2011, but have been redesigned in a more restricted way, with the option of being able to “opt out”.

In Switzerland the 1998 reform of the extension law mandated the federal or cantonal Government to set a mandatory minimum wage where there is no collective agreement, or none that can be extended, in a sector with substandard pay and working conditions. This requires the binding advice of a tripartite commission. The federal Government used this mandate for the first time in 2011 to set a wage floor for workers in household services; in 2014 this was extended for a further three years. Some cantons have used this device to set minimum wages for particular occupations (Chapter 2). In Argentina the Ministry of Labour sets the wages and working conditions for over one million domestic service workers and workers in private households (Chapter 8). The Australian Fair Work Act (2010) follows a different approach. Whereas, in general, the Act promotes enterprise bargaining, it contains a provision that permits multi-employer bargaining for low-paid workers. This “low-pay bargaining stream” is supported by somewhat weak procedural rights (Naughton, 2011), but it has been the conduit for some major national campaigns leading to higher wages for predominantly female workers in social and community services; the introduction of quality standards for early childhood education and care workers; and a new tribunal to address safety and pay issues for truck drivers in the road freight transport industry (although this has now been abolished). According to Buchanan and Oliver (2016), the success of these campaigns hinged on the unions being able to mobilize workers, customers and public opinion, in striking contrast to the institutional support of tribunal awards and extension in the past.

Comparative research shows that collective bargaining institutions, together with minimum wage setting, play a determining role in moderating or accelerating inequality (Bosch, Mayhew and Gautié, 2010; Grimshaw, Bosch and Rubery, 2014;

Hayter and Weinberg, 2011; Hayter, 2015). Higher bargaining coverage, sustained by sectoral bargaining and extension, goes together with lower wage inequality and a reduced share of low-paid employment. The collapse or erosion of these institutions corresponds with an accelerated increase in inequality, as can be shown with data for countries as diverse as the United Kingdom, Germany, Israel, and Australia (Bosch, 2015; Buchanan and Oliver, 2016; Kristal and Cohen, 2007). Cross-national comparisons show that wage inequality is highest in countries with no or low minimum wages and restricted collective bargaining coverage, while wage dispersion is lowest in countries with high collective bargaining coverage. Bosch (2015) argues that “collective bargaining penetration” – a combination of the extent of bargaining coverage and trade union presence – has a greater effect on reducing wage inequality than the statutory minimum wage. Using evidence from European Union countries, he shows a strong, negative correlation between bargaining coverage and shares of low-wage employment, defined by the OECD as below two-thirds of the median wage.

7. Conclusion

In the wake of the global financial crisis in 2008, which led to the haemorrhaging of employment in many countries around the world, collective forms of regulation again came under scrutiny. Despite wide-spread acceptance that the absence of regulation in financial markets had placed economies, jobs and incomes at risk, a number of countries were required to deregulate labour protection provided through the extension of collective agreements. This neoclassical view of labour market regulations as imposing “downward wage rigidity” has become pervasive in policy debates. Wage policies premised on the exercise of fundamental democratic freedoms in the workplace and in labour markets are viewed as anti-competitive and a violation of market freedoms.

This volume seeks to advance a different view – one premised on an appreciation of markets as an institution, fair competition as an engine of economic growth, and of reflexive and democratic forms of labour market governance as a preferred method of regulation. The authors of the various chapters in this volume share a view of labour markets premised on institutional economics and new regulatory theory. However this volume is not aimed at academics, its primary audience is policy makers and social partners who seek to afford effective and inclusive labour protection to workers.

In a context in which labour markets around the world are characterised by inequality, exclusion and insecurity, the authors of the chapters in this volume examine the evolution of a particular form of regulation that has a proven track record in reducing inequality, facilitating inclusion in labour markets and addressing the downside of unfair competition by ensuring a level playing field – the extension of collective agreements. They show that this policy tool is undergoing a period of renewal as policy makers look for ways to address ‘fissuring workplaces’.

The extension of collective agreements is a key policy tool in promoting collective bargaining and enhancing its role in reducing inequality and enhancing inclusivity. As with any public policy, certain principles must be upheld in order to avoid capture by minority interests at the expense of all enterprises and workers. These are set out in

ILO Recommendation No. 91, which focuses on the need for “sufficient representivity”, discretionary rather than automatic extension, and that those to be affected have the opportunity to submit their observations and objections. These conditions are important to ensure respect for the free and voluntary nature of collective bargaining. They also guard against the imposition by the minority of conditions on the majority, while at the same time allowing for particular circumstances where factors such as the proportion of small businesses or workers with non-standard contracts of employment require different consideration of what may be implied by “sufficiently representative”.

The chapters in this book show that extension policies do respond to changing circumstances, such as the integration of labour markets, the rise in non-standard forms of employment, migration and the posting of foreign workers, and decentralization. Traditionally extension has focused on the inclusion of national employers not covered by collective agreements. With the further integration of markets for labour and services, extension now plays a much bigger role in regulating the competition from employers operating from abroad, as shown in Chapters 2 and 5. Extension has proved to be an important means of providing inclusive labour protection to migrant and posted workers, and those working in SMEs. At the same time, it has provided a guarantee to organized enterprises that they will not be undercut by below-standard competition, whether from national enterprises or service providers from other countries. It has also proved to be a reflexive regulatory instrument, able to encompass a diversity of business interests and to rapidly adapt wages to a possible downturn in the economy. Perhaps more importantly, it reinforces other institutional features such as multi-employer bargaining.

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2. Extension policies compared: How the extension of collective agreements works in the Netherlands, Switzerland, Finland and Norway

*Jelle Visser**

1. Introduction

Extension is a public policy act based on legislation that mandates the government, a public agency or a court to declare a collective agreement between trade union(s) and employers' association(s) generally binding on all employers operating in the sector or occupation irrespective of whether they are members of the organizations that signed the agreement. As has been shown in Chapter 1, the ways in which extension policies operate vary widely. Opinions about the institution of extension, its principles, operation and impact are divided. Are the public policy objectives sufficiently important to compensate for the limitation on freedom of contract? Does extension contribute to more inclusive labour relations or protect insider coalitions? Is extension an alternative to statutory regulation of minimum wage and working conditions? Are its administrative costs commensurate with the benefits? Is extension an obstacle to decentralization?

I try to answer these five questions by examining how extension works in four rather similar countries. Studying a small sample of similar countries allows us to understand how a particular institution works. The four selected high-income countries can be classified as “neo-corporatist” (Schmitter, 1974), defined by a high degree of organization of business and labour, with an emphasis on self-regulation, and the involvement of organized interest groups in the formation and execution of public policy. Birds of a feather, the Netherlands and Switzerland are examples of “liberal corporatism”, whereas Norway and Finland belong to the Nordic model of “social democratic corporatism” (Afonso and Visser, 2015). Besides the smaller role of the public sector and weaker position of organized labour in Switzerland and the Netherlands, and a stronger emphasis on consensual policy making, I expect that in the liberal variant extension is more aligned with business, whereas in the Nordic model it is closer to labour.

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The Netherlands is a founding member of the European Community, now the European Union (EU); Finland joined in 1995; Norway and Switzerland elected to stay out. By joining the European Economic Area (EEA) in 1994, Norway gained access to the internal market and must adhere to EU labour law and the principle of free movement of persons. Having rejected the EEA Agreement in a popular referendum in December 1992, Switzerland negotiated its own bilateral treaty with the EU, which entered into force in 1999. As part of gaining access to the EU internal market, free movement of persons from the EU also applies to Switzerland. Extension policies predate EU membership in the Netherlands and Finland, and underwent no major changes as a result of such membership. Norway and Switzerland, however, changed the law in response to the EU and introduced new policies on extension to address the potential issue of “social dumping” as a result of the free movement of persons and free access of foreign service providers to their markets.

2. The legal basis for extension

In the Netherlands, the 1937 Extension Act (Wet AVV¹) empowers the Minister of Employment and Social Affairs to declare clauses of a collective agreement to be generally applicable to an entire sector. When this happens, employers in that sector must apply the terms defined in these clauses. Employers bound by another valid collective agreement, negotiated at the company level or for a particular sub-branch, may be exempted and it is the task of the Minister to ascertain that the extended agreement is properly demarcated and does not violate the rights of others. In this aspect legislation in the four countries is similar. Under the Federal Statute of 1956, in Switzerland the federal or regional (cantonal) Government may declare a collective agreement binding on all employers within the agreement’s domain of application.² In 1999, as part of a set of accompanying measures for the free movement of persons in preparation of the bilateral treaty with the EU, a special extension procedure for sectors in which wages and working conditions are “repeatedly and abusively undercut” was amended by the law of 1956.³ In Finland, the Employment Contracts Act of 1970, amended in 2001,⁴ mandates the Government to declare representative nationwide collective agreements generally applicable, meaning that its terms are to be followed as minimum conditions by all employers in the sector. Employers bound by another collective agreement, concluded with a nationwide trade union, are exempted from this obligation. The extension of collective agreements to the non-organized is alien to the concept of collective bargaining in Norway, with one exception. Before the EEA Agreement came into force in January 1994, the Norwegian Parliament

¹ *Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten* (WET AVV) [Law on the general applicability and non-applicability of clauses of collective agreements], 25 May 1937, *Staatsblad* [Official Gazette], Stb. 801.

² *Bundesgesetz über die Allgemeinverbindlicherklärung von Gesamtarbeitsverträgen* (AVEG) [Federal law on the general applicability of collective agreements], 28 Sep. 1956, *Systematische Sammlung des Bundesrechts* (SR) 221.215.311.

³ The so-called “accompanying measures to the free movement of persons” (FlaM, *Flankierenden Massnahmen zum freien Personenverkehr*) also contained measures related to the posting of workers and the possibility of setting a minimum wage in particular low-wage sectors without collective bargaining.

⁴ *Työ sopimuslaki* (ECA) [Employment Contracts Act], No. 55, 26 Jan. 2001.

adopted a law to allow the extension of collective agreements in sectors that are particularly affected by the opening of the domestic labour market and the abolition of regulations, for example by the requirement for work permits and migrant work quotas, disallowed under the EEA Treaty.⁵

In each of these countries the collective agreement, *before* extension, is legally binding only on the parties that concluded the agreement and on those members affiliated to the parties (sub-organizations, individual employers, and employees) to whom the agreement is applicable pursuant to its provisions on scope and application. For the employees thus covered, the terms of the agreement acquire the effect of a contract of employment and the rights and obligations conferred by the agreement persist in their capacity as terms of the individual employment contract when the agreement expires (“after effect”).⁶ The agreement is not binding on non-signatories and other “outsiders” – that is, on other employers’ associations or trade unions and their members, or on non-unionized employees working with an employer who is bound by the agreement. The Finnish situation differs insofar as collective agreements apply *erga omnes* (“towards everybody”) and, unless otherwise specified in the agreement, also bind non-unionized employees working with an employer who is bound by the agreement.⁷ Under Dutch law (article 14 Wet CAO⁸), the employer bound by the agreement is obliged to offer the same terms to the non-unionized employees who are themselves not bound by the agreement. In Norway, it is common practice for organized employers to apply the agreement to non-unionized employees; in Switzerland the non-organized employees must sign an “opt in” statement.⁹ Obviously, this cumbersome procedure is relevant only for collective agreements that have not been extended.

Finally, as an alternative to mandatory extension, non-organized employers can also “adopt” the collective agreement on a *voluntary* basis, without joining the employers’ association. Especially in Finland and Norway it is common for the trade union to exert pressure on a non-organized employer to adhere to the collective agreement concluded for the sector and to formalize this in an enterprise-level collective agreement. These “accession agreements” (*hengavtaler*) between a union and an unaffiliated employer are quite frequent in Norway, as they are in the other Scandinavian countries, and are almost identical in their content and legal effect to the sectoral collective agreement for the same kind of business. This practice is sustained by a high unionization rate. In Switzerland, for a small fee the non-affiliated employers can “join” the sectoral collective agreement through a so-called “adhesion procedure”, which requires the approval of the organizations that have signed the agreement.

⁵ *Lov om allmenngjøring av tariffavtaler* [Law on the general application of collective agreements], No. 58, 4 June 1993.

⁶ This “after effect” does not apply to employees covered by the agreement through extension; in their case, the statutory minima apply (Beltzer, 2010).

⁷ *Työehto Sopimus Laki* [Collective Agreement Act] No. 436, 1946.

⁸ *Wet op de Collectieve Arbeidsovereenkomst* (Wet CAO) [Collective Agreement Act], 24 Dec. 1927, *Staatsblad* [Official Gazette], Stb. 415. Art. 14 was inserted in order to prevent employers from hiring employees at terms below those established by the agreement and to head off union demands for compulsory membership (Van Peijpe, 1985).

⁹ According to the Swiss Code of Obligations (*Obligationen Recht* (OR), art. 356b, para. 1), which regulates collective agreements, employers must demand a so-called “adhesion statement” (*Anschlußerklärung*) from their employees.

3. Origins

In the Netherlands and Switzerland extension is a child of the Great Recession of the 1930s. In Finland extension has its origin in a set of changes in the late 1960s that paved the way for a “neo-corporatist” reconfiguration of labour relations, ending a period of intense inter-union rivalry and labour conflict (Bergholm, 2009; Lilja, 1998). The Norwegian extension law of 1993 is the result of trade union pressure for measures against social dumping after the establishment of the EEA and opening the labour market to migration from the EU (Evju, 2013).

Extension had already been discussed when the first legal basis for collective agreements was added to each country’s civil code: 1907 in the Netherlands, 1909 in Switzerland (van der Veldt, 2002; Rieger, 2009). At the end of the First World War, alarmed by high levels of industrial conflict, several proposals were considered in the Swiss Parliament, but besides a special regulation for the ailing embroidery industry in 1922, none of these proposals made it into law. During the 1920s the cause of extension in the Netherlands was promoted by centrist, Catholic and Protestant parties and unions, in alliance with employers’ federations representing small and medium-sized enterprises (SMEs). The centre-right Government even proposed a draft bill, but dropped the provisions on extension in the final version of the Collective Agreements Act that was passed in 1927 (van Peijpe, 1985). In both the Netherlands and Switzerland, opposition came from the main employers’ associations representing large and export-oriented firms, and the liberal parties, whereas the socialist parties and unions were divided on the issue.

Two factors changed the situation during the Great Depression. The decline of collective bargaining under severe downward pressure on wages – at that time covering only some industries and occupations, mostly of manual workers, with a total bargaining coverage rate of between 20 and 25 per cent – moved the main socialist unions and parties in both countries from opponents to supporters of extension. Earlier legislation on anti-crisis measures promoting economic cooperation within sectors broke the opposition of the political right and the main employers’ federation in the Netherlands. After passing the 1935 crisis law, which allowed and even promoted the formation of cartels, it took Parliament less than two years to pass the extension law (Mok, 1939; van Peijpe, 1985).¹⁰ Law making in Switzerland takes longer. There were some early attempts to legislate on extension in some western cantons, but in deciding that this was a federal issue and disallowing cantons to have their own laws, the federal Government’s proposal to the Swiss Parliament was put forward in 1939, with official consultations starting in 1943. Meanwhile, in 1941, the federal Government obtained a temporary mandate to extend collective agreements in several sectors, which was duly prolonged in later years. In the post-war consultation process, nearly all cantons and interest groups were persuaded to support the new

¹⁰ The Dutch extension law of 1937 contains a provision that allows the Government to declare a clause in the collective agreement to be *non-binding* (Wet AVV, art. 8.1). This article allows the Minister to remove a provision from the collective agreement if “deemed to be in conflict with the general interest” (art. 8.2). The Conservative-Christian-Liberal coalition in government defended the “preventive effect” of art. 8, which has actually never been used and is, to my knowledge, not found in any other extension law. Although in favour of the 1937 law, art. 8 caused the socialist opposition to abstain during the final vote (van Peijpe, 1985).

article 110 of the Swiss Constitution – the legal basis for extension – which entered into force in 1956.

The Employment Contracts Act in Finland followed several years of experience with minimum wage guarantees for forest workers based on a collective agreement that, covering a key sector in Finland's economy, applied to a rather small but influential group of employers (Lilja, 1992, p. 205). With the 1970 Act, the centre-left coalition circumvented demands for a mandatory national minimum wage and adopted instead a minimum wage regime based on generally applicable sectoral agreements. At the time, both employers and unions were opposed both to extension and to a national minimum wage. Employers feared more state intrusion and unions were afraid that extension would take away incentives for organizing (see Chapter 5). However, starting in the late 1960s and continuing into the 1990s, the union density rate rose to levels comparable with Sweden and Denmark, two countries *without* legal extension. The rise in unionization probably had other reasons, such as the new union-related unemployment funds, employers' support for "checking off" membership dues, tax deductions, the restored unity in the labour movement and the security and prestige that resulted from the 1968 and 1969 tripartite incomes policy agreements (Ebbinghaus and Visser, 2000; Lilja, 1992). Whatever its reasons, the increase in unionization helped to allay union fears that extension undermines incentives for union membership. Finnish employers also made their peace with extension, seeing the benefit of more peaceful labour relations after many years of intense conflict. The opposition comes from Suomen Yrittäjät (SY) [Federation of Finnish Enterprises], an interest organization for SMEs that is not itself involved in collective bargaining.

Norway had no system for extending collective agreements until it prepared to join the EEA, having rejected EU membership in a popular referendum in 1972. That referendum had split the unions, with some unions campaigning against the loss of control over labour standards and social policy. Promoted by the unions, who feared social dumping as a result of the migration of "cheap labour" from the EU, Parliament in 1993 adopted the Act on the general application of collective agreements. Preparations in the Ministry and pressure from employers went in the direction of a mandatory minimum wage to be set at the sectoral level. However, Landsorganisasjonen i Norge (LO) [Norwegian Confederation of Trade Unions], supported by the union federations for salaried employees and professions, persuaded the centre-left Government to accept its proposal to extend minimum wages and employment terms defined in collective agreements to non-organized employers, including those operating from abroad with workers posted in Norway (Evju, 2013). At the time, with a union density and bargaining coverage rate of around 55 per cent in the private sector – roughly 20 to 25 percentage points below that of their Scandinavian neighbours – the Norwegian unions calculated that they needed help from the State, even if that took them outside the tradition of Scandinavian labour relations (Evju, 2013; Dølvik, Eldring and Visser, 2014).

4. Aims and objectives

Support for collective bargaining, stable employment relations and the prevention of labour conflict are mentioned as core public policy objectives of extension in

Switzerland and the Netherlands. The 1941 mandate for extension in Switzerland was directly motivated by the wish to strengthen domestic social cohesion in a country surrounded by war. Five years later the country was engulfed by the largest strike wave since 1918. These labour conflicts led to a dramatic rise in regional and national collective agreements: from 417 before the war to 1,500 in the early 1950s (Aubert, 1989). The argument in favour of extension was that it would help to stabilize these agreements by removing the incentive for employers to leave their organizations under pressure from employers offering below standard wages and employment terms, and thus prevent a repetition of the pre-war events. The perspective of extension, moreover, would increase the willingness of employers to conclude a sectoral collective agreement in the first place.¹¹

The Preamble to the Dutch Extension Act reads that “the institution of collective agreement has in many ways been a blessing ... [has] brought order and peace in industry where previously there was unrest, uncertainty and recurrent strife”.¹² In the most recent “Review Framework” (Toetsingskader AVV) used for adjudicating extension requests the Ministry reaffirms that:

[T]he core objective of extension is to support and protect the assumption of responsibility of the social partners (in the form of collective agreements). The intended effect of extension is to prevent competition on working conditions through the undercutting of standards by unorganized employers and workers. Extension can limit the need for other regulations by the state.¹³

In addition to social functions, the Swiss Government stresses self-regulation and lower costs for the State, as well as the importance of creating a level playing field for domestic and foreign firms. This objective has gained additional importance since the 1999 agreement with the EU (Rieger, 2009; Oesch, 2007).

Industrial peace and promoting collective bargaining are *not* explicit policy goals in Finnish and Norwegian law. The Finnish law states as its objective “to provide for a wide-ranging guarantee of minimum conditions for employees of unorganized employers by means of making representative nationwide collective agreements between organized employers and workers generally applicable”. The Norwegian law aims “to ensure foreign employees’ terms of wages and employment [are] on a par with those of Norwegian employees” and prevent workers from being employed on terms that are “demonstrably inferior to the terms stipulated in existing nationwide collective agreements” ... or “otherwise normal for the place or occupation concerned”. The emphasis on establishing a set of minimum wage floors is explained by the absence of a statutory national minimum wage. In fact, of the four countries under consideration the Netherlands is the only one with a national minimum wage,

¹¹ These arguments can be found, almost verbatim, in the message of the federal Government to the Swiss Parliament in the preparation of the legislation of 1941 and 1954 (*Bundesblatt* (BBi) [Federal Gazette] 1941 323 ff; and BBi 1954 I 126 ff).

¹² *Memorie van Toelichting* [Explanatory Memorandum] Wet AVV, Stb. 801.

¹³ Toetsingskader AVV [Review Framework AVV], Staatscourant [State Gazette], 2010/13489.

established by central agreement in 1964 and implemented since 1968. Switzerland, too, lacks a statutory national minimum wage, which is probably why recent legislative changes have put so much emphasis on ensuring minimum standards in sectors and occupations with large numbers of migrant workers. The emphasis on the defence of collective bargaining as an instrument in the original legislation in the Netherlands and Switzerland is probably best explained in historical terms. These laws were framed at a time when collective bargaining was unstable and still under threat in many sectors. Extension was introduced for different reasons in Finland and Norway, and at a time when the structure and practice of collective bargaining seemed robust.

5. Procedure and requirements

In the Netherlands, the authority to declare a collective agreement to be binding is vested in the Minister. The procedure starts with a request by one or more of the signatory parties. The agreement then must “in the opinion of the Minister” apply to “an important majority” of those working in the sector (article 2 Wet AVV).¹⁴ Until the 1990s it was not specified what this meant, leaving the Minister with considerable discretion. However, as a result of challenges to the system by economists and politicians the need was felt to improve the democratic legitimacy of extension. In 1999 the Ministry published a protocol, which it still uses as a template for adjudicating extension requests.¹⁵ A supermajority of 60 per cent is always “an important majority”; 55 per cent is “an important majority” *unless* there is “limited support” for the agreement as a result of the absence or exclusion of particular interests in the negotiations, or in the event of a skewed balance between large and small firms, or subsectors. If the collective agreement covers less than 55 per cent of the employees (working with affiliated employers) it will not be extended unless “in the opinion of the Minister” particular conditions in the sector make extension desirable. This could be the case, for instance, if the agreement provides for particular public goods or funds that are seen as crucial for the sector (for instance, training or work sharing). These criteria give still some discretion to the Minister. Since, by law, a collective agreement applies to all employees in an organized firm, it is the organization rate of employers that matters and union density is irrelevant. The level of employers’ organization in the Netherlands is very high – between 75 and 80 per cent, though in some sectors (parts of the construction and transport industries and private services with a high presence of foreign-based firms) it is sometimes below the critical threshold of 55 to 60 per cent.

If it is deemed sufficiently representative and in conformity with the law, the proposal to extend the collective agreement will be published together with its content, providing the opportunity to raise objections during a three-week period. Unless serious objections are lodged, the Government is obliged to reach its decision within

¹⁴ The threshold was debated in Parliament in 1936–37, with some on the right favouring a higher threshold, a supermajority, and a minority right (30 per cent of the employers) to block the extension; others, on the left, argued that it would be enough to establish the “significant importance” of the collective agreement, as had been proposed in the 1927 bill (van Peijpe, 1985).

¹⁵ *Toetsingskader AVV*, n. 14 above, art. 4.1.

eight weeks,¹⁶ although in exceptional cases extension decisions can take well over one year.¹⁷ Extension decisions cannot be challenged in court. Although there has been occasional pressure in that direction, there is no hard “public policy” test, unlike, for instance, that which exists in German extension law (Chapter 3). It is legally possible for an extension to be refused on the ground that it conflicts with the “general interest”. This has been threatened only once – in 2004, during a conflict between the Government and the unions over pre-retirement policies – but within weeks the Minister had to back down under pressure from the central employers’ and union federations (Røjer and van der Veldt, 2012; Visser and van der Meer, 2011). The definition of what constitutes the “general interest” is notoriously vague and the attempts of various governments to declare its particular policy in the country’s general interest have usually failed.

In Switzerland the procedure starts with a *joint* request for extension by the signatory parties to the collective agreement. The final decision is made by the federal Government – or, in case of a regional agreement, by the cantonal authorities with the approval of the federal Government – and there is no right of appeal. Before a decision is reached a whole range of criteria must be satisfied. First, in their request for extension the parties must give “credible” (*glaubwürdige*) reasons why extension is necessary (article 2.1 AVEG¹⁸) – for instance, by showing that the survival of the collective agreement is threatened as a result of “disloyal” low-cost competition and pressure on “loyal” employers to leave their association. It is admitted that these reasons can never be infallible, but only plausible. As in the case of the Dutch legislation, the public interest criterion is stated in negative terms. The collective agreement may not be in the “general interest”, but it certainly must not be *against* the “general interest”. An example of the negative nature of the public interest criterion can be seen in the Swiss Government’s reference to a collective agreement that in its promised social entitlements was far ahead (*vorausseilend*) of the general developments in social policy (SECO, 2014, p. 21).

Like the Dutch legislation (article 2.5 Wet AVV), a collective agreement in Switzerland cannot be extended if it violates the constitutional principle of “equality for the law” and freedom of association (article 2.5 AVEG), conflicts with the “open door” principle of allowing firms and employees to join or leave their organizations (article 2.7 AVEG), or discriminates between members and non-members (article 2.4 AVEG). Finally, the collective agreement must satisfy no fewer than three quorums. It must, first, cover at least half of the employers and, second, at least half of the employees in the area of application. Third, the unions bound by the collective agreement must organize at least half of the sector’s employees. In practice, only the first and second criteria are enforced. In 1956, the federal Government had already declared that it would accept a lower than 50 per cent unionization rate in the hotel and tourist business,

¹⁶ During the period 2012–14 there were just over 100 extension requests per year, of which 13 per cent had objections and calls for exemption. The average time needed for reaching the decision varied from 5 to 8 weeks for extension requests without objections, and 7 to 11 weeks for those with objections (Mevissen, de Weerd and Cremers, 2015, pp. 10–11).

¹⁷ A recent example is the collective agreement in respect of inland shipping, where the agreement covers less than 55 per cent (most employers are very small). The Minister used his mandate to extend the collective agreement because of its “desirability” for the industry, as it contained a scheme for reducing the overcapacity in the sector.

¹⁸ AVEG, n. 3 above.

since fluctuation in staffing is high and unionization difficult. Disregarding the third threshold has become the rule in most industries. Between 1970 and 1998, 41.5 per cent of all extension decisions did not meet the third quorum of a union majority; between 1999 and 2013 this applied to 70 per cent of all extension decisions (SECO, 2014).¹⁹ The Schweizerische Gewerkschaftsbund (SGB) [Swiss Confederation of Trade Unions] advocates dropping the first quorum (requiring a majority among employers) as well, thus bringing Swiss legislation more in line with the law in other countries (SGB, 2011). Thus far, the Government has insisted that, to ensure legitimacy, this threshold must be maintained.²⁰

Under the amended procedure, introduced as part of the accompanying measures (FlaM) to the freedom of movement of persons,²¹ an agreement signed by a federation of SMEs may be extended even if it covers less than half of the sector's employers. In such a case, the additional requirement is that a special tripartite committee must find that wages in a particular sector or occupation are substandard. The committee does not have to wait for an extension request but may take the initiative and, with the consent of the social partners, even propose a collective agreement that is then extended. Currently three extended collective agreements have been decided in this manner: cleaning services (the German-speaking part), retail trade (Canton Geneva), and gardening (Canton Geneva) (Bundesrat, 2015, p. 34). A new mechanism, also part of the FlaM and falling between extension and minimum wage-setting, is the ability of the federal or cantonal Government to set a mandatory minimum wage if there is no collective agreement, or none that can be extended, in a sector with substandard pay and working conditions. In 2011 the federal Government used this mandate for the first time to set a wage floor for workers in household services; in 2014 this was extended for a further three years. Some cantons (Geneva, Tessin, Wallis, Jura) have used this device to set minimum wages for particular occupations (Bundesrat, 2015, p. 35).

Although extension is an act of law, the consultation process (*Vernehmlassungsverfahren*) relevant for the making of public law, which is very elaborate in Switzerland, is much shorter and decision-making is faster than in the case of introducing or changing legislation. According to the framers of Swiss law, this requires additional caution and legitimacy. In addition to the criteria already mentioned, the law stipulates explicitly that the extended agreement must “take into account the legitimate interests of minorities and regional conditions, the principle of equal rights and freedom of association” (article 110 of the Swiss Constitution). This can involve elaborate investigations including a voluntary yet highly recommended “pre-trial” of the agreement by the Ministry before it adjudicates the extension request. Once the request becomes official, is found to be in conformity with the law and is published, firms and unions

¹⁹ In 1999 the federal Government proposed dropping the third threshold, arguing that extended collective agreements are particularly relevant in sectors with a high share of migrant workers, temporary contracts and staff turnover – factors which usually result in low levels of unionization. It further argued that a unionization quorum is a redundant test of legitimacy, since it may be assumed that workers always favour extending minimum standards, irrespective of unionization. Finally, openly admitting that it ignores this threshold in its decisions, dropping it from the statute would change nothing and only cut bureaucratic red tape (unions must still send in detailed statistics). However, the proposal stood no chance of gaining a majority in Parliament or among the cantons.

²⁰ However, in three recent extension decisions (personal security services, cleaning, and temporary work agencies) the criteria were relaxed by excluding very small (micro) firms (SECO, 2014, p. 85).

²¹ See n. 4 above.

affected by the decision may lodge an appeal with a right of reply by the union(s) and employers' association(s) that requested the extension. In special cases a committee of experts assists the Government in making the final ruling. A typical complaint is that this procedure, which also involves consultation with the cantons, takes too long – up to nine months for new agreements and three months for renewed or amended agreements (SECO, 2014). Unions, in particular, are pressing for a shorter track. As in the case of the Netherlands, extension decisions cannot be backdated and the extended agreement cannot last longer than the agreement itself, usually no longer than one month after its expiry. In Switzerland the extension ends before the agreement expires if the signatory employers' association loses its majority.

A collective agreement in Finland is generally binding when it covers more than half of the employees in a sector or occupation. Until 2001 the decision was left to the Minister, but after repeated criticisms from the Federation of Finnish Enterprises, the new Employment Contracts Act introduced new criteria and an adjudication procedure in the hands of an impartial committee located in the Ministry.²² In addition to a 50 per cent coverage rate, the committee may take into account other criteria, such as the “established nature” of collective bargaining in the sector, the degree of union organization, and the “purpose” of the extension in guaranteeing minimum working conditions. For example, in the building industry and among truck drivers and road transport, where the predominantly small employers do probably not reach the 50 per cent threshold, the committee has cited the established tradition of collective bargaining and the high union density rate (about 70 per cent) as sufficient reasons to extend the collective agreement (Hellsten, 2011). Contrary to Switzerland, changes in representation during the contract period – as, for example, when one or more large employers withdraw from their associations – do not result in the extension being annulled.

In Finland extension is “semi-automatic”. No application or request for extension is required; upon registration of the collective agreement and delivery of the necessary statistics, the committee makes its investigations *ex officio* and bases its decision on whether the representation criteria are met, the agreement is well demarcated and is not in conflict with other agreements. When the committee confirms that the agreement is representative, its minimum conditions apply to all workers and those “doing comparable work” in the sector, irrespective of whether they work with an affiliated or a non-affiliated employer. The parties to the agreement, as well as any employer or employee affected by the decision, may lodge an appeal before the Labour Court. This occurs mainly in the few sectors where employers are poorly organized. and especially the Federation of Finnish Enterprises has been active in challenging extension decisions. I know of no case where the challenge has come from minority unions. The only issue that may be challenged and be subject to the Court's consideration is whether the representation criteria have been met. The Court's ruling is final. In 2010, out of a total of 201 sectoral collective agreements, 159 were extended; 42 agreements, mostly for salaried workers in new and emerging

²² Act on Confirmation of the General Applicability of Collective Agreements (No. 56/2001), which was passed in conjunction with the (renewed) Employment Contracts Act of 2001.

services, did not qualify and extension was rejected either by the committee or the Court. This affected only one “old” collective agreement (Hellsten, 2011).

In Norway an application for extension must be filed by the relevant trade union(s) and/or employers’ organization(s). In most cases, the unions will request extension only for the minimum (wage and hours) terms of the agreement, fearing that to go beyond the minimum (such as by extending clauses that offer dismissal protection or additional compensation) takes away incentives for workers to organize. There is no majority threshold criterion for extension, but the requesting organizations must be nationwide and representative. The decision to extend the collective agreement is taken by the Tarifnemnda [Tariff Board], which is a public administration body nominated by the Government, with five permanent members of whom three are independent experts, one represents the employers and another the employees. In addition to verifying the representative credentials of the union(s) and employers’ association(s) involved in the collective agreement, the Board must check whether foreign workers are employed at substandard conditions in the field covered by the agreement. The Tariff Board is mandated to extend the whole range of normative provisions, but it has thus far mostly extended those relating to minimum wages and maximum working hours. However, in the cleaning business the standard wage and employment terms have been extended; in shipyards extension has included additional issues relating to labour costs.²³ In exceptional cases the Tariff Board can proceed on its own (section 4 of the 1993 Act), like the Swiss authorities under the amended procedure. In at least one case the Board has changed the collective agreement before extending it,²⁴ a decision that would have been impossible in the Netherlands and Switzerland, where the rule is that if the authorities want changes to be made to the agreement, they can return it to the parties for negotiations before extending it. In the Finnish case, extension is automatic once the criteria are met, and there can be no changes either way.

The request for extension will be rejected if the agreement covers only Norwegian workers, irrespective of the wages and employment conditions in the sector. This narrow window for extending collective agreements reflects the particular origin of Norway’s extension law as an instrument to prevent substandard conditions among migrant workers in order to protect the relatively high domestic labour standards. The Board will also not consider the application if the applicant organization(s) cannot prove at least a probability that the working conditions of foreign workers are less favourable than those of Norwegian workers. In the initial cases the burden of proof was on the party that was seeking extension, usually the trade union. As this turned out to be very difficult, the obligation on employers to provide the Board with information has been strengthened. The decision procedure anticipates timely information to those affected by the extension and public hearings. As it can be

²³ In the court case against extension brought by the shipyards, *employers* wanted to exempt clauses relating to costs for travel, lodging, working time and “extras” for working out of town. They argued that including these clauses was not in compliance with EU Directive 96/71/EC concerning the posting of workers. The rejection of the appeal by the Norwegian Supreme Court was based on “public order” considerations, on the ground that keeping these issues out would lower the net wages of posted workers to such an extent that it undermined coordination of wage bargaining, in which shipbuilding has a pivotal role as wage leader (see Chapter 5).

²⁴ In one extended agreement the maximum working week was raised from 37.5 to 40 hours, thus lowering the hourly wage. Not surprisingly, the trade unions criticized this decision.

difficult to establish the facts of the case, it sometimes takes a year until the decision is made.

6. Exemption policies

For a firm to be exempted from a generally applicable collective agreement in the sector the minimum condition is that it has already negotiated a valid company or enterprise agreement. This rule allows employment conditions to be customized for particular firms where their labour or product markets deviate significantly from the sectoral norm, such as in the case of a multinational company. In none of the four countries under consideration is there a general exemption rule for SMEs, start-ups or firms facing hardship, although across the countries the stringency of the exemption policies vary. In Finland, the company agreement has to be signed by a national union, usually the one that is involved in negotiating the sectoral agreement. In the Netherlands, with its pluralistic union landscape, these company agreements are often negotiated by minority unions. In Switzerland extended collective agreements are made to custom at the regional level, which may obviate the need for exemption. Given its special function in setting standards in sectors with migrant workers, there are no exemptions in Norway. In the Netherlands, on the other hand, exemption has always played an important role, with the large multinational firms, although prominent members of the employers' associations, negotiating their own company agreements.

Employers in the Netherlands may be exempted from the extended collective agreement in two ways. The main approach is to obtain dispensation from all or some of the agreement's clauses from the social partners that signed the agreement. For this purpose, the Government has put pressure on negotiators to insert an exemption clause in their agreements. This policy is supported by the Stichting van de Arbeid [Dutch Labour Foundation], which is the central negotiating and consultation body of unions and employers.²⁵ Since 2014, in order to qualify for extension, the collective agreement must offer a transparent procedure with clear criteria for exemption. Its actual use, however, is limited (Mevisen, de Weerd and Cremers, 2015), and it is unclear whether this is because of a lack of requests that satisfy the criteria or rejection by the negotiating parties. Recently, there have been calls to set up an independent agency for this purpose (Grapperhaus, 2015).

In some sectors in the Netherlands exemption is a routine matter. In the building industry, for instance, the social partners allow exemption when there is a valid enterprise agreement that, on balance, guarantees the same wage and working conditions as in the sectoral agreement. In other sectors – such as road transport, cleaning and work agencies – there are continual conflicts. Houwerzijl (2013, p. 194) mentions the case of an Irish company, with workers posted in the Netherlands, which was granted exemption from one of the sectoral agreements in the building industry for no other reason than that it was holding up the decision of the Minister by mounting objections. The next collective agreement clarified the rules for foreign

²⁵ Stichting van de Arbeid, *Dispensatieverlening van bepalingen in CAO's*, The Hague, 1996, advice 6/96; and Stichting van de Arbeid, *Dispensatie in de cao, een transparante procedure*. The Hague, 2012, advice 4/12.

service providers and the exemption was not repeated. If exemption is refused, the conditions stipulated in the sectoral agreement apply irrespective of whether there is an enterprise agreement.

The second approach is based on a request to the Minister. The Government policy on dispensation has changed from very permissive in the 1990s to rather strict in recent years (Houwerzijl, 2007). Until 2007 the existence of an enterprise agreement was deemed a sufficient ground and, once obtained, the exemption was automatically renewed (Rojer and van der Veldt, 2010). Although the Netherlands had, in 1993, ratified the International Labour Organization (ILO) Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the independence of the unions involved in these agreements, signed for the purpose of exemption, was not guaranteed.²⁶ It took various cases of abuse involving “yellow” unions and collusion with the employer (Steger, 2011) before the Government tightened the rules. In 2007 the Christian Democratic Minister recalled the original rules of the 1937 Act, which requires “compelling reasons” (*zwaarwichtige redenen*) for exemption. An enterprise agreements is not sufficient; unions or employers seeking dispensation must file a “motivated request” and show that it is “unreasonable” to have the sectoral agreement applied to them. The Minister decides, after consulting the parties that requested extension. The automatic prolongation of an exemption is no longer possible. Since 2007 exemption from an extended collective agreement has again become the exception rather than the rule and Labour Ministers from different political parties (Liberal, Christian Democratic and social democratic) have upheld the new approach.²⁷ Right at the start a complaint that the new policy constituted an unreasonable restriction of the freedom of negotiation was lodged with the ILO Committee on Freedom of Association. In 2008 the Committee declared the policy to be in conformity with ILO principles.²⁸

7. The scope of extension

The mandatory extension of the provisions of a collective agreement makes null and void any derogation from these provisions in the individual employment contract that offer less favourable terms. As a rule, extension concerns the normative clauses, those that stipulate individual rights, but law and practice vary across the countries as to whether this encompasses or excludes collective and obligational issues. For obvious reasons, clauses that define the relationship between the contracting organizations (such as when to renew the contract, the procedure in the event of disputes, sanctions and payments) cannot be extended. However, clauses that define the obligations of employees and firms towards their organizations (*diagonale bepalingen* in Dutch law, *schuldrechtliche Bedingungen* in Swiss law) can, with restrictions, be extended in the

²⁶ It took until 2003 before the Ministry published a checklist of how it proposed to test whether a negotiating union satisfied the criteria of ILO Convention No. 98: the union’s history and membership, its governance and structure, finances, facilities received from the employer, and the history of the negotiations (Stcr, 2003/234).

²⁷ In 2016 the Ministry reported that from 2007 to 2016 it had granted 62 and rejected 108 exemption requests, of which 45 were on formal grounds (no valid enterprise agreement, for instance). Exemption requests are most frequent in business services, temporary work agencies, construction, international road transport, and hotels and restaurants (SZW, 2016).

²⁸ ILO Committee on Freedom of Association, Geneva, 18 Nov. 2008.

Netherlands and Switzerland. Evju (2013, p. 237) points to the difference between Norway, where the law limits extension to those parts of the collective agreement that stipulate terms relating to the wages and employment conditions of individual employees, and Germany, where extension encompasses all forms of legal norm in the collective agreement and not only those pertaining to the individual employment relationship.²⁹ The Swiss and Dutch legal systems are in this sense closer to that of Germany, albeit with the difference that contractual compliance in Germany is a matter of public law, whereas in the four countries in this comparison it is a matter of private contract law (Chapter 1).

As in Norway, Finnish law extends the individual rights specified in the agreement but not the obligations and, for instance, the sanctions specified in the contract. This has repeatedly been the target of critique among Finnish employers (Chapter 5). The extension laws in the Netherlands and Switzerland allow the application of “private law” enforcement mechanisms to non-members, but prohibit clauses that discriminate between members and non-members, exert pressure on employees to join the union or on firms to join the employers’ association, and hinder or change the recourse to public law. Under the Swiss Civil Code (article 357a CO), the obligation to preserve industrial peace implies the duty to refrain from any kind of challenge to issues settled in the agreement and this also applies to extended agreements. Following the trendsetting “peace treaty” (*Friedensabkommen*) of 1937 in the metal engineering sector, many collective agreements in Switzerland contain the obligation to refer disputes to joint arbitration tribunals (Ebbinghaus and Visser, 2000, p. 661; Höpflinger, 1990). This obligation cannot be extended.

However, in response to abusive practices related to migration and cross-border agency work, changes are under way and private law mechanisms are being reinforced with public policies and instruments. This development is common to the four countries: enforcement is given more prominence, with administrative penalties for infringements, more resources for the public labour inspectorate, closer cooperation between the Inspectorate and the unions, and additional public money for surveillance by the social partners. In the Netherlands, the private law approach was partly abandoned in 2007 when, triggered by the abusive conditions of posted workers and bogus self-employment, Parliament introduced administrative fines and user firm liability for temporary and posted workers hired through TWAs (Houwerzijl, 2013). In Switzerland, in the case of an extension decision intended to redress abusive conditions, under the amended legislation of 1999³⁰ the rules in collective agreements that give unions and employers a role in ensuring compliance, and issuing sanctions, can be extended. Rules on subcontracting were tightened in 2013, followed in 2017 by additional administrative sanctions, with the possibility of barring firms or persons from offering services in the Swiss market. Control of minimum wages, terms of employment and “fake” self-employment is now the responsibility of the social partners in the case of an extended agreement, and of a tripartite body in sectors without extended agreements. In the TWA business the extra surveillance

²⁹ *Tarifvertragsgesetz* (TVG) [Collective Agreement Act], 1949, s. 5(4).

³⁰ FlaM, n. 4 above.

costs are levied through a monthly payroll tax on all firms under the extended sectoral agreement, with foreign service providers obliged to make a deposit (SECO, 2014).

In Norway the 1993 Act introduced a novel enforcement mechanism enabling workers and unions to institute private criminal proceedings against employers who are found to be in breach of the agreement. Employers are made responsible for informing their subcontractors of their obligations under extended agreements and also for monitoring compliance with these obligations (Eldring, 2011).

Finally, in addition to the social and employment rights negotiated in their (extended) collective agreements, unions and employers have also struck so-called “funding” agreements for financing a specific social scheme, to be used for easing lay-offs and transfers, pre-retirement and training. Such schemes can be set up at company or at sectoral level. In Switzerland such funding agreements cannot be extended; in the Netherlands they can be extended, with the exclusion of occupational pensions, which are regulated by a separate law. In Norway and Finland this is also outside the scope of the existing extension laws, since it is beyond the focus on assuring minimum standards and involves obligational clauses. In the Netherlands, about half of the 114 sectoral funding agreements existing in 2013 were extended (there were 320 funding agreements pertaining to a single company).³¹ Roughly half of the seven million employees in the Netherlands are covered by funding agreements (compared to a coverage rate of about 80 per cent for regular collective agreements), about 15 per cent as the result of extension. Under guarantees of financial transparency, equal access and “good governance”, funding agreements can be extended for the maximum duration of five years.

8. The size of extension

In 2014 the bargaining coverage rate in the private sector varied from around 50 per cent in Switzerland and Norway to around 80 per cent in the Netherlands and Finland (table 2.1). Sectoral bargaining dominates. There are more enterprises than sectoral agreements, especially in the Netherlands and Switzerland, but the share of employees covered by enterprise agreements is rather modest – below 10 per cent, and not rising. Sectoral agreements are, on average, much larger and cover far more employees.

The importance of extension can be approached, quantitatively, in three ways: (i) the number of extended sectoral agreements as a proportion of all sectoral agreements; (ii) the coverage of extended sectoral agreements as a proportion of all employees covered by sectoral agreements; and (iii) the share of employees who are additionally covered through extension. Qualitatively, we can examine which sectors are affected and how relevant these sectors are for the economy, for the protection of migrant workers, domestic standards and maintaining standards against poverty.

Clearly extension is most comprehensive in Finland: 75 to 80 per cent of the sectoral collective agreements are extended and together these extended agreements account

³¹ Ministerie van Sociale Zaken en Werkgelegenheid (SZW), Jaarverslag sociale fondsen 2013, deel A en B [Annual report social funds, part A and B], The Hague. Available at: <http://cao.minszw.nl>.

for more than 90 per cent of the coverage of sectoral agreements. The direct or additional coverage effect of extension is in the order of 16 to 30 per cent, which is quite similar to the effect in other countries, such as France or Belgium, where extension is semi-automatic (Chapter 1). Norway is at the other end, with just eight extended agreements, which is a small share of all sectoral agreements. However, they apply to some key sectors, such as shipyards, oil refineries, fish processing and construction. The direct effect of extension, of workers otherwise not covered, can be estimated to lie below 10 per cent (though much higher in the sectors where extension applies) and, as expected given the narrow scope of Norway's extension law, concerns almost exclusively migrant and posted workers. The size of the Dutch and Swiss extension systems lies in between, with almost half of all sectoral agreements in the Netherlands and one third in Switzerland being extended, accounting for 61 per cent of the coverage of all sectoral agreements in both countries. Extension adds 9 percentage points to the coverage rate in the Netherlands and nearly 14 points in Switzerland (table 2.1).

Table 2.1. The scope of collective bargaining and extension, 2014–15

| Indicators | Finland | Norway | Netherlands | Switzerland |
|--|----------|--------|-------------|-------------|
| Number of collective agreements <i>of which:</i> | 275* | 550** | 701 | 602 |
| Single-employer agreements (SEAs) | <40 | <70 | 519 | 391 |
| Multi-employer agreements (MEAs) | >200 | 370 | 182 | 211 |
| Number of extended MEAs | 165 | 8 | 86 | 73 |
| <i>As share of all MEAs</i> | 80% | 3% | 47% | 34% |
| Total bargaining coverage rate | 89.7 | 67.0 | 79.3 | 49.2 |
| Private sector coverage rate <i>of which:</i> | 84.5 | 54.0 | 77.5 | 49.2 |
| Coverage SEAs | 9.0 | <10.0 | 7.6 | 8.2 |
| Coverage MEAs | 75.5 | >44.0 | 71.7 | 41.1 |
| Coverage rate of extended MEAs <i>as share of coverage all MEAs</i> | >90% | <33% | 61% | 61% |
| Covered only through extension | 16.0 *** | <6.0 | 9.2 | 13.7 |
| Union density | 66.4 | 52.7 | 17.7 | 15.4 |
| Employer density (private sector) | 69.8 | 58.0 | 82.0 | >50.0 **** |

* of which some 200 are in the private sector; ** including 100 municipal collective agreements; *** Hellsten (2011) estimates the effect at around 25–30 per cent, this being the difference between the private sector coverage rate and the density rate of employers; **** estimate.

Source: Visser, 2015; and additional national sources.

Little has changed in quantitative terms since the 1990s in Finland and the Netherlands. In Switzerland and Norway extension has clearly expanded. In Finland there is some variation, depending on the signing of central incomes policy agreements (in 2011, 2013 and 2016), which raises the overall bargaining coverage rate. In the Netherlands the number of extensions, absolute and in proportion to all sectoral agreements, has decreased, but the size of extended agreements has increased, especially in services. The direct effect of extension on the coverage rate has been fairly constant since the 1990s. In Switzerland, the number of extensions has nearly doubled since the late 1990s, the number of employees covered by collective agreements has increased by more than 40 per cent, the number of employers by 10 per cent. The downward trend in bargaining coverage during the 1990s – as a result of the membership losses of employer associations and the end of sectoral bargaining in some crucial industries – has stopped and been turned around. Currently, the bargaining coverage rate is again getting close to the 50 per cent of the 1970s and 1980s. The direct effect of extension on bargaining coverage has doubled from 7 to 8 percentage points in the late 1990s to 13 to 14 points today (which is more than a quarter of the total coverage rate). In Norway it took ten years – until the opening of the Norwegian labour market to migrants from Central and Eastern Europe after the 2004 EU enlargement – before the 1993 Act was activated with the decision to partially extend three collective agreements for workers in onshore oil refineries. The number of extensions has gradually expanded to the eight extended agreements that are currently in force for workers in construction, agriculture and horticulture, cleaning, shipyards, fish processing, electricians (including those working on offshore and onshore oil facilities), freight road haulage and long distance passenger bus transport. Arguably, this has halted the slow erosion of bargaining coverage, which is currently at 56 per cent in the private sector.

In Finland and the Netherlands extended agreements are found in nearly all sectors. In the Netherlands bargaining coverage rates, after extension, vary from 60 per cent in business services (but less than 20 per cent for IT specialists, most of whom work as independent contractors), 70 to 80 per cent in transport (also with many independent contractors), to an average of 90 per cent in industry and close to 100 per cent in construction and agriculture (SZW data). The lowest bargaining coverage rates in Finland, at around 60 per cent, are in construction, retailing and some service sectors, with some subsectors (such as cleaning) falling below the 50 per cent threshold needed for extension.³²

In Norway there is more variation.³³ Taking only the sectors in which collective agreements are extended, it is estimated that in shipyards around 80 per cent of the workers are directly covered; those who benefit from the mandatory minimum wage through the extended agreement are foreign workers posted by foreign firms or hired from domestic TWAs. Extension may also matter for workers employed by subcontractors. Bargaining coverage in construction, *before* extension, has declined to about 40 per cent whereas the share of foreign workers has risen to almost 30 per cent, most of whom are covered only through extension guaranteeing minimum

³² These estimates are based on administrative data, analysed by Lasse Ahtiainen of the Ministry of Economic Affairs and Employment. Available at: <https://julkaisut.valtioneuvosto.fi/handle/10024/59364>.

³³ Estimates for Norway have kindly been provided by Jon-Erik Dølvik of Fafo Oslo.

conditions. Coverage is even lower in cleaning, where two-thirds of the sector's workforce is foreign. Hence, we can estimate that one-third works directly for firms that are covered and two-thirds through staffing agencies, with minimum wages and conditions guaranteed through extension. In agriculture, extension applies mainly to seasonal foreign workers. Extension orders in road transport, fish processing and for electricians are fairly recent and the effects are as yet unclear, especially in transport where calculating and controlling effective working hours is fraught with problems.

In Switzerland the data from the Federal Statistical Office show a chequered picture.³⁴ Collective bargaining is well established in industry and construction, but not in services, with some exceptions in air and road transport, and banking. Some collective agreements, extended or not, exclude administrative and higher technical staff. Figures from the Federal Statistical Office for 2007 reveal bargaining coverage rates of below 10 per cent in research, personal services, insurance, agriculture, real estate, and textiles, slightly higher in health care (12 per cent) and still only 21 per cent in chemicals and 25 per cent in foodstuffs. Above average coverage rates are found in construction (83 per cent), road transport (79 per cent), banking (65 per cent), printing and media (57 per cent), and metal engineering (54 per cent). Extension hardly plays a role in industry, but is vital in the building industry where six agreements with a total of 300,000 employees have been extended. The picture in private services is mixed, with extended agreements in retail (in the Geneva canton), for butchers, private security agents, cleaners in hotels and restaurants (216,000), and TWAs (270,000), but not in banks (80,000), retail (exclusively company-level agreements in the two chains Migros and Coop, total 95,000), and road transport (36,000). Extension hardly matters in the formerly public sector (under private statute since 2001) of some 250,000 workers, because most are covered by company agreements (for instance, in railways, postal services and communication). Extension has recently been requested for the printing industry, which is a novelty in manufacturing.

Since the early 1990s (extended) collective agreements in the Netherlands also cover part-time workers and those in temporary jobs, and confer equal rights and employment terms, as defined in the EU Directives. Since the 1980s agreements for employees hired through TWAs have been common, and the main agreement – which, in addition to clauses on wages, working conditions and training, sets up a scheme for renewal of contracts and the gradual build-up of more employment and pension security – has been declared to be generally binding and renewed several times. Posted workers have been included in the extended collective agreement for the building industry since 1995 and in most other sectors since 2006, when the Cross-Border Work Act (WAGA) of 1999 was amended.³⁵ Before 2005, and with the exception of the building industry, extended agreements excluded posted workers (Houwerzijl, 2013; Dølvik, Eldring and Visser, 2014). The newest challenge is to

³⁴ Bundesamt für Statistik [Federal Statistical Office], "Gesamtarbeitsverträge (GAV) nach Typ, Größe und Wirtschaftssektor" [Collective agreements, by type, size and economic sector], Stand 1. Mar. 2014.

³⁵ This *Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid* [Cross-Border Work Act] in July 2016 was replaced by a new Act on the Working Conditions of Posted Workers from the EU (*Wet arbeidsvoorwaarden gedetacheerde arbeid in the Europese Unie*), Stb 2016, 220., which transposes into Dutch law Directive 2014/67/EU regarding the application of Directive 96/71/EC concerning the posting of workers.

include self-employed workers, possibly through the negotiation and extension of “standard setting agreements” that include minimum hourly tariffs.

In Finland the unions had won a maximal interpretation of Directive 96/71/EC on the posting of workers right from the start, applying similar conditions over the full range (and not simply the core conditions) of the agreement, and in all sectors (Bruun, 2010). EU Directives do not apply to Switzerland, but as part of the FlaM the Swiss Parliament adopted a law on the posting of workers, which guaranteed that posted workers could claim the minimum wages and working conditions stipulated in collective agreements.³⁶ To uphold this guarantee, the extension of collective agreements in sectors with many workers posted to Switzerland, for instance through work agencies, is considered crucial (SECO, 2014). However, it took ten years, until 2012, before the first collective agreement for temporary work agencies was reached and extended. EU law does apply in Norway and workers hired through TWAs must be given the same protection and wages as regularly employed workers in the user firm if they do “comparable work”, although this is not always the case. There is no special collective agreement for TWA workers and many are not covered unless working for one of the established firms, like Adecco or Randstad, or working in sectors where collective agreements have been extended and minimum wage conditions are guaranteed.

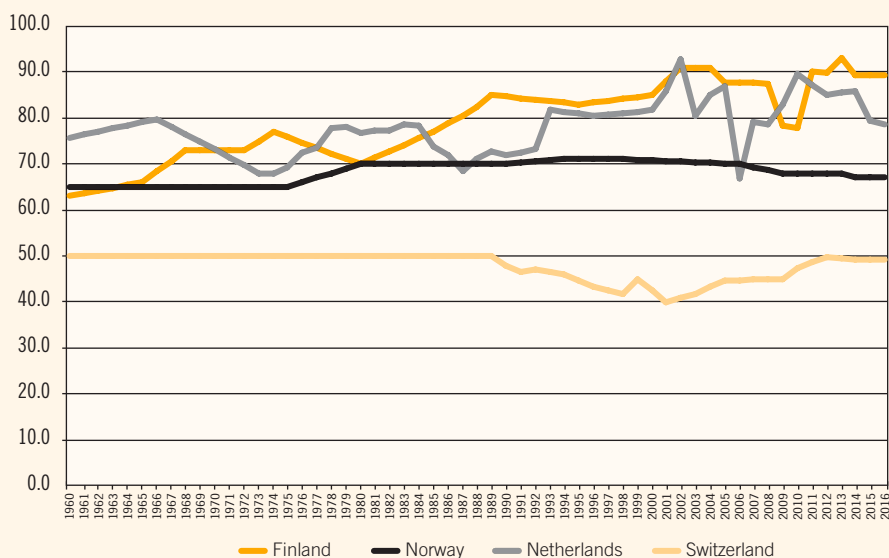
9. The effects of extension

Undoubtedly, extension has a stabilizing effect on the institution of collective bargaining. Through its support for multi-employer bargaining, extension contributes to a higher coverage rate. Knowing that their agreement cannot be undercut by low-cost firms, employers will be more confident about entering into negotiations with the unions. This stabilizing function is evident and intended by the framers of extension laws in the Netherlands and Switzerland. In addition, its function lies in creating a minimum floor of wages and employment terms in critical sectors, a function that has gained in importance with the opening of domestic labour markets to migrants, posted workers and international TWAs, and is explicit in Finnish, Norwegian and Swiss legislation. In the Netherlands, this function became apparent with the rise of the posted worker issue and the application, and stricter control (as called for in Directive 2014/67/EU) of extended collective agreements in the case of posted workers.

Over several decades, coverage rates have been rising in Finland and the Netherlands, have remained rather stable in Norway and have been rising in Switzerland after a decade of decline (see figure 2.1). As we saw in table 2.1, additional coverage as a result of extension varies from 16 to 25 percentage points in Finland, 13 to 14 points in Switzerland, 9 to 10 points in the Netherlands, and less in Norway. However, the *indirect* effect may be greater, especially in the Netherlands and Switzerland. Blanchard, Jaumotte and Loungani (2013) argue plausibly that in sectors dominated by small firms the transaction costs might pre-empt collective bargaining *ab initio* and that extension arrangements help to rule out or lessen incentives to undercut decent wages and working conditions.

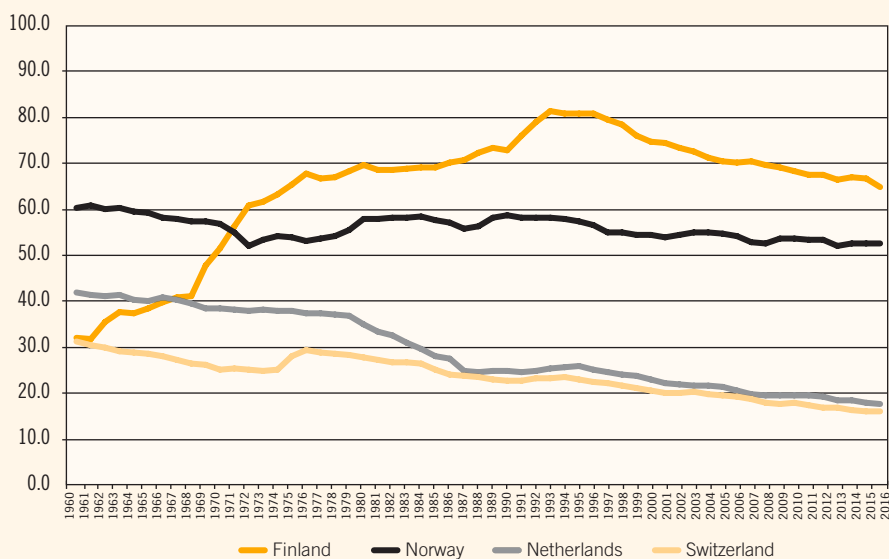
³⁶ *Entsende Gesetz* [Law on Posted Workers], 2002, art. 2.1, revised in 2012, BBI 2012 3397.

Figure 2.1. Bargaining coverage, 1960–2016



Source: Visser, 2015; Industrial Relations Indicators, ILO, available at: www.ilo.org/ilostat [Industrial Relations].

Figure 2.2. Union density, 1960–2016



Source: Visser, 2015; Industrial Relations Indicators, ILO, available at: www.ilo.org/ilostat [Industrial Relations].

Given threshold conditions, extension requires a high level of employer organization but can be combined with both high (Finland), medium (Norway) and low (Switzerland, the Netherlands) levels of unionization (figure 2.2). By providing for free what organizations charge for, extension might encourage “free rider” behaviour and decrease the representativeness and, by implication, the legitimacy of the unions. Given the divergent levels and trends in unionization in the four countries studied here, there are obviously other factors at play. It is also possible that extension thresholds motivate employers’ associations into organizing SMEs, though I have seen no evidence for this hypothesis. Against these potentially disorganizing effects, extension increases union bargaining power (Flanagan, Hartog and Theeuwes, 1993, p. 424; OECD, 1994). By eliminating the competition from low wage non-union firms, extension reduces the incentives for employer resistance and lowers the incentives for consumers to shift purchases to the non-union sector.

Research on the effects on wages of mandatory extensions is scarce. Comparing employees under extended and non-extended agreements, Hartog, Leuven and Teulings (2002) found no significant wage-increasing effect of extension. These findings were reiterated in studies commissioned by the Ministry (Rojer, 2002; Venema et al., 2005), with data ranging from 1995 to 2004. A recent study, using a different methodology and micro-level data on employees, found that “comparable” workers in firms under extended collective agreements earned on average 4 per cent more than similar workers in firms under non-extended collective agreements during the business upswing of 2006–07, but that the difference disappeared during the recession after 2008 (Ridder and Euwals, 2016). This result suggests that extension does bolster union bargaining power, especially in low-wage sectors where extension is most relevant, but it also increases the unions’ capacity to coordinate and moderate wage demands in a downswing (Villanueva, 2015; Teulings and Hartog, 1998). In Switzerland, a Government commissioned study, based on administrative micro-data of 2010, found that the opening of Swiss markets to foreign labour had exerted a downward pressure (of about 1 to 2 per cent) on the wages of salaried employees in services with tertiary education, but that for unskilled workers and those without tertiary education there had been no downward pressure. Workers with secondary education or a professional training had improved their position. These differences were attributed to the FlaM and, in particular, the effective use of extended agreements (Müller, Graf and Asensio, 2013).

Norway, Finland, Switzerland and the Netherlands are among the OECD countries with the lowest wage inequality. Among the 31 member States and based on the D9/D1 ratio for wages in 2013, Norway (2.40) ranks third place, Finland (2.54) fifth, Switzerland (2.70) sixth, and the Netherlands (2.89) tenth. Across the countries there is a clear relationship between wage equality and bargaining coverage (Hayter, 2015). Recent data for Switzerland confirm this relationship also for sectoral variation; lower bargaining coverage is associated with a higher incidence of low pay (Bundesrat, 2015). The data for at least three of the four countries do not suggest that less inequality comes at the price of higher unemployment or lower employment rates. In past decades the employment population ratio has risen in Switzerland, the Netherlands and Norway, and unemployment rates are among the lowest in Europe, albeit with large cyclical swings in the Netherlands. Switzerland and Norway have

attracted and employed large numbers of immigrants. Finland is the exception, with a much higher unemployment rate.

Finland, Norway and Switzerland are among the few countries without a national mandatory minimum wage, and extending the minimum wage in sectoral collective agreements therefore has a key function in preventing the bottom from falling out of the labour market. Arguably, in the Netherlands extension has facilitated the *lowering* of the sectoral minimum (entry) wage relative to the mandatory national minimum at times of high unemployment. In the early 1990s the lowest pay scales in sectoral collective agreements were on average 12 per cent above the national minimum wage (Rojer, 2002), which for some time had been frozen. According to its critics, high sectoral minimum wages in extended agreements had prevented employers from hiring inexperienced, unskilled and unemployed workers. In 1993 the outgoing Minister proposed that wage clauses should be excluded from extension, reiterating a proposal that in 1937 had been made by the main employers' federations representing large firms in the export sector. In 1993 the proposal was quickly shelved after criticism, especially from employers, that such a reform would be tantamount to state interference in collective bargaining, as wage and non-wage issues are closely connected. However, keen to have their agreements extended, unions and employers bowed to pressure to lower the minimum wage scales in collective agreements (Visser and Hemerijck, 1997). By the end of the decade the "gap" with the national minimum wage had been halved (Rojer, 2002) and Ministry data for 2013 show that the lowest pay scales in sectoral agreement average just 1.4 per cent above the national minimum wage. This example shows that extension, as a public policy, casts a "shadow of hierarchy" over the bargaining table between unions and employers, and can help to realign partial interests with public policy objectives.

10. Conclusion

The origins of extension laws in the four countries differ and this is reflected in how their policies operate today. In the Netherlands and Switzerland extension originated in the 1930s Great Recession and became a mainstay in the defence of collective bargaining, self-regulation, social partnership and social peace. In Finland and Norway extension has a different background and function: it is first and foremost a tool to defend the minimum conditions defined in collective agreements and uphold domestic standards in a globalizing economy. Typically, in the Dutch and Swiss cases, extension tries to preserve the full self-regulatory set-up of collective agreements, including their collective norms, whereas in the Finnish and Norwegian cases extension is limited to upholding minimum rights (see table 2.2).

Another difference is that extension in Finland and Norway tends to respond to union concerns – defending a floor in the labour market. This is what the policy was designed for and is reflected in how it has evolved since. In the Netherlands and Switzerland employer support has always proved to be crucial, from the very start when the first laws were passed until the recent revisions. It is reflected not only in the relative high thresholds – a double quorum in Switzerland and supermajority in the Netherlands – but also in the elaborate appeal procedures and possibilities of exemption. Support from the SMEs, in a coalition with the unions, was vital for

Table 2.2. Original and new legislation, aims and functions of extension

| Indicators | Netherlands | Switzerland | Finland | Norway |
|--|-------------|-------------|---------|--------|
| Founding year (original legislation) | 1937 | 1941/56 | 1971 | 1993 |
| Year of major changes | 1999/2007 | 1999 | 2001 | – |
| i) promoting collective bargaining and self-regulation; | 0 | 0 | | |
| (ii) furthering industrial peace | 0 | 0 | | |
| (iii) creating common funds (social insurance, training, pre-retirement | 0 | | | |
| (iv) establishing and enforcing minimum wages and terms of employment | | | 0 | |
| (v) binding foreign service providers and migrants to domestic standards | | N | | 0 |
| (vi) protecting wages and rights of posted workers | N | N | N | 0 |

0 = aim or function in original legislation; N = new aims or functions, added later.

the 1999 reform in Switzerland (Afonso, 2010). The 1999 amendments had broad political support and helped to reverse the trend of declining bargaining coverage, but the disaffection of large employers with sectoral bargaining has not disappeared and especially in services many employers oppose collective bargaining and extension (Oesch, 2012; SGB, 2011). At several times during the 1990s and 2000s – when extension came under attack in the press, the Parliament and among economists – Dutch employers’ associations rallied behind the policy. The overwhelming support for collective bargaining and extension as instruments for preserving social peace among Dutch employers, including those that are not organized themselves and involved in collective bargaining, has been confirmed in several surveys (Heijen and van Rij, 2003; van den Berg and van Rij, 2007). Early in 2016 the Dutch Parliament, after a prolonged debate, renewed its near unanimous support for the present extension system while calling on the social partners to modernize collective bargaining, for instance, by including self-employed workers and improving the representation and legitimacy of collective agreements by balloting workers in critical cases.

In Finland and Norway, there is opposition from employers. In Finland the opposition is located outside the main federations. However, the concern that extension is an obstacle to decentralization is more widespread. In Norway the opposition comes from large employers and has also found a voice in the main employer’s federation. Extension of collective agreements seems to be accepted, even supported, by employers in construction,³⁷ in agriculture, cleaning and transport (Eldring, 2011), but

³⁷ An early survey among managers in construction showed that 70 per cent supported extension (cited in Alsos and Eldring, 2008).

is contested among shipyard owners and in the oil refinery business. The opposition among larger employers in export sectors probably stems from the fact that extension narrows the opportunity for improving their international cost-competitiveness by using cheaper posted labour and temporary workers; moreover, these large firms do not face competition from small firms in export markets. In contrast, SMEs face competition with foreign firms and independent contractors in domestic markets and this has often motivated their support for extension.

Let me return to the five questions raised at the beginning of this chapter. Are the public policy objectives sufficiently important to limit freedom of contract? We accept such limitations in democratic societies when legitimated by a sound parliamentary majority and consideration of minority rights. Extension decisions are executive orders based on agreement between special interest organizations. They need additional guarantees of legitimation by a majority in the industry where it is applied, respect for minority interests and rights, thoughtful decision-making with the availability of appeal and exemption, and a “public interest” test to ensure that the agreement does not suppress “inconvenient” competitors and “outsiders” with no (effective) voice in the process (see also ILO Collective Agreements Recommendation, 1951 (No. 91), discussed in Chapter 1). It seems to me that, in particular, the legislation in Switzerland and Netherlands satisfies these conditions. We can argue, furthermore, that extension helps to achieve laudable public policy objectives like industrial peace, wage coordination, a decent minimum wage, and setting a level playing field for domestic and foreign firms. Switzerland and the Netherlands are among the countries with the lowest levels of industrial strife. In a global and highly networked economy, finding peaceful solutions to industrial disputes remains a key asset. Moreover, the defence of a national floor in the labour market in the face of increased international migration and cross-border service provision garners support for, and renders democratic legitimacy to an economy that is constantly changing and open to trade with the world.

Does extension contribute to more inclusive labour relations or does it instead protect insider coalitions? Evju (2013, p. 238) claims that the protection of domestic standards against foreign competition, rather than improving the working conditions of migrants, was the key objective of extension in Norway and the main motive for Norwegian unions to seek legislation. In Switzerland the amended legislation of 1999, for similar reasons, was wanted by a coalition of trade unions and employers’ associations representing domestic producers and SMEs (Afonso, 2010). Did these “insider coalitions” damage the rights and interests of outsiders? In both countries the higher contractual minimum wage of migrant and posted workers achieved through extended agreements has not at all diminished immigration flows and employment opportunities for migrant workers. Wage differentials between migrant and domestic workers still leave a considerable margin for making migrant workers competitive, as can be deduced from the continuous rise in migrant shares in sectors with extended agreements. This goes against the hypothesis that extension has been an instrument that benefits only or mostly insiders. Extension in the Netherlands has successfully served as “stick in the window” to lower entry wages in collective agreements on the assumption that this will improve the employment opportunities for unskilled, inexperienced and unemployed workers.

Is extension an adequate alternative to the mandatory regulation of minimum wage and other terms of employment? The interaction between the national minimum wage, collective bargaining and extension is an issue that deserves separate treatment. From the analysis here, with only one of the four countries having a mandatory national minimum wage, we cannot draw conclusions. It is possible that extension, while making collective agreements more inclusive, is a substitute for a statutory national minimum wage, as it allows for sectoral variation and leaves more autonomy to unions and employers. The main employers' association in Norway has toyed with the idea of introducing a national minimum wage as an alternative to extension (Evju, 2013). Norwegian unions are opposed to this, as they fear that it will pull down the wages of unskilled workers and eventually everybody else. The Dutch case shows that a statutory national minimum wage and extended collective agreements can coexist, but they operate not independently of each other and the autonomy of social partners in wage-setting is probably more circumscribed than it is in the other three countries.

Are the administrative costs of extension commensurate with the benefits? Rather than consider the costs, there are complaints about delays in reaching extension decisions, except in Finland where extension is quasi-automatic. In Switzerland matters are complicated by the federal co-decision structure, in Norway by very demanding criteria to be satisfied, and in the Netherlands by exemption requests. In each of the countries, decisions obviously take longer when extension is contested. The failed experiment with "quasi-automatic" exemption in the Netherlands was motivated partly by the desire to reduce regulation costs. In Switzerland there is a proposal to limit the number of appeals against extension decisions by taxing firms when their appeals turn out to be groundless.

Is extension an obstacle to decentralization? This issue is raised in Finland, where extension is considered by employers to be an obstacle to decentralizing collective bargaining on a pattern similar to Sweden and Denmark. Recent central agreements in Finland include sectorally differentiated pay components, which employers want to negotiate at a local level together with performance-related pay, the importance of which has increased over the past 15 years (Uusitalo and Vartiainen, 2009). Extension affects mostly small firms, with fewer than 30 employees, and many have no union representation. This may prevent small firms from properly using the "opening clauses" or differentiation offered in central and sectoral agreements through a second bargaining round. Data from the Algemene Werkgeversvereniging Nederland (AWVN) [General Dutch Employers' Association], which is involved in negotiating most enterprise and many sectoral agreements, suggests that extension need not be an obstacle to decentralization. Most sectoral agreements have evolved into minimum or framework agreements allowing a variable and increasingly individual package of employment terms determined at enterprise level (AWVN, 2014). Many of these agreements have been extended (van den Ameele and Schaeps, 2014). Opening clauses in sectoral collective agreements that do not include a minimum norm and delegate all negotiations to the company level for setting a binding norm cannot be extended under Dutch law as the rights they confer are unclear, in contrast to clauses that allow or promote negotiations within pre-defined sectoral norms, or clauses that permit individual choice but do not rely only on company negotiations

for setting a binding norm. As shown in this example, extension presupposes and supports a process of “organized” as opposed to “disorganized” decentralization (Traxler, 1995). It does so in another sense as well. In some areas (such as working time or employment protection) it is possible, within boundaries, to derogate by collective agreement from the norms fixed by law. This “flexibility by agreement” can be important for the fine-tuning of legal norms to the conditions prevailing in particular industries and firms.

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3. The role of extension in German collective bargaining

Thorsten Schulten

1. Introduction

German collective bargaining, as it evolved during the 1950s in the post-war period, was for a long time rightly regarded as a prototype for an “inclusive system” (Hayter, 2015), with a comprehensive and stable structure of multi-employer bargaining. For more than three decades trade unions and employers’ associations were able to conclude collective agreements for almost every economic sector, covering between 80 and 90 per cent of all workers in Germany. Against the historical background of strong state interference during the 1920s, as well as the total abolition of free collective bargaining during the Nazi period, the German post-war model relied heavily on the principle of “collective bargaining autonomy” (*Tarifautonomie*), according to which the state should largely be excluded from the regulation of labour relations. This also held true for the extension of collective agreements, which in practice was limited to a number of mainly domestic sectors.

The position started to change after German unification in the early 1990s, when collective bargaining entered a period of creeping erosion, leading to a reduction in bargaining coverage of more than 20 percentage points to a current level of below 60 per cent. While, during the 1990s, a further reduction in the use of extensions contributed to that decline, extensions have regained some significance since the mid-2000s as an important instrument in restabilizing the German bargaining system. Finally, in 2014 a new Law for the Strengthening of Collective Bargaining Autonomy (*Gesetz zur Stärkung der Tarifautonomie*) was adopted. This law has not only introduced a statutory minimum wage for the first time in German history, but has also facilitated the legal preconditions for extensions with the explicit aim of enabling more collective agreements to be declared generally binding.

This chapter is organized as follows. It starts with an analysis of the main trends in German collective bargaining over the last two decades and their social and economic consequences (section 2), followed by an examination of the German extension regime and its legal basis (section 3). It then analyses the development in the use of extension in practice and identifies the sectors in which extension has a significant role (section 4). Finally, it examines the recent reform of the legal preconditions for extension (section 5), and concludes with a discussion of its possible implications for the future of collective bargaining in Germany (section 6).

2. Recent trends in German collective bargaining

The more fundamental changes in Germany's post-war collective bargaining system started after German unification in the early 1990s. First of all, the country was never able to fully transfer its West German bargaining institutions to East Germany. As a consequence, the bargaining coverage in the East has never been able to catch up and still remains significantly below West German levels (Ellguth and Kohaut, 2017; figure 3.1).

2.1. The decline in bargaining coverage

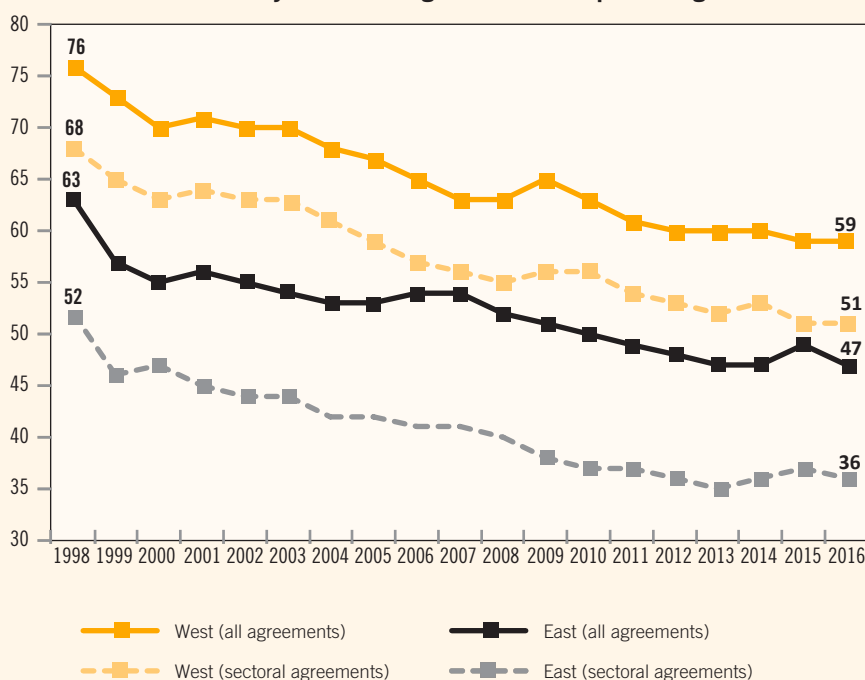
Profound changes since the mid-1990s led to increasing fragmentation and the partial erosion of collective bargaining in both East and West Germany (Artus, 2001; Bispinck and Schulten, 2010; Haipeter, 2013; Schulten and Bispinck, 2015; Addison et al., 2017; Oberfichtner and Schnabel, 2017). According to data provided by the IAB Establishment Panel (which is collected on an annual basis by the Institute of Employment Research (IAB) of the Federal Employment Agency), between 1998 and 2016 the proportion of workers covered by collective agreements in West Germany decreased from 76 per cent to 59 per cent, while at the same time dropping from 63 per cent to 47 per cent in the East (figure 3.1). For the whole of Germany, overall bargaining coverage in 2015 was estimated to be around 56 per cent, according to IAB data (Ellguth and Kohaut, 2017). The IAB Establishment Panel has been the standard source for calculating statistics on collective bargaining coverage in Germany since the end of the 1990s. More recently, the German Statistical Office has published an alternative calculation, based on the German Structure of Earnings Survey (SES) of 2014. According to this survey, overall bargaining coverage is not 56 per cent of employees (as calculated by the IAB), but only 45 per cent (Statistisches Bundesamt, 2016).

The erosion of bargaining coverage is even more pronounced when only sectoral agreements, considered to be the traditional core of the German bargaining model, are counted. Here, the IAB data show that in West Germany just half of all workers (51 per cent) are covered by a sectoral agreement, while in East Germany it is only a minority of 36 per cent. In addition, a further 8 per cent of West German and 11 per cent of East German workers are covered by company agreements signed by trade unions and individual firms (Ellguth and Kohaut, 2017).

In general, larger companies are far more likely to be covered by collective agreements while the majority of smaller companies have no agreement at all (Statistisches Bundesamt, 2016). Thus, the bargaining coverage of companies is quite low: in 2016 only 31 per cent of all companies in West Germany and 22 per cent of companies in East Germany were covered by a collective agreement (Ellguth and Kohaut, 2017).

The influence of collective bargaining in Germany would be somewhat underestimated if only the formal coverage is taken into account. There have always been a significant number of companies which, although not legally bound by a collective agreement, nevertheless use existing agreements as a reference for their own in-house wage-setting. According to IAB data, around half of all employees who are not formally covered by a collective agreement work in companies that have adopted valid

Figure 3.1. Collective bargaining coverage in Germany, 1998–2016 (workers covered by collective agreements as a percentage of all workers)



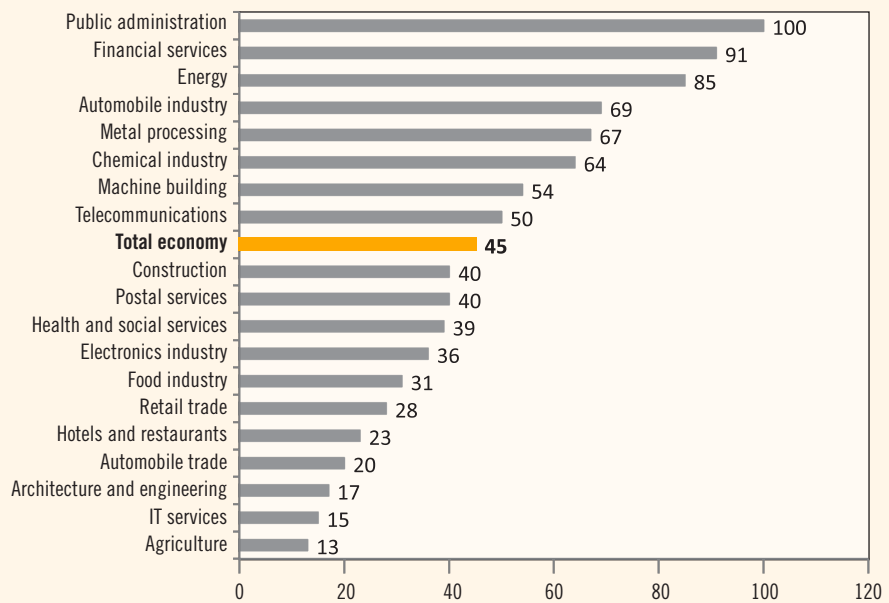
Source: IAB Establishment Panel (Ellguth and Kohaut, 2017).

sectoral agreements as an “orientation” in determining their own wages and working conditions (Ellguth and Kohaut, 2017). For the majority, however, orientation towards existing collective agreements means, in practice, that the companies pay below the collectively agreed wage standards (Addison et al., 2016; Berwing, 2016).

2.2 Differentiation between sectors and groups of workers

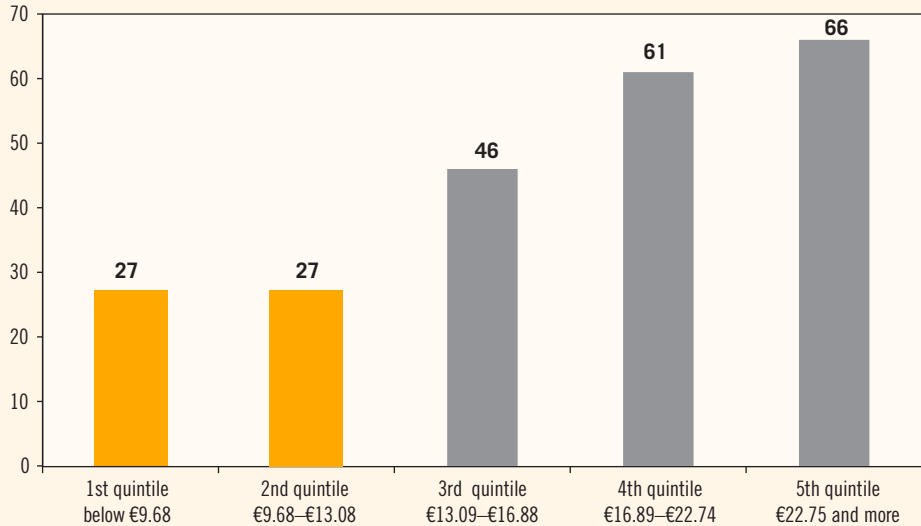
Apart from the general tendency towards a decline in bargaining coverage, there are significant differences across sectors (figure 3.2). In some sectors – such as public administration, financial services and energy – the vast majority of workers (over 80 per cent) are still covered by collective agreements. The same holds true for some core manufacturing industries such as the automobile and chemical industries, where over two thirds of workers are still covered by collective agreements. Sectors such as construction, transport, health and social services, and retail show a bargaining coverage of between 40 and 50 per cent, so that only about half of the workforce of these sectors is protected through collective bargaining. Finally, in a large number of service sectors (such as the retail trade, hotels and restaurants, the automotive trade, IT services and agriculture) a minority of about one third of the workforce, or even less, is covered by collective agreements.

Figure 3.2. Collective bargaining coverage in selected sectors, 2014 (workers covered by collective agreements as a percentage of all workers)



Source: Statistisches Bundesamt (2016), using data from the German Structure of Earnings Survey (SES).

Figure 3.3. Collective bargain coverage in different wage groups, 2014 (workers covered by collective agreements as a percentage of all workers in the respective wage group)



Source: Bundesministerium für Arbeit und Soziales (2017a, p. 74), using data from the German Structure of Earnings Survey (SES).

Apart from these large sectoral differences in the importance of collective bargaining, there is also a close relationship between collective bargaining coverage and wage levels. Compared with other European countries, Germany has a rather unusual pattern of bargaining coverage, which rises at higher wage levels. Among the workers in the two lowest wage quintiles in 2014 only little more than one quarter (27 per cent) were covered by a collective agreement; in contrast, bargaining coverage in the two highest wage quintiles was more than 60 per cent (figure 3.3). This suggests that the decline in German collective bargaining has been particularly marked in the low-wage sector where only a minority of workers are still protected by collective agreements.

2.3. The impact of the decline in collective bargaining on actual wage developments

A key motive for an employer to leave the collective bargaining system is to lower the wage costs. According to a study by Addison et al. (2016), in 2013 the average wage bill per employee in companies that were not covered by collective agreements but had adopted them for “orientation” purposes was only 75 per cent of the wage bill in companies that were covered by sectoral agreements. In companies that were not covered and did not orient themselves towards collective agreements it was even less at only 66 per cent. According to Amlinger (2014), workers covered by sector-level collective agreements still receive a significant wage premium of about 6 per cent.

The continuing decline and growing differentiation in German collective bargaining had a strong impact on actual wage development. First, Germany was faced with a large increase in overall wage inequality between various sectors and different groups of workers (Felbermayr, Baumgarten and Lehwald, 2015). The growing wage inequality was particularly pronounced at the lower end of the wage ladder, where Germany saw a marked increase in its low-wage sector, which is now one of the largest in Europe (Schulten and Bispinck, 2015).

Moreover, the decline in collective bargaining also had a dampening effect on overall wage increases which, during the 2000s, were the slowest in Europe (Schulten, 2015). As workers covered by collective agreements still receive a significant wage premium, the shrinkage in bargaining coverage contributed largely to a negative wage drift: actual wage increases, on average, were below the increase in collectively agreed wages (Schulten and Bispinck, 2015).

2.4. Reasons for the decline in collective bargaining

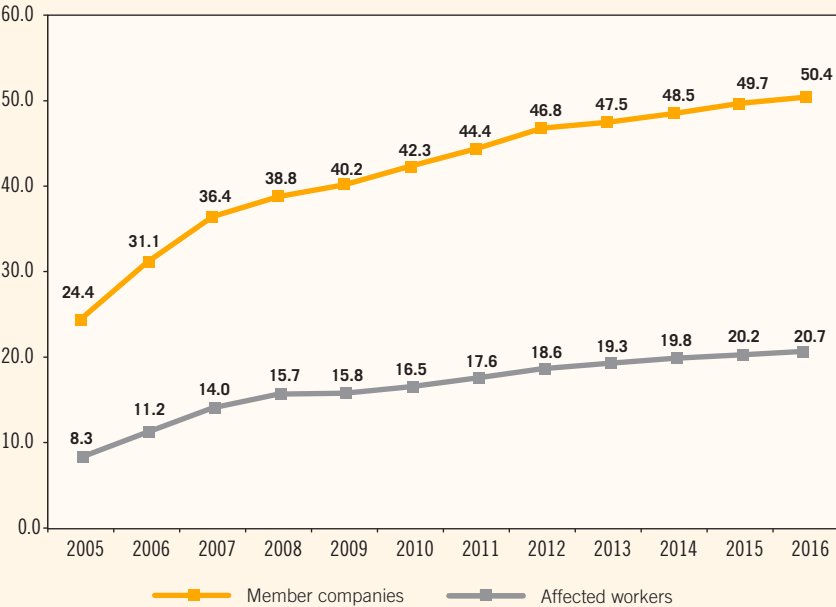
The reasons for the decline in German collective bargaining are manifold. First, there has been a significant weakening of trade union power. Since the early 1990s German trade unions have lost almost half of their members, so that union density decreased from 36 per cent in 1991 to around 18 per cent in 2011 (Dribbusch, Lehndorff and Schulten, 2017). In many sectors and companies, trade unions became simply too weak to force employers into negotiation. This is particularly true for large parts of the service sector where, consequently, there is no collective bargaining.

The position of German trade unions was further weakened by a significant deregulation of labour market protection. During the 2000s this led to a strong

increase in non-standard and precarious employment, which now accounts for more than one third of the German workforce (Bispinck and Schulten, 2011; Keller and Seifert, 2013). As a result, even sectors with more stable collective bargaining structures (such as manufacturing or public services) have seen a growing dualism of a relatively well protected “core” workforce and much more precarious “peripheral” groups of workers (Hassel, 2014). This dualism has run in parallel with a growing fragmentation of collective bargaining (Doellgast and Greer, 2007).

Finally, the decline in German collective bargaining is also the result of changing behaviour and lower acceptance among employers (Helfen, 2013; Nicklich, 2013; Deinert and Walser, 2015). Although a significant number of companies actively withdrew from collective bargaining, the greater problem was that newly established companies refused to accept collective agreements (Ellguth and Kohaut, 2010). The German employers’ associations reacted to this development by offering these companies a special membership status according to which they are no longer bound by the agreements signed by the association (Behrens, 2011, pp. 137 ff.; Behrens and Helfen, 2010). According to survey data provided by Behrens and Helfen (2016, p. 453), about half of all German employers’ associations have introduced into their statutes the option of a so-called ‘OT’ membership status (OT stands for *ohne Tariffbindung*, which means “not bound by a collective agreement”).

Figure 3.4. Members of the employers’ association Federation of German Employers’ Associations in the Metal and Electrical Engineering Industries with a special OT status, 2005–16 (as a percentage of all member companies and affected workers)



Source: Gesamtmetall (2017), calculations made by the author.

The extent to which employers make use of this OT membership in practice is rather unclear, as most employers' associations do not publish data on their membership. One of the few exceptions is the metal industry where, according to the employers' association Gesamtmetall [Federation of German Employers' Associations in the Metal and Electrical Engineering Industries], the percentage of companies using an OT membership status increased from around 25 per cent in 2006 to about 50 per cent in 2016 (figure 3.4). As larger companies are more likely to be covered by a collective agreement, the proportion of workers in an organized company with an OT status is around 20 per cent.

In other sectors the practical relevance of OT membership status might be even higher. Many employers' associations have created the option for companies to change between "covered" and "non-covered" status within a very short period of time (sometimes even in one day). In fact, the OT membership status has helped in keeping the organizational density of some employers' associations relatively stable, while it has further contributed to the weakening of collective bargaining (Behrens 2011, 2013).

Most of the economic, social and political developments that caused the decline in German collective bargaining can be found in one form or another in many other European countries that have had much higher and more stable bargaining coverage. What has distinguished Germany from many other European countries is the fact that the bargaining system received little support from the State. The most obvious indication of this was the very limited use of extensions which, in a couple of other European countries, was a core instrument in stabilizing collective bargaining (Schulten, Eldring and Naumann, 2015).

3. The legal basis of the German extension regime

The legal foundations for administrative extension of collective agreements go back to the beginning of the twentieth century. Germany was, in fact, the first European country to introduce nationwide regulation on extension as part of the newly adopted Collective Bargaining Order of 1918 (*Tarifvertragsordnung*) (Hamburger, 1939). According to the Order, collective agreements were directly binding only on members of the contracting parties – that is, trade union members in organized companies. If requested by at least one of the parties, however, the Minister of Labour was mandated to declare the agreement generally applicable, legally binding non-organized companies and their workers in a specific sector or area to the collectively agreed conditions. The only legal requirement for such an extension was the rather vague provision that the collective agreement is to be of "predominant importance".

3.1. The Collective Agreement Act

A new Collective Agreement Act (*Tarifvertragsgesetz (TVG)*) was adopted in 1949, which, with very few revisions, is still valid today. Like its predecessor of 1918, the Collective Agreement Act provides that collective agreements are legally binding only for the members of the signatory parties – that is, trade union members in organized firms. In contrast to many other European countries, Germany has no *erga omnes* regulation for non-organized workers in organized firms (Kamanabrou, 2011). In

practice, however, companies typically make no distinction between organized and non-organized workers in the provision of collectively agreed working conditions.

Article 5 of the Collective Agreement Act includes a separate section on extension (*Allgemeinverbindlichkeit*), which defines some basic preconditions for declaring an agreement to be generally binding so that it becomes valid also for non-organized firms. Some further procedural rules for extension are laid down in the Ordinance for the Implementation of the Collective Agreement Act (*Verordnung zur Durchführung des Tarifvertragsgesetzes (DVO TVG)*) of 1970. Until the most recent reform of the German extension regime in 2014 the following preconditions had to be fulfilled. First, the application for extension had to be made by at least one of the two bargaining parties.¹ The Ministry of Labour could then extend the agreement if all of the following three conditioners were fulfilled.

1. The sector-level collective agreement had to cover 50 per cent of all workers in the affected bargaining area. The criterion used here was the collective bargaining coverage of the employers – that is, the companies covered by the agreement had to represent at least 50 per cent of the workers in the affected bargaining area.²
2. The extension had to be desirable as a matter of “public interest”. Since the law did not provide exact criteria for determining “public interest”, however, it was de facto the Ministry of Labour which decided this, with wide room for interpretation.
3. The extension had to be approved by a majority of the Tarifausschuss [Collective Bargaining Committee] at the Ministry of Labour. This Committee was composed of three representatives, each from the peak-level organizations of trade unions and employers’ associations. Both parties thereby had de facto a veto power and could block the extension. The sectoral bargaining parties, which had applied for the extension, had the right to present a statement to the Collective Bargaining Committee but were not allowed to take part in the decision.

With the first review of the Collective Agreement Act in 1952 a provision was introduced whereby an application for an extension is not bound by the threshold of 50 per cent collective bargaining coverage in the situation of a “social crisis” (*sozialer Notstand*). In practice, however, this “social crisis clause” was never used.

If the above criteria were fulfilled, all of the provisions of the collective agreement could be extended. There were no limitations regarding the content of the agreement as long as it was in accordance with the law. The extension could take place at the national level through the Federal Ministry of Labour in the case of nationwide agreements, as well as at regional level through the Ministries of Labour of the Federal States in the case of regional agreements.

¹ Before the adoption of the Collective Agreement Act in 1949, there had been a proposal to give the State the right to take the initiative for an extension. However, at the time this proposal was rejected by both trade unions and employers’ associations (Bispinck, 2012).

² In fact, it was the British military administration in Germany that insisted on the threshold of a collective bargaining coverage of 50 per cent and rejected other proposals which demanded less restrictive criteria in order to have a higher number of extensions (Nautz, 1985; Wonneberger, 1992).

3.2. The Posted Workers Act

With the implementation of the European Union (EU) Posted Workers Directive (96/71/EC), through the introduction of the German Posted Workers Act (*Arbeitnehmer-Entsendegesetz (AEntG)*) in 1996, Germany created de facto a second legal system for the extension of collective agreements.³ This second system was introduced mainly to ensure that extended collective agreements apply also to posted workers from other EU countries.

In comparison with extension on the basis of the Collective Agreement Act, extension under the Posted Workers Act was far more limited. First, the validity of the Posted Workers Act was limited to specific sectors (Eichhorst, 2000). Initially, it applied only to the construction sector and some trades related to construction, but from 2007 the scope of the Act was gradually broadened, so that by 2016 there were around 20 sectors for which an extension of collective agreements based on the Posted Workers Law had become possible.

Second, the Posted Workers Act does not usually allow the extension of entire collective agreements but only certain provisions, such as:

- minimum rates of remuneration, including overtime rates;
- the length and payment of annual leave, together with holiday allowances;
- maximum working times and minimum rest periods;
- conditions for the provision of temporary agency workers;
- occupational health and safety and the protection of particular groups; and
- gender equality and other non-discrimination measures.

Third, extension on the basis of the Posted Workers Act requires nationwide collective agreements and are administered only at national rather than at regional level.

Apart from these restrictions, the Act contains preconditions and procedural rules for extension which, in comparison with the Collective Agreement Act, are more straightforward. First, if requested by both parties to the agreement, an extension does not need the approval of the national Collective Bargaining Committee, but may be legislated by decree of the Ministry of Labour. Initially, the Posted Workers Act had also foreseen endorsement by the national Collective Bargaining Committee, but this was abolished in the late 1990s when the employers' representatives on the Committee threatened to refuse to extend the collective agreements in the construction industry (Däubler, 1997; Eichhorst, 2000; Dombre, 2007). The outcome of that conflict, within the employers camp, was that the Collective Bargaining Committee now saw its role reduced to an advisory function under the Posted Workers Act. A further difference between the two systems is that extensions under the Posted Workers Act do not

³ In addition, during the 2000s many states (*Länder*) started to introduce pay clauses into their public procurement laws. These clauses obliged companies in receipt of public contracts to accept the employment terms stipulated in the prevailing collective agreement, even when these agreements were not generally applicable. In Germany these pay clauses were often called the "small extension" (*kleine Allgemeinverbindlicherklärung*). However, as a result of the *Rüffert* judgment of the European Court of Justice in 2008 (C-346/06) these pay clauses were no longer permitted as they were claimed to contravene the fundamental principle of freedom of services in the EU. Today, pay clauses in public procurement laws refer only to extended collective agreements, with the exception of the public transport sector which has a special legal status under EU law (Schulten et al., 2012).

require a quorum of a collective bargaining coverage of 50 per cent for the relevant agreement. In this respect such extensions are less restrictive than those based on the Collective Agreement Act.

4. The use of extension in practice

In January 2016 the German Ministry of Labour registered approximately 71,900 collective agreements in force. Among them were around 30,000 sector-level agreements, of which only 444 (1.5 per cent) were declared to be generally binding (Bundesministerium für Arbeit und Soziales, 2017b). This shows, at first glance, that in practice the overall importance of extension for German collective bargaining is rather limited and that it is relevant mainly in a small number of sectors.

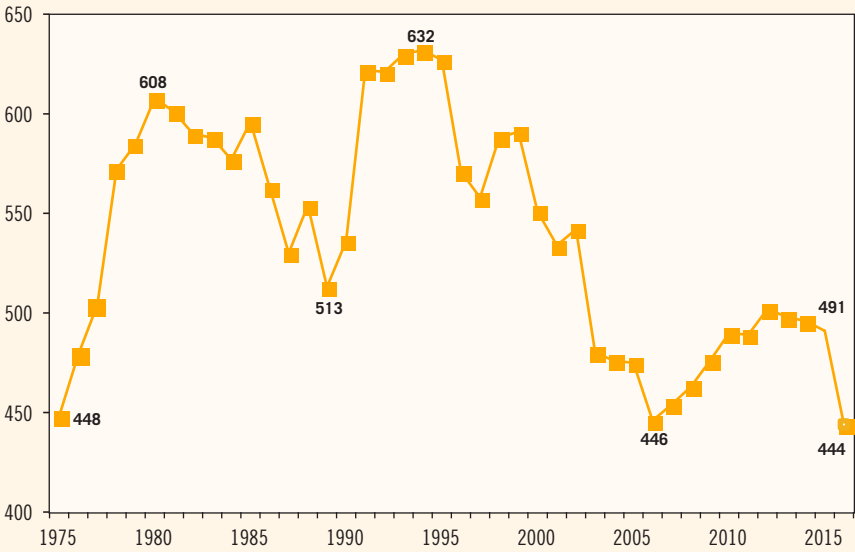
4.1. Historical development of the use of extension

When the legal basis for extension was introduced after the First World War extensions became relatively widespread during the 1920s. In 1929, about 20 per cent of all collective agreements for blue-collar workers and as much as 45 per cent of the agreements for white-collar workers were extended (Wiedemann et al., 2007, p. 1516). During the same period, however, extensions were often tied to compulsory arbitration by the State, which imposed certain conditions without the agreement of the bargaining parties. During the Nazi period all free collective bargaining was abolished and replaced by statutory tariff orders. Given this historical legacy, after the Second World War there was a strong emphasis on the principle of collective bargaining autonomy and the establishment of free collective bargaining without state interference. This might also explain why neither the employers' associations nor the trade unions have actively promoted the extension of collective bargaining during the post-war period.

In 1959 – ten years after the reintroduction of the legal framework for extension – there were in total 121 collective agreements declared to be generally binding out of 5,554 agreements in force, which was just about 2.2 per cent of all agreements (Ringer, 1959). The number of extended agreements increased steadily during the 1960s and 1970s to a temporary peak of around 600 in the early 1980s (figure 3.5). In 1978 there were 572 extensions out of 7,752 agreements in force, corresponding to 7.4 per cent of all agreements (Boedler and Keiser, 1979). After the 1980s, however, the absolute number of extended agreements dropped by more than 15 per cent, whereas the total number of valid agreements continued to grow. With German unification in 1991, the number of extended collective agreements increased temporarily as some of the new collective agreements in East Germany were also declared to be generally binding (Bispinck, 2012). From the mid-1990s, however, there was again a sharp downturn in the number of extended agreements which continued until the mid-2000s, when a slight recovery began.

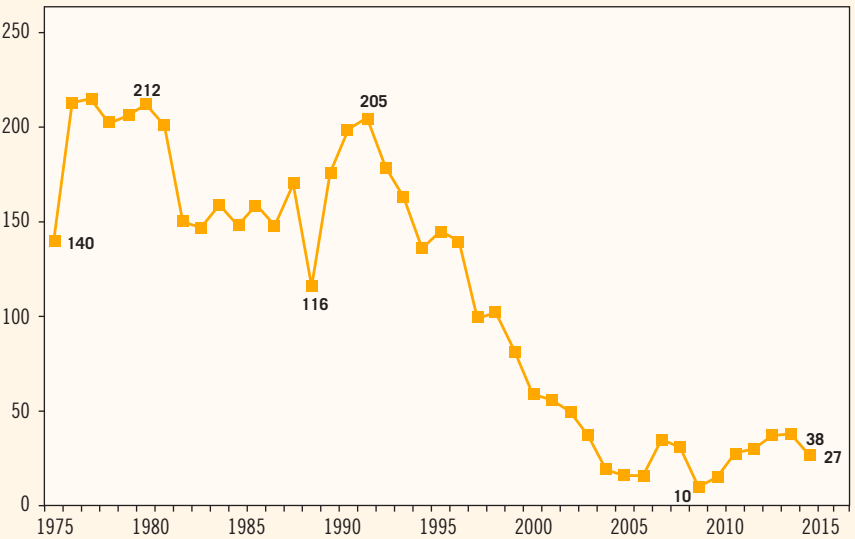
The limited importance of extension becomes even more obvious when we consider only the number of extensions of new agreements concluded in a given year (figure 3.6). In the second half of the 1970s around 200 new collective agreements were extended every year. In the 1980s this figure dropped to around 150. After the first half of the 1990s the number of extended new agreements per year decreased steadily until a historical low point of only ten extended new collective agreements in 2010. More recently there was again a slight increase to 38 extended collective agreements in 2015, while it dropped again to 27 in 2016.

Figure 3.5. Number of extended collective agreements in force, 1975–2016



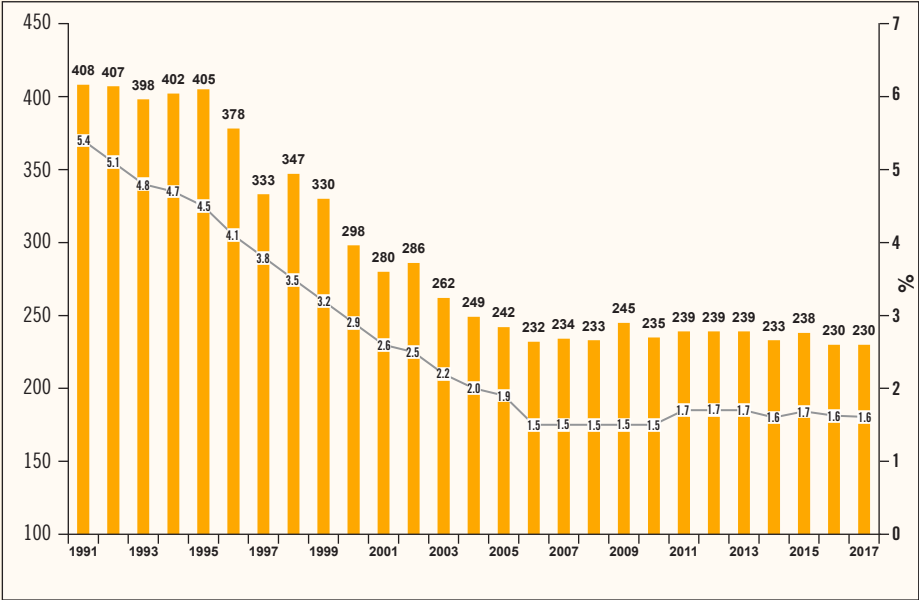
Source: Bundesministerium für Arbeit und Soziales (2017b).

Figure 3.6. Number of extensions of newly concluded collective agreements per year, 1975–2016



Source: Bundesministerium für Arbeit und Soziales (2017b).

Figure 3.7. Extended original* collective agreements in force, 1991–2017
(in absolute numbers and as a percentage of all original collective agreements)



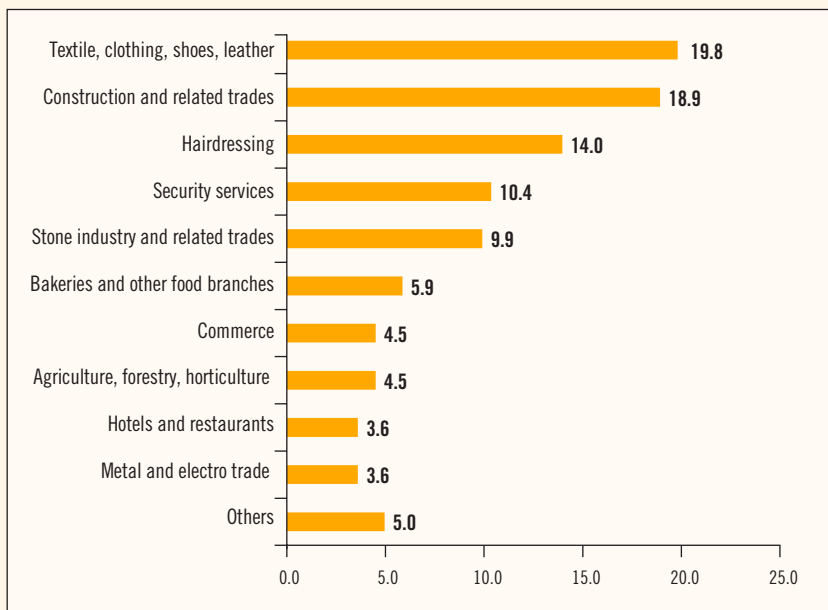
* excluding agreements amending existing agreements
Source: Calculations made by the author, based on data provided by the German Ministry of Labour.

Considering only “original” agreements (*Ursprungstarifverträge*) – that is, excluding all agreements which simply amend existing agreements (*Änderungs- und Ergänzungstarifverträge*) – the percentage of extended collective agreements in Germany decreased from 5.4 per cent in 1991 to 1.5 per cent in 2006, and has since stabilized at between 1.5 and 1.7 per cent (figure 3.7; Bispinck, 2012).

4.2. Sectoral composition of extended collective agreements

Although the general impact of extension on German collective bargaining has been rather limited, it has always been the case that extension is very important in a small number of sectors. In July 2017 nearly three quarters (73 per cent) of all extended collective agreements in force were from just five sectors: textile and clothing, construction and construction-related trades, hairdressing, security services, and the stone industry and related trades (figure 3.8). In addition, a few extensions can also be seen in bakeries and other food branches, commerce, agriculture, hotels and restaurants, and the metal and electronics trades. Most of these sectors are rather labour intensive, cover a high number of small and medium-sized companies, and are oriented mainly towards domestic markets.

Figure 3.8. Sectoral composition of extended original* collective agreements in Germany, 2017 (as a percentage of all extended original* collective agreements in force)**



* excluding agreements amending existing agreements; ** effective July 2017.

Source: Bundesministerium für Arbeit und Soziales (2017b), calculations by the author

The sectoral composition of extended collective agreements has been relatively stable for decades (Bispinck, 2012). The major exception is commerce, which includes the retail and wholesale trades. Until 2010 almost all agreements in commerce were declared to be generally binding. The situation changed radically after the employers' associations in the commerce sector introduced an OT-membership status, thereby introducing an organizational principle that was fundamentally in conflict with extension (Behrens, 2011). After the commerce sector had largely abolished extended collective agreements (subject to a very few exceptions in the form of regional framework agreements), during the 2000s it faced a sharp decline in sectoral bargaining coverage and a strong increase in wage inequality between workers who were covered by collective agreements and those who were not (Felbermayr and Lehwald, 2015; Schulten and Bispinck, 2018).

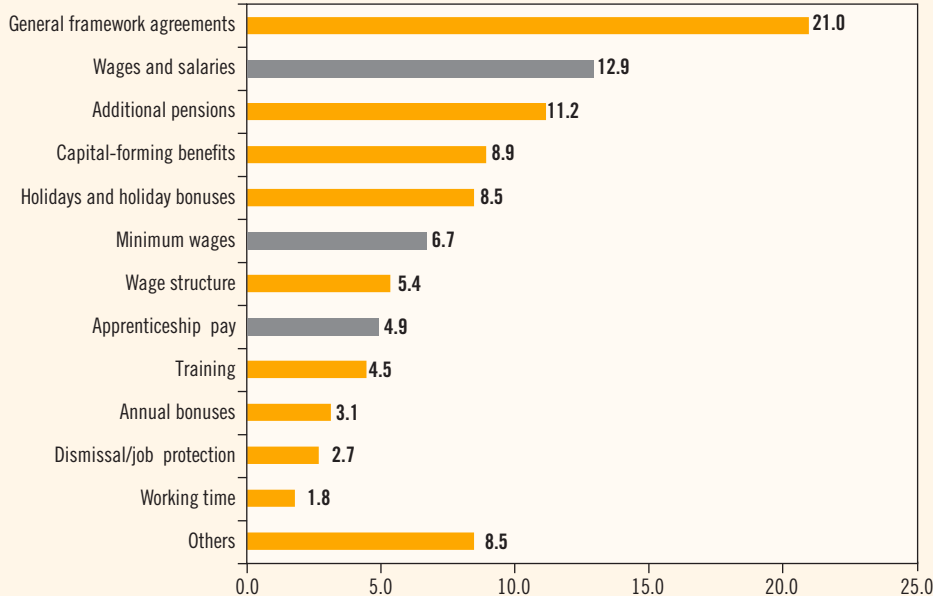
4.3. The content of extended collective agreements

While the sectoral focus of extended collective agreements has remained relatively stable, their content has undergone some significant changes. During the 1950s between 55 and 60 per cent of all extended agreements were wage agreements,

so that the agreed wage increases were declared generally binding for the whole sector (Wonneberger, 1992). During the 1970s and 1980s the proportion dropped to around 40 per cent. Since the early 1990s the importance of wage agreements among extended agreements has shown a sharp decline from around 30 per cent in 1991 to about 15 per cent in 2011 (Bispinck, 2012) and 13 per cent in 2017 (figure 3.9). While in 1990 there were still 17 sectors with extended wage agreements, by April 2016 there remained only seven sectors (the electronics trade, transport services at airports, band weaving, hairdressing, hotels and restaurants, private bus services and security services) in which wage agreements are extended on the basis of the Collective Agreement Act (Bundesministerium für Arbeit und Soziales, 2017b). This decline is partly compensated by the newly extended agreements under the Posted Workers Act, which cover mostly the lowest wage groups and thus define some sector-wide minimum wages.

The great majority of around 80 per cent of all extended collective agreements in Germany covers issues other than basic wages (figure 3.9). More than one fifth of the extensions concerns general framework agreements (*Manteltarifverträge*), which typically include several aspects of working and employment conditions (such as

Figure 3.9. Content of extended original* collective agreements in Germany, 2017 (as a percentage of all extended original* collective agreements in force)**



* excluding agreements amending existing agreements; ** effective July 2017.
Source: Bundesministerium für Arbeit und Soziales (2017b), calculations by the author.

pay structure, working time, holidays and social contributions). In addition, there is a relatively large number of extended agreements on additional pensions, capital-forming benefits, holidays and holiday bonuses. A few extended agreements regulate annual bonuses, wage structures, training, employment protection and working time. Finally, especially in the construction industry, there are extended agreements to secure sectoral social funds which are run jointly by employers' associations and trade unions and which finance vocational and further training, holiday payments and additional pensions (Asshoff, 2012).

With regard to geographical coverage, most extensions take place at the regional level through the Ministries of Labour of the German Federal States. While the proportion varies from year to year, between 20 and 40 per cent of all extensions concern nationwide collective agreements (calculations by the author on the basis of Bundesregierung (2017)).

4.4. Extensions on the basis of the Posted Workers Act

While extensions of wage agreements under the Collective Agreement Act are becoming the exception, the number of wage agreements extended under the German Posted Workers Act is increasing. Although this second legal system of extension was introduced in 1996, for more than a decade its application was restricted to the construction industry and some construction-related trades (such as roofing, painting and the electronics trade). In 2007 the Posted Workers Act was extended, for the first time, to the commercial cleaning sector. Since 2009 the Act has gradually been opened to more and more sectors, such as care services and further training. By autumn 2017 there were extended wage agreements on the basis of the Posted Workers Act in 18 sectors (table 3.1).

The major difference between extensions of wage agreements under the two Acts is that the Collective Agreement Act allows extension of an entire wage structure (including all wage grades) while extension under the Posted Workers Act usually leads only to extension of a sector-wide minimum wage. In some sectors (such as construction) there are separate minimum wages for qualified and non-qualified workers, as well as for workers in West and East Germany. In autumn 2017 the extended collectively agreed minimum wages varied between €8.75 per hour in the German meat industry and €16.13 for money transport workers in some regions of West Germany (table 3.1).⁴

5. The 2014 reform of the legal basis for extension

Against the background of a continual decline in German collective bargaining and its negative implications of increasing wage inequality, since the mid-2000s there has been an ongoing debate on how to strengthen collective wage-setting. A key issue was whether Germany should have a mandatory national minimum wage. This,

⁴ According to the new German Minimum Wage Act from 2015, collectively agreed sector-wide minimum wages, which were extended on the basis of the Posted Workers Act, can be below the statutory minimum wage for a transitional period until the end of 2017.

Table 3.1. Collectively agreed minimum wages extended in accordance with the Posted Workers Act, January 2018 (in € per hour)

| Sector | West Germany | East Germany | Sector | West Germany | East Germany |
|---------------------|--------------|--------------|--|--------------|--------------|
| Agriculture | 9.10 | | Money processing* | 9.88–13.24 | |
| Care services | 10.20 | 9.50 | Money transports* | 11.64–16.13 | |
| Chimney sweeping | 12.95 | | Painting | 10.35/13.10 | 10.35/11.85 |
| Commercial cleaning | 10.00/13.25 | 9.05/11.53 | Roofing | 12.25 | |
| Construction | 11.30/14.70 | 11.30 | Scaffolding | 11.00 | |
| Electronics trade | 10.65 | 10.40 | Stonemasonry | 11.40 | 11.20 |
| Further training | 14.60 | | Temporary agency work** | 9.23 | 8.91 |
| Laundry services | 8.84 | | Textiles and clothing | 8.84 | |
| Meat industry | 8.75 | | Trade relating to neon advertising signs | 10.31/13.26 | |

* Regional differences; ** Extended on the basis of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz); / = indicates two minimum wages (for non-qualified/qualified); – = indicates a range of minimum wages pursuant to regional agreements.

Source: WSI Collective Agreement Archive, Nov. 2017. Available at: www.boeckler.de/wsi-tarifarchiv_50804.htm.

for a long time, had been rejected by both employers and trade unions as being in contradiction with the principle of collective bargaining autonomy. With bargaining coverage sharply dropping, especially in low-wage sectors, German trade unions finally revised their position and started to campaign for the introduction of a statutory minimum wage (Schulten and Bispinck, 2015). Besides the minimum wage, there was a parallel debate on how to stop the downward trend and how to reinforce collective bargaining. In principle there were two strategic approaches (Bispinck, Dribbusch and Schulten, 2010; Bispinck, 2016). The first approach is the restabilization of collective bargaining “from below” through the strengthening of the trade unions’ organizational power base, so that they can force employers into negotiating and signing collective agreements. Since around 2006 German trade unions have put increased efforts into organizing various campaigns with the aim of recruiting new members and activating existing members (Kocsis, Sterkel and Wiedemuth, 2013; Wetzel, 2013). The second approach can be called a restabilization of collective bargaining “from above”, focusing on political and legal support for collective bargaining. Considering the experience of other European countries, where a broader use of extension has often contributed to higher and more stable bargaining coverage (Schulten, Eldring and Naumann, 2015), the debate has finally concentrated on reform of the German extension regime.

5.1. The debates on the reform of extension⁵

The first proposals for reform of the legal framework for the extension of collective agreements in Germany were made in the early 2000s (Bispinck, Kirsch and Schäfer, 2003; Zachert, 2003; Peter, Kempen and Zachert, 2004). It took almost another decade until the reform debate reached the political arena and some of the political parties added their own reform proposals to the agenda for the German Parliament.⁶ In 2012 the Parliament organized the first public hearing on a possible reform of extension regulation, with representatives from employers' associations and trade unions, as well as various academic experts (Deutscher Bundestag, 2012).

The debate focused mainly on two obstacles, which became widely regarded as the major reasons for the decline in extensions since the 1990s. The first was the threshold of 50 per cent coverage of an agreement before extension, which – against the background of the declining organization rate of employers, and thus of coverage rates – had become more and more difficult to reach in many sectors. Consequently, proposals were made either to reduce or abolish that threshold. The second obstacle concerned the role of the national or regional Collective Bargaining Committees where representatives from the peak employers' organization, the Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA) [Confederation of German Employers' Associations] and its regional representatives have, on many occasions, given their veto against an extension even when their own sectoral member organization has supported it. Every year, since 2000, the Collective Bargaining Committees have rejected some applications for extension. In some years these rejections amounted to 18 per cent of all applications (figure 3.10). In almost every case it was the employers' side that rejected the application.⁷ Moreover, many applications were cancelled by the applicants in order to avoid rejection by the Collective Bargaining Committees. In some years more than 30 per cent of all applications were de facto blocked either by rejections or cancellations (figure 3.10). With this in mind, reform proposals suggested either giving the sectoral bargaining parties a vote in the Collective Bargaining Committee or reducing the Committee's role to that of a consulting body, with no final vote.

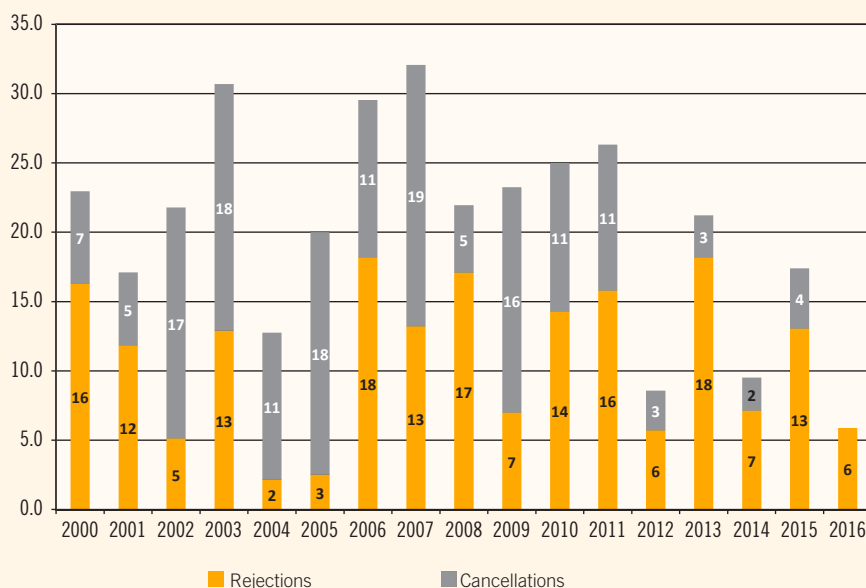
The positions taken among employers and trade unions with regard to reform of the German extension regime have been rather different. While the peak trade union organization, Deutscher Gewerkschaftsbund (DGB) [Confederation of German Trade Unions], has strongly supported reform and has even presented its own detailed

⁵ The following is partially based on in-depth interviews with representatives of the Confederation of German Employers' Associations (BDA) and the Confederation of German Trade Unions (DGB). The author thanks both organizations for their kind cooperation.

⁶ For a more detailed discussion of the reform proposals of the various political parties see Däubler (2012) and Schulten and Bispinck (2013).

⁷ To the author's knowledge there were very few cases where rejection of an application for extension came from the unions. This occurred when the application came from minor non-DGB affiliated trade unions (usually members of the so-called Christian Trade Union Confederation (CGB)). The latter were accused of not being representative and of undermining existing collective agreements of DGB affiliates.

Figure 3.10. Rejections and cancellations of applications for extension in Germany, 2000–2016 (as a percentage of all applications for extension)



Source: Bundesregierung (2017); calculations by the author.

reform proposal (DGB, 2012), the Confederation of German Employers' Associations saw no need for reform (BDA, 2014). The peak employers' association takes the principled viewpoint that extension should be used only in "exceptional cases" and must not become the rule (BDA, 2010, 2017). According to the Confederation of German Employers' Associations, a more widespread use of extension would "weaken the principle of collective bargaining autonomy" and make "membership in employers' associations and trade unions less attractive" (BDA 2014, p. 2). In contrast, some of the sectoral employers' associations have strongly supported reform of extension law in order to secure their own extended agreements (Schulten and Bispinck, 2013). In the construction industry, for example, the employers' associations have demanded less restrictive criteria for extension in order to safeguard fair competition and to stabilize social funds in the sector (Zentralverband Deutsches Baugewerbe, 2013).

5.2. The new legal provisions for extension

In July 2014 the German Parliament finally adopted a legislative package on "the strengthening of collective bargaining autonomy" (*Gesetz zur Stärkung der Tarifautonomie*), which, apart from introducing a national statutory minimum wage, includes some revisions of the legal preconditions for extension of collective agreements (Bundesregierung, 2014; Preis and Peramato, 2017; table 3.2). In justifying the new

law the German Government has explicitly stated that the extension of collective agreements is seen as an instrument to support collective bargaining, which should be strengthened (Bundesregierung, 2014, pp. 26 ff.). The most important change has been the abolition of the 50 per cent bargaining coverage threshold as a strict precondition for extension. Instead, the new article 5 of the Collective Agreement Act emphasizes that extensions must be “in the public interest”, which would be the case if any one of the following conditions is satisfied:

- the agreement is of “predominant importance”; for the calculation of importance not only the formal but the actual coverage should be taken into account, which includes companies which take over the agreement as an orientation mechanism without being formally covered;
- the extension is necessary to prevent an undesirable economic development; or
- the extension is needed to secure joint social funds at sectoral level.

The abolition of a strict bargaining coverage threshold and the introduction of a broader definition of public interest should give the Ministry of Labour more flexibility and room for manoeuvre in its decisions on extension. What has not been changed, however, is the role of the Collective Bargaining Committee, which is still required to approve these decisions.

Table 3.2. Two systems for extension of collective agreements in Germany, 2015*

| Preconditions, procedures, content and scope | Collective Agreement Act (1949) | Posted Workers Act (1996) |
|---|--|---|
| A quorum of a collective bargaining coverage of 50% | Until 2015: Yes Since 2015: No | No |
| Extension has to be “in the public interest” | Yes Since 2015 with a more concrete definition | Yes |
| Application for extension | Until 2015: At least one party Since 2015: Both parties | Both parties |
| Approval of the Collective Bargaining Committee | Yes | No |
| Content of extended agreements | No limitation | Limited to minimum wages and other minimum conditions |
| Sectoral scope | Total economy | Until 2015: Limited to certain sectors Since 2015: Total economy |
| Collective agreements to be extended | National and regional agreements | Only nationwide agreements |

* Newly introduced provisions under the Law on the Strengthening of Collective Bargaining Autonomy (Bundesregierung, 2014).
Source: WSI Collective Agreement Archive. Available at: www.boeckler.de/wsi-tarifarchiv_50804.htm.

A second major change concerns the Posted Workers Act, which could be used in a limited number of sectors that are explicitly mentioned in the Act. With the recent reform the Posted Workers Act has been opened to the whole economy, so that in principle all sectors can use this second, less restrictive system of extension, at least for setting generally applicable sectoral minimum wages and conditions.

6. Conclusion: Has the reform of extension law contributed to strengthening collective bargaining in Germany?

The recent reform of Germany's collective bargaining law, in principle, has facilitated the legal preconditions for extension, with the result of declaring more collective agreements to be generally binding. However, since the reform came into force in mid-August 2014 no significant changes in the number and practice of extensions have been observed (Bundesministerium für Arbeit und Soziales, 2017b; Bundesregierung, 2017; figures 3.7–3.9). This could indicate that there are still significant obstacles which prevent German collective bargaining from achieving a greater number of extensions.

The first obstacle relates to the preconditions for an extension of a collective agreement. While the reform aimed to facilitate the procedures by replacing the strict bargaining coverage threshold with a more flexible criterion of “predominant importance”, in practice the Ministries are still using bargaining coverage to prove the relevance of the agreements and to avoid legal uncertainties (Körzell and Nassibi, 2017). Moreover, one year after the extension reforms were put into place, there have been various legal claims against the legitimacy of extensions in specific cases (Bundesregierung 2016, p. 4). This makes the (State) Ministries very cautious in examining whether the legal preconditions for an extension are fulfilled.

Another major obstacle lies in the fact that the recent reform did not change the role of the Collective Bargaining Committee and remove the de facto veto power of the peak employers' and trade union organizations. Since the reform in 2014 there have been seven cases in which the Federal State-level Collective Bargaining Committees have refused applications for extension (table 3.3). Six of them were rejected on the initiative of the employers' representatives. An example is the case of hotels and restaurants in the State of Saarland (Wollschläger, 2015). In July 2015 the sectoral trade union and employers' association jointly applied for the extension of a regional collective agreement in order to guarantee fair competition and to increase the attractiveness of working in the sector (DEHOGA Saarland, 2014). The regional organization of the peak employers' association, Confederation of German Employers' Associations, however, vetoed the extension, arguing that it was not in the public interest as defined in the Collective Agreement Act.

While cases of an open veto by the peak employers' association against the will of its own sectoral member organizations are relatively rare, the more common occurrence is that sectoral organizations are not even considering applying for extension when they know in advance that the peak employers' association will reject it. In January 2015 the Confederation of German Employers' Associations agreed new guidelines for the extension of collective agreements in order to coordinate its policy with

Table 3.3. Rejections of applications for extension through the employers’ representatives at Federal State-level Collective Bargaining Committees since 2015

| Sector | Federal State | Date |
|--|--------------------|--------------|
| Hotels and restaurants | Saarland | 9 July 2015 |
| Security services at commercial airports | Hesse | 13 Oct. 2015 |
| Elderly care | Bremen | 14 Dec. 2015 |
| Elderly care | Lower Saxony | 25 Jan. 2016 |
| Hairdressing | Schleswig-Holstein | 14 Dec. 2016 |
| Security services* | Saxony | 20 Dec. 2016 |
| Security services at commercial airports | Saxony | 28 June 2017 |

* rejected by the trade union representatives.
Source: Bundesanzeiger (various issues).

its regional affiliates (BDA, 2016, p. 60). Although the Confederation of German Employers’ Associations has declared that it will impartially review every request for extension, it still follows a rather restrictive approach for extensions to remain an exception.

The strong scepticism against extensions exists, however, not only at peak level but also in many sectoral employers’ organizations. According to a survey of employers’ associations in 2012, three quarters of them were against the proposals to facilitate the legal conditions for extension (Nicklich, 2013, p. 529). When, for example, during the 2017 collective bargaining round, the service sector trade union, Vereinte Dienstleistungsgewerkschaft (ver.di) [United Services Union], launched a campaign for the reintroduction of extension in the retail trade, this demand was strongly rejected by the sectoral employers’ organization, Handelsverband Deutschland (HDE) [German Retail Trade Association], although some of its member companies had openly argued in favour of extension (Schulten and Bispinck, 2018).

The strong scepticism of large parts of German employers’ associations against extension is all the more astonishing given that in many other European countries the employers are among its strongest supporters. This is not only because extension protects employers against unfair outsider competition, but also because it creates an incentive for companies to become members of an employers’ association (Schulten, Eldring and Naumann, 2015). A German peculiarity, however, is that many employers’ associations introduced an OT membership status for companies which did not want to be bound by collective agreements. The German employers’ associations have thereby established an organizational logic which fundamentally contradicts the principle of extension.

As the legal reform of 2014, so far, has largely failed to enable more extensions, the German trade unions are demanding further reforms, which basically contain three points (DGB, 2017; Körzell and Nassibi, 2017). First, the unions are asking for further revisions to the German Collective Bargaining Law in order to clarify the circumstances in which an extension is in the “public interest”. They emphasize, in particular, that the current provision on the “predominant importance” of the collective agreement should no longer be used as a bargaining coverage threshold and that other criteria, such as the provision of equitable working conditions and stability of the bargaining system, should be of equal importance. In this they are supported by legal experts, who argue that an effective extension system need not use any quantitative criteria for the representativeness of the collective agreement (Preis and Peramato, 2017). Second, the unions are demanding the abolition of the veto power of the Collective Bargaining Committees (Körzell and Nassibi, 2017). For this, they propose amending the decision procedure, so that an application for extension can be rejected only by a majority of the votes within the Committee. This would fundamentally strengthen applicants for an extension. Finally, the unions have demanded that employers “stop the mischief of OT-membership” (Hoffmann 2015, p. 16) and use the new opportunities of extension for a revival of German collective bargaining. Without any changes in the organizational behaviour of many German employers’ associations it is likely that the recent reform of extension law will bear little fruit and extensions will remain a relatively rare phenomenon in a limited number of sectors.

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4. Reregulating the extension of collective agreements in Portugal: A case study

Reinhard Naumann

1. Introduction

In the political debate about the crisis in the Eurozone and the so-called GIPSIs¹ Portugal is frequently presented as a positive example to show the correctness of the policies imposed by the “Troika”² on countries that asked for a bailout. The Portuguese Partido Social Democrata (PSD) [Social Democratic Party] Government (2011–15) implemented a large part of the stipulations in the Memorandum of Understanding of 2011 (MoU, 2011) and concluded the adjustment programme in June 2014, some months before the deadline set in the Memorandum and without making use of the last tranche of the financial support. During the course of implementing the programme, the country was able to achieve a positive balance of payments (for the first time in decades). After the conclusion of the programme the economy registered a moderate growth (following the deep recession of 2011–13) and unemployment was decreasing.

The demand for a profound change in the extension mechanism for collective agreements was one of the central elements of the stipulations in the Memorandum regarding the reregulation of labour relations. The radical reduction, or even the abolition of extension is seen as a precondition for the creation of adequate wage flexibility, with further decentralization of pay bargaining, preferably at enterprise level (OECD, 2012 and 2014; Portugal and Vilares, 2013; Addison, Portugal and Vilares, 2015).

The reforms of 2011–12 and 2014 moved the Portuguese system of extension away from the quasi-automatic regime that had applied prior to the crisis (see Chapter 1). These were not the only changes – there were other measures favouring enterprise bargaining and already before the crisis there had been important changes in the legal framework of collective bargaining, inherited from the first years after the democratic transition of 1974. The most important of these changes – some obtained through negotiations, some imposed by a right-of-centre government – regarded the validity of agreements and their renewal. To understand, and assess, the impact of the reforms made during the current crisis, one has to see them in the context of these earlier reforms.

¹ Greece, Ireland, Portugal, Spain and Italy.

² International Monetary Fund (IMF), European Commission, and European Central Bank.

The chapter begins with a brief historical overview of the main features and developments of the Portuguese system of industrial relations since the democratic transition of 1974 (Section 2), followed by a brief description of the collective bargaining system and the issues at stake in the reforms of 2003 and 2009 (Section 3). The reform pressure during the crisis, stipulated in the Memorandum with the Troika, is described in Section 4. Section 5 describes the system of “quasi-automatic” extension before the recent reforms and summarizes the main problems and criticisms. To assess the effect of extension on the coverage of agreements, before and after the reforms (both those of the 1990s and those during the crisis), bargaining coverage must be compared with the organization rate of employers’ organizations rather than with union density, as has been common. Moreover, to assess the impact on the vitality of collective bargaining, and its relevance for actual pay setting (above the mandatory national minimum wage), we must distinguish between the stock of (old) agreements that are still valid and those that are renewed in any given year. Section 6 sets about this task and presents the statistical yardstick needed for the assessment of the effect of the reforms on collective bargaining. Section 7 presents the political and scientific debate about the benefits and costs of extension, with employers and unions favouring extension and economists criticizing its stifling effects on wages. The direct impact of the 2011–12 measures is assessed in Section 8. The reform of the reform in 2014 and the move towards a less restrictive regime on extension are the topics of Section 9. Section 10 reviews the ongoing debate over extension and other labour market reforms, with contrasting views of the European Commission and the IMF. The concluding section presents a resumed “policy story” and overall evaluation of the process.

2. Industrial relations in Portugal

The structures and strategies of the principal actors in industrial relations in Portugal have their origin in the revolutionary process after the fall of the dictatorship in 1974 (Barreto and Naumann, 1998). Since then, Portuguese society has undergone profound changes in the context of the country’s integration into the European Union (EU) and into the Eurozone. The largest trade union confederation, the CGTP-IN,³ continues to be strongly tied to its highly politicized and antagonistic roots, in contrast to the other actors who have built a basic consensus on their joint role in the Portuguese economy and society. Employers’ peak-level organizations have their origins in various sectors (manufacturing, services, agriculture and tourism) while divisions among union confederations are politically motivated. The CGTP-IN is dominated by a communist current and the UGT has a social-liberal orientation close to the Socialist Party and to the liberal-conservative PSD.⁴ The UGT has signed all tripartite agreements.

Employers and unions have been trying to modernize the model of industrial relations that was created during the first years after the revolution and to adapt its core (collective bargaining) to the needs of a liberal economy in the context of European

³ Confederação Geral dos Trabalhadores Portugueses (CGTP) [General Confederation of Portuguese Workers].

⁴ The União Geral de Trabalhadores (UGT) [General Union of Workers] was founded in 1978–79 as a result of a deep political divide in the labour movement, which emerged during the period of democratic transition.

and global integration. Some governments have played an important role in this process.

The system of industrial relations in Portugal can be divided into three levels:

- (a) the tripartite macro-level negotiations carried out by the employers' and trade union confederations and the national government at the Standing Committee for Social Concertation (CPCS);
- (b) collective bargaining, mostly in the form of branch-level agreements signed by basic or intermediate-level organizations (employers' associations or federations of associations, and trade union federations or individual unions); and
- (c) company-level negotiations and consultations on working conditions, dominated by the trade unions (union delegates and committees), with a secondary role for the Comissões de Trabalhadores [works councils].

De jure, there is a two-tier system of workers' representation (unions and works councils), but in fact the system is strongly dominated by the unions. A major reason for this is that the unions have the exclusive legal right to sign binding collective agreements and to call for strikes.

3. Collective bargaining: Shifting power relations, stagnation and reform

The creation of the collective bargaining system during the transition to democracy occurred in a context that was particularly favourable for trade unions and the regulatory framework (labour legislation and jurisdiction, the law on collective agreements), which was shaped in these years (1974 and after), has a strong pro-labour bias. This first phase in collective bargaining produced a broad framework of collective agreements with extensive and detailed stipulations with regard to working conditions and was followed by a long period of stagnation brought about by increasingly irreconcilable positions of the contracting parties. Since the 1980s, in the context of the liberalization and opening of the national economy to European and global competition, employers exerted growing pressure on unions and governments to make changes in the regulation of employment relations. Under the leadership of the manufacturers' confederation (the CIP⁵) employers obtained part of what they wanted during the right-of-centre Government led by Prime Minister José Manuel Barroso (2002–04). The approval of the Labour Code in 2003, promoted by the Barroso Government was a major breakthrough from the employer's perspective. The Labour Code abolished the principle of *favor laboratoris* (the "favourability" condition that says that no lower or newer agreement can set less favourable conditions, seen from the perspective of the worker, than a higher or older one) and the practical interminability of collective agreements, whereby an agreement could not be

⁵ The Confederação Empresarial de Portugal (CIP) was founded in 1974 as the Confederation of Portuguese Industry, with its domain in manufacturing. In 1993 the CIP extended its domain to the service sector and in 2010 it merged with the two largest entrepreneurial associations of the country (the AIP and AEP), changing its name to Confederation of Portuguese Business, while maintaining its distinctive acronym "CIP".

cancelled without substituting it. In this system the trade unions had a strong hand as they could always refuse to renegotiate an agreement.

The introduction of the legal option of withdrawing from an existing collective agreement (in 2003 and 2009) was probably the most important policy measure regarding collective bargaining since the democratic transition. Irrespective of the opposition of the largest trade union confederation, the CGTN-IN and the shift in power relations in favour of employers, there was a second phase based on a process of negotiated change that was embedded in a broader process of a series of tripartite agreements negotiated and signed between 2006 and 2008. The Labour Code of 2003 and its major revision in 2009 introduced and generalized the legal possibility for employers to withdraw unilaterally from collective agreements. The extension mechanism itself was not touched in these reforms.

4. The crisis: Memorandum demands changes in extension mechanism

Following the financial and economic crisis of 2008, Portugal was one of the Eurozone countries that ran up high debts and had to ask for financial assistance. In the Memorandum of Understanding signed in 2011 with the Troika, the Portuguese Government committed to various policy reforms, among them a change in the existing practice of extending collective agreements. Portugal ended the adjustment programme in June 2014, some months before the deadline set in the Memorandum and without making use of the last tranche of the financial support.⁶ In the course of the programme, the country was able to achieve a positive balance of payments for the first time in decades. Following the deep recession of 2011–13, Portugal was restored to moderate economic growth and unemployment decreased. In 2012 the Government was able to conclude a tripartite agreement with one of the two major union confederations (the General Union of Workers (UGT)) and all the employers' organizations that are represented on the Standing Committee for Social Concertation (CPCS), which gave political legitimacy to the adjustment programme.

As mentioned above, the demand for a profound change in the extension mechanism for collective agreements was one of the central elements in the Memorandum's stipulations with regard to labour relations. The radical reduction, or even the abolition of extension was seen as a precondition for the creation of adequate wage flexibility.⁷ This view is part of a broader strategy aimed at the elimination of sector or branch agreements as the dominant level of collective bargaining over wages and their substitution by decentralized negotiations at company level. Under this strategy, tripartite cross-industry agreements are still welcome where they promote wage moderation (OECD, 2012 and 2014; Portugal and Vilares, 2013; Addison, Portugal and Vilares, 2015).

⁶ "The Programme ended in an unconventional manner when, on 12 June 2014, the Government allowed the Programme to lapse without disbursement of the final tranche of EUR 2.6 billion in assistance" (EU, 2014c, p. 9).

⁷ "The authorities' new commitment not to grant automatic extension of collective agreements in 2012 should reduce wage pressures inconsistent with the economic situation of firms not represented in the bargaining process" (IMF, 2011b, p. 11).

In 2011 the Government bowed to international pressure and suspended the issuing of Extension Ordinances; in 2012 it introduced a 50 per cent representation threshold for the employers' associations who requested the extension of collective agreements. The reform of the extension regime was not the only change to affect collective bargaining. The industrial relations system in Portugal had already been undergoing changes before the crisis. The comprehensive reforms of collective bargaining in 2003 and 2009 had caused major changes in the negotiating behaviour of employers and unions, and in bargaining coverage.

The next section assesses the role of extensions before the recent reforms and summarizes the main problems and criticisms within and outside Portugal. Against this background, the impact of the changes in the extension regime on industrial relations and labour protection is analysed. This is followed by a brief assessment of the revision of the restrictive regulation of extensions in 2014 together with an analysis of the ongoing political and scientific debate about collective bargaining and extension.

5. The extension mechanism before the reform

Until 2010 the Ministry of Labour extended any collective agreement by Ordinance (*Portaria de Extensão*) if so requested by the signatory parties. In Portugal, any employers' association or trade union may sign a binding agreement in any sector of the economy without there being specific criteria regarding their representativeness in a particular sector or region. Before 2012 this absence of representation criteria applied also to the issuing of extension ordinances.⁸

The normal procedure, until 2010, was that all signatory parties typically filed a request for the extension of their collective agreements with the Direção-Geral do Emprego e das Relações de Trabalho (DGERT) [General Directorate of Employment and Labour Relations].⁹ If the agreement did not contain stipulations that violated the law, the DGERT would announce in the Official Bulletin of the Ministry (*Boletim do Trabalho e Emprego* (BTE)) its intention to extend the agreement. Employers' associations and trade unions that had not signed the agreement but had members in its domain, could request exemption for these members. The DGERT usually accepted such requests and the exemption was explicitly mentioned in the Extension Ordinance, as published in the BTE.¹⁰ It should be noted that there is no threshold for employers or unions to engage in collective bargaining, and no mechanism to assess the representativeness of the contracting parties; employers frequently sign agreements with less representative, but more "willing" unions (in order to obtain

⁸ The articles of the Labour Code that regulate the extension of agreements (arts 514–516) do not mention any requirements with regard to representativeness. This situation of non-regulation changed with the Government Resolution of 2012.

⁹ All Extension Ordinances published in 2015 refer to "the signing parties requested the extension" ("*as partes signatárias requereram a extensão ...*").

¹⁰ By way of example we cite the Extension Ordinance (published in BTE 1/2015 on 8 Jan. 2015) in respect of the branch agreement between the employers' federation in metal manufacturing (FENAME) and the union federation (FETESE). The Ordinance states that the extension "does not apply to the employers who are affiliated [with] the AIMMAP" (a metal employers' association outside FENAME), nor to the workers affiliated with the member unions of the federation FIEQUIMETAL.

more favourable results). If such an agreement, signed by a less representative union, is extended and the other unions request exemption, the members of those unions are not covered by the extension, but the large non-unionized workforce (given a union density rate of about 20 percent, this involves on average four out of five employees) is covered by the extension. This raises serious questions regarding the legitimacy of extension in a system without any substantial criteria for the participation of trade unions in collective bargaining.

Extension applies to all parts of the collective agreement. This typically includes a set of clauses covering working time, remuneration and other aspects of the employment relationship, and a set of annexes (dealing with aspects such as definitions of functions and wage tables).

Extension Ordinances extend the collective agreements to:

- (a) all workers of the companies in the sector that are not affiliated with the signatory employers' associations; and
- (b) the workers of the companies affiliated with the signatory employers' associations but who are not members of the signatory trade unions.

The second form of extension is of less importance because, irrespective of these Extension Ordinances, it seems to have been the common practice of affiliated companies to apply the agreements signed by their associations to all their staff, irrespective of union membership, even if there was no Extension Ordinance. We may call this procedure a “voluntary internal extension”.¹¹

Until the reform of 2012 the extensions applied without any distinction to all types of companies and salaried workers outside public administration. There were no exemptions for certain types of companies (SMEs, for example) or for certain types of salaried workers. Before 2012 the law did not provide for appeals, exemptions or special provisions for specific types of companies, such as new or small firms, or firms in difficulty.¹²

6. Statistical data regarding the use of the extension mechanism and its effects on bargaining coverage

From 1999 until 2010 the Ministry of Labour issued more than 100 Extension Ordinances nearly every year. In 2004 the number of Ordinances dropped to a historical low, and the number of collective agreements and their coverage fell simultaneously to less than half of previous years; both indicators rapidly recovered in later years. A similar change occurred in 2011 with the drastic reduction in the number of Extension Ordinances and the collapse of collective bargaining in a large part of the economy between 2012 and 2014. In contrast to what had happened ten

¹¹ It seems that no empirical research on this issue has been undertaken, but three of the four interviewed representatives of employers' and union confederations confirmed that this “voluntary extension” inside the affiliated companies is common practice. One person interviewed stated that he had no empirical evidence that would confirm or refute this assumption.

¹² For companies in difficulty, Law No. 55/2014 (2014) made it possible for employers' associations and trade unions to suspend their collective agreement by mutual consent, although it seems that no one has ever made use of this.

Table 4.1. Published collective agreements and extension ordinances, 1999–2016

| Published per year | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|---|-------|-------|-------|-------|-------|------|-------|-------|-------|-------|-------|-------|-------|------|------|------|------|------|
| Number of all published collective agreements | 388 | 371 | 361 | 338 | 342 | 162 | 254 | 245 | 252 | 296 | 252 | 230 | 170 | 85 | 94 | 152 | 138 | 146 |
| Number of all covered employees (000) | 1 465 | 1 453 | 1 396 | 1 386 | 1 512 | 600 | 1 125 | 1 419 | 1 570 | 1 704 | 1 303 | 1 407 | 1 237 | 328 | 241 | 246 | 490 | 749 |
| Coverage of agreements published in the respective year | 64% | 61% | 58% | 56% | 60% | 23% | 41% | 51% | 53% | 56% | 45% | 52% | 47% | 13% | 8% | 10% | 19% | 29 |
| Number of Extension Ordinances (EOs) | 183 | 144 | 185 | 147 | 152 | 4 | 56 | 137 | 74 | 131 | | 116 | 17 | 12 | 9 | 13 | 36 | 35 |
| Share of EOs in total number of published agreements | 47% | 39% | 51% | 43% | 44% | 2% | 22% | 56% | 29% | 44% | 40% | 50% | 10% | 14% | 10% | 9% | 26% | 24% |

Note: The total number of employees for 2001 and 2016 are estimates by the author.

Sources: DGERT, Variação média ponderada intertabelas (VMPI) [Average weighted variation between wage tables]; DGERT, Instrumentos de regulamentação colectiva de trabalho publicados [Published instruments of collective labour regulation]; GEE [Strategy and Research Office], Boletim Estatístico [Statistical Bulletin], Jan. 2014 and Jan. 2015.

years earlier, this trend was not reversed during the following years. A slow and partial recovery of bargaining began only in 2015.

With the exception of the years 2004 and 2011 to 2016, the Extension Ordinances issued annually typically represented a share of 50 to 70 per cent of the total number of collective agreements signed at branch level (*contrato coletivo de trabalho* (CCT)) and for groups of companies (*acordo coletivo de trabalho* (ACT)).

The widespread and quasi-automatic application of extension until 2010 had a significant effect on bargaining coverage. Before extension, collective agreements bind only the signatory organizations and their members. This means that a worker must (i) be employed by a company that is affiliated with the signatory employers' association, and (ii) be a member of the union that signed the agreement. Based on the annual survey of companies (the *Relatório Único*, which is part of the *Quadros de Pessoal* [Personnel tables]), the share of workers employed in organized firms can be estimated at 38 per cent between 2010 and 2012¹³ and 39.2 per cent in 2014.¹⁴ The same survey has been used to evaluate union membership, but this is more problematic as managers do not necessarily know who is or is not member of a union. This may be relatively straightforward to ascertain where they “check off” membership contributions, but there are many sectors in which workers pay their dues directly to the union. The survey indicates a density rate in the private sector of 11 per cent between 2010 and 2012 (Portugal and Vilares, 2013, p. 68), but the actual rate is higher. When the public sector is included, union density in Portugal can be estimated to lie between 18 and 20 per cent (Visser, 2015; OECD statistics¹⁵).

From a legal standpoint, double affiliation (union and employers' association) is a condition for the application of collective agreements, but given that employers are interested in a uniform regulation of work relations within their companies there is a common practice of “voluntary internal extension” – that is, companies usually apply the agreement to all employees, regardless of their union affiliation. Thus, the only relevant criterion for estimating the direct coverage of a collective agreement, before administrative extension, is the affiliation with the signatory employers' association. In 2014 employers' associations organized 19 per cent of all companies. These affiliated companies employed 39 per cent of all workers.¹⁶ This density of 39 per cent may be seen as the upper limit of the estimated direct coverage of all collective agreements (without administrative extensions) in relation to the total workforce in the private sector.¹⁷

In 2010 the number of employees covered by all valid collective agreements signed since the 1970s until 2010 was 2.4 million and represented 88 per cent of all employees in the private sector. This accumulated coverage of all formally existing agreements, including those signed many years earlier, is commonly used as an

¹³ Unpublished data provided to the author by the Gabinete de Estratégia e Estudos, Ministério da Economia (GEE) [Strategy and Study Unit of the Ministry of Economy].

¹⁴ Dray, 2016, p. 308.

¹⁵ Organisation for Economic Co-operation and Development (OECD), “Short-term labour market statistics: Trade union membership and trade union density”. Available at: <http://stats.oecd.org/Index.aspx?DatasetCode=STLABOUR>.

¹⁶ Dray, 2016, p. 308.

¹⁷ If we apply the legal principle of double affiliation, coverage would be between 6 per cent and 8 per cent. This estimate is based on a density of 39 per cent of employers' associations (in terms of workers) and of 18 to 20 per cent trade union density.

indicator to show the very high degree of bargaining coverage (nearly 90 per cent) in Portugal. Accumulated coverage tends to overstate the degree of actual protection based on collective bargaining as it includes a large number of old agreements with very limited regulatory capacity. It should be noted that in Portugal agreements are cancelled only if one of the signatory parties formally applies to the Ministry of Labour for its termination. If one excludes agreements of more than five years of age from the calculation of bargaining coverage, we arrive at an estimated accumulated coverage of around 60 per cent (Naumann, 2015). The coverage of the agreements published in 2010 was 1.4 million employees, representing 52 per cent of the total salaried workforce in the private sector. This number of employees covered by collective agreements published in a specific year is an indicator for the relevance of collective bargaining as a continuous process of adaptation of labour regulation.

The difference between the coverage rate of all agreements concluded and published¹⁸ in 2010 (52 per cent) and the estimated accumulated coverage rate of all valid agreements concluded between 2005 and 2010 (60 per cent) on the one hand, and the organization rate of employers (38 per cent in 2010) on the other, is in the region of 14 to 22 percentage points, depending on whether the estimate is based on newly concluded agreements or those concluded in earlier years but are still relevant and existing. This estimate of the effect of the extension on the bargaining coverage rate in Portugal is more precise and realistic than the rather excessive estimates found in recent OECD publications (Serres and Murtin, 2013; Gal and Theising, 2015).

Critics of the Portuguese extension practice have made much of the large gap between the high bargaining coverage and low unionization levels (Addison, Portugal and Vilares, 2015; Portugal and Vilares, 2013), but the relevant yardstick is employer organization. From a legal standpoint, double affiliation (union and employers' association) is a condition for the application of collective agreements, but given that employers do not always know who is a member and the practice of "voluntary internal extension", the only relevant criterion for estimating the direct coverage of a collective agreement, before extension, is affiliation with the signatory employers' association. The reforms of 2012 and 2014 confirmed this. The new representation criteria or thresholds for granting extension were based exclusively on criteria related to the representativeness of the signatory employers' associations, and trade union membership did not play a role. Our analysis of collective agreements shows that sector or branch agreements tend to set a low level of minimum wages, just above the national mandatory minimum wage, or even below the mandatory minimum when the agreement has not been updated for many years. Rather than directly affecting the actual wages of the majority of workers, the primary function of these agreements is to mobilize trade unions to use all their resources for the enforcement of the legal minimum wage (and other legal minimum standards), thus contributing to combating unfair competition by social dumping. This interpretation is supported by interviews with representatives from unions and employers' associations.

¹⁸ There is always a delay of some weeks between the conclusion of an agreement and the publication of the respective extension ordinance in the BTE. This small discrepancy does not affect the trends in collective bargaining and coverage over time.

7. The political and scientific debate on the extension of collective agreements

There has always been and still is remarkable mutual support among the major peak-level organizations of employers (the Confederation of Portuguese Business (CIP)¹⁹ and the CCP²⁰) and the trade union confederations (the General Confederation of Portuguese Workers (CGTP-IN) and the General Union of Workers (UGT)) for the comprehensive use of Extension Ordinances. The suspension of extensions since 2011 and the restrictive regulation introduced in 2012 were based on unilateral decisions of the Government, against the declared opinion of the social partners. The latter argued that extensions guarantee that the member firms of employers' associations do not suffer negative consequences in competition with non-members, thus favouring the willingness of employers' associations to sign an agreement. As was mentioned above, extension orders guarantee the validity of the agreement's minimum standards in the whole domain of the agreement, with the exception of those firms and workers covered by other agreements, signed by organizations that requested that their members be excluded from the extension. In the opinion of the employers' associations this allows unfair competition.²¹ The Portuguese employers' associations also see the extension of collective agreements as an important factor for their organizational strength, because it avoids the loss of members who fear competitive disadvantages as a result of collective bargaining.²² Furthermore, they consider extension to be an important instrument for their capacity to regulate work relations and avoid social dumping. This opinion is shared by the trade unions.

Távora and González (2016, p. 363), who have studied two low-wage industries (textiles and footwear), conclude that the blockage in collective bargaining observed during the crisis (when coverage fell from 52 per cent of workers in 2010 to 8 per cent in 2013) was:

at least partly caused by the suspension (in 2011) of the extension of collective agreements and the subsequent introduction of representativeness rules in 2012. Employers' associations claim that negotiating wage increases and favourable conditions for workers would result in firms that belong to the employers' associations facing unfair competition from non-member firms not bound to apply the same wages and terms and conditions. Moreover, they claim that this may encourage the disaffiliation of current members. This has been a key argument of employers' associations in textiles and footwear to justify their unwillingness to negotiate wage increases.

Collective bargaining is the core business of trade unions in Portugal, even if the resulting improvements in the working conditions are very modest. The mobilization

¹⁹ See n. 6 above.

²⁰ The CCP was founded as the Confederation of Commerce Trade and Services of Portugal and later extended its domain to the entire service sector. Its present designation is Confederation of Commerce and Services of Portugal.

²¹ Interviews with the CIP and the CCP.

²² Ibid.

for a better agreement, the negotiations and the implementation of the results are the unions' central activities. Therefore, unions have at least two strong reasons for supporting unrestricted extensions. First, because they know that employers' associations will not sign sector or branch agreements without the guarantee of their extension. Second, because the application of the (although modest) improvements to working conditions stipulated by their agreements allow them to receive recognition not only from their members, who benefit directly, but also from the non-unionized workers, who benefit via extension.

In the context of the global economic crisis several authors criticized the wage-setting mechanism in Portugal as being a cause of wage rigidity (Duarte, 2008; Portugal, Carneiro and Guimaraes, 2010). This critique focused on collective bargaining at the sectoral level, the extension of sectoral agreements and the national minimum wage. The Bank of Portugal had a central role in this debate. In an influential paper "On the cyclical sensitivity of real wages", published in the Bank's *Economic Bulletin*, the observed decrease in the cyclical adjustment of real wages was attributed to "the inadequacy of mechanisms for determining wages in low inflation regimes. The use of across-the-board procedures to ensure that agreements are extended to cover the whole of the sector tends to exacerbate the already strong nominal wage rigidity" (Portugal, Carneiro and Guimaraes, 2010, p. 95). In its economic surveys of Portugal the OECD (2012 and 2014) advocated a more restrictive use of extension or even complete abolition, arguing that the increased coverage of collective agreements had reduced companies' competitiveness and had "stifled" negotiations at company level. The OECD argued that extended collective agreements and the national minimum wage had reduced the so-called "wage cushion" and contributed to an increase in unemployment. This critique became part of a broader offensive for changes in labour regulation in Greece, Portugal and Spain, which Meszmann (2015, pp. 115–116) summarizes as follows:

In all three southern European countries, OECD and IMF recommendations from 2008 (or somewhat earlier) centred on cost competitiveness measures, especially labour costs. Recommended measures included wage moderation or removing wage indexation, flexibilisation of wage setting (decentralisation of collective bargaining) and/or reducing "rigidities" in employment protection legislation, expanding part-time work opportunities These more moderate recommendations intensified into more aggressive recommendations in the adjustment period. Measures included decentralisation of collective bargaining mainly to company level, drastic reductions in severance payments in Portugal ... and abolition of administrative extensions of collective agreements In Spain, reduction of other business costs was also suggested to counter the "inertia in the wage bargaining system" The most radical change in recommendations and implementations of decreasing labour costs and flexibilisation of working arrangements occurred in Greece, all on the pretext of restoring "cost-competitiveness and boosting employment over the medium term"

None of the critiques of the Portuguese wage-setting mechanism referred to took into consideration that a major reform of collective bargaining and revision of key collective agreements (in particular, in manufacturing) had taken place in 2003 and 2009. The Labour Code of 2003 and its major revision in 2009 had introduced and generalized the legal possibility for employers to withdraw unilaterally from collective

agreements.²³ An analysis of some of the most important withdrawal cases and subsequent renegotiations demonstrates that the main reason for the employers' associations (almost all of which were located in sectors exposed to international competition) to withdraw from their sector or branch agreements was not wage rigidity. "[T]hey wanted to withdraw from the framework agreements²⁴ with their very restrictive regulation of the labour process. ..., this aim was achieved by all large employers' associations in manufacturing" (European Union, 2014b, p. 37).

The argument that the Portuguese extension mechanism "exacerbates" nominal wage rigidity (Portugal, Carneiro and Guimaraes, 2010, p. 95) and reduces the "wage cushion" (OECD, 2012) does not take into account that the wage level defined in most sectoral agreements is far below the average effective pay and that a large number of agreements have not been revised for many years. Many extended agreements have a low effective regulatory capacity in relation to wages; consequently their contribution to wage rigidity is limited or non-existent. This assessment is supported by a series of studies carried out by the Ministry of Labour (DGERT, 2013a, 2013b and 2013c), which revealed that in a large sample of collective agreements in 18 sectors – concluded in 2003, 2005, 2008 and 2011 – the lowest wage categories in almost all branches were equal to or lower than the mandatory minimum wage of 2011 (€485), and in many cases were equal to or lower than the minimum wage of the year in which they were concluded (Naumann, 2015, pp. 22–23).²⁵

The criticism that the Portuguese extension mechanism had "stifled" negotiations at company level (OECD, 2012 and 2014) ignores the fact that the limited number of company agreements results, above all, from the employers' unwillingness to negotiate and the weakness or absence of proper trade union representation at the company level. From the European Company Surveys in 2009 and 2013 (Eurofound, 2010, pp. 47–48; Eurofound, 2015, p. 99) it transpires that the coverage of even medium-sized firms by works councils is very limited in Portugal and, in fact, there are very few works councils that can negotiate or monitor agreements at the company level.²⁶ The extension of branch agreements does not pose any obstacle for companies that consider themselves in a position to pay higher wages and offer better working conditions to negotiate and conclude company agreements. The only intelligible reason for the scarcity of company agreements is that the employers prefer to keep things under unilateral control and avoid entering into binding commitments to more advantageous conditions above those stipulated in sectoral agreements. It would also seem that, in the event that employers would like to negotiate lower wages

²³ Most of the employers' associations who withdrew from their agreements substituted them with new ones. The extension of other agreements in the respective sectors or branches did not affect them because they had (and have) the option of requesting exemption of their members from the extensions of other associations.

²⁴ Collective agreements in Portugal comprise in general a framework agreement that regulates the basic principles and the working conditions (such as rights and duties, working time) and several annexes (containing, for example, wage table, catalogue of functions).

²⁵ In the four largest sectoral agreements in retail that were in place in 2010 two to five of the lowest categories (out of a total of 11 to 13) were below the minimum wage valid in 2010.

²⁶ The reports of the trade union, the General Confederation of Portuguese Workers (CGTP-IN, presented at its Congress, are the most comprehensive source of published data regarding the elections of works councils (*comissões de trabalhadores*)). During the period 2012–16, the CGTP-IN registered the election of 268 works councils, each with a mandate for four years (CGTP, 2016, p. 54). This represents an infinitesimal number compared with the more than 270,000 companies in Portugal (GEE, 2012–14). In 2010 the Ministry of Labour registered just 173 works councils with a valid mandate (CITE, 2014, p. 71).

or wage increases (below those fixed in the national or sectoral minimum), they have little to offer in compensation and there is no established practice of negotiation in such cases; this is different from, for example, the practice of “opening clauses” negotiated by German works councils, which is often mentioned as a best practice.

A concrete comparison with the German position underlines the difference between the situation in Portugal in relation to highly industrialized countries with strong union movements. The lowest collectively agreed wage in the German metal industry is close to double that of the legal minimum wage; this is a very demanding standard for companies and is therefore not subject to extensions (which are exceptional measures in Germany, Chapter 3). In the context of such high levels of collectively agreed wages and working conditions, German metal companies have a strong motive to make use of opening clauses that allow them to adapt the high standards to their specific capacities. The lowest wage categories in the collective agreements in the Portuguese metal industry are identical to the legal minimum wage. This leaves no room for the negotiation of opening clauses below the standards of the branch agreements and negates any idea of an “exacerbated” nominal wage rigidity induced by collective bargaining at branch level.

In summary, given the fact that wages in most sectoral agreements are set at near or even below the national minimum wage, it is unlikely that they are a major factor in wage rigidity. The observed decrease in real wage cyclicity (Portugal, Carneiro and Guimaraes, 2010) most probably has other causes: the strong accelerated increase in the mandatory minimum wage since 2007 (relative to wage increases in the lower categories), and the legal principle of “irreversibility of compensation” that prohibits employers from reducing agreed wages.²⁷ The Labour Code allows exceptions from this rule in some very specific situations (such as the integration of a worker into a lower wage group) or by way of a new collective agreement. Here, the issue is, rather, that most wages are already fixed close to the minimum, as well as the absence of a negotiation culture in which employers offer compensation for unions agreeing to a temporary reduction in wages.

8. The impact of the change in the extension regime (2011–12)

The economic crisis in Portugal in the first half of 2011, worsened in the following months, and reached its peak in the second half of 2012. In this adverse context employers had little interest in renegotiating collective agreements. The number of updated collective agreements, as well as those revised and newly signed, fell, as did the number and share of covered workers.

The political and scientific debate had revealed a clear opposition between the Portuguese social partners, who supported the unrestricted extension of collective agreements, and international institutions like the Troika, who demanded a profound change. The Portuguese Government’s option was clear. In 2011 it suspended the issuing of Extension Ordinances; in 2012 it introduced a 50 per cent representation

²⁷ The *princípio da irredutibilidade da retribuição* is guaranteed in art. 129-1-d of the Labour Code and states that “it is prohibited for the employer ... to reduce payment, except in the cases specified in this Code or by collective agreement”.

threshold for the employers' associations who requested the extension of collective agreements (share of the affiliated companies in the total workforce in the domain of the agreement).²⁸ This measure had been an explicit demand in the Memorandum of Understanding²⁹ and excluded a large part of the employers' associations from making a successful request for an extension.³⁰

As was mentioned above, extension tends to have a positive effect on the willingness of employers' associations' to sign sectoral agreements. The suspension of extension orders in 2011 and their restrictive reregulation in 2012, with the introduction of a 50 per cent representation threshold for the signatory employers' associations, became an additional disincentive for employers to sign collective agreements. The combined effect of the crisis and of the change in the extension mechanism produced a rapid decrease in the number of updated collective agreements (see table 4.2). The share of workers covered by updated agreements in the total number of salaried workers in the private sector fell from 52 per cent in 2010 to 13 per cent in 2012, and reached its absolute low in 2013–14 with a coverage rate of 8 to 10 per cent. The accumulated coverage rate of all existing agreements remained almost unchanged (table 4.2), but the deadlock in collective bargaining suspended the increase of collectively agreed wages in many sectors and further reduced the already limited capacity of collective bargaining to regulate wages.

The direct impact of the new regulation of extensions on wage and working time standards was probably limited because the already existing and, in most cases, extended collective agreements remained in place. A further and most important obstacle for any wage reductions resulting from the absence of new extensions of collective agreements was the legal principle of the irreversibility of wages, which states that “it is forbidden for the employer ... to reduce the [worker's] pay”.³¹ For the same reason, the immediate impact of the new regulation of extensions on vulnerable workers, including those in SMEs, was probably small. Nonetheless, in the medium term the prolonged deadlock in collective bargaining (provoked partly by the absence of new restrictive regulation of extensions) meant, for the workers in SMEs, stagnation in their wages, because SMEs tend to apply the wage tables of the branch agreements without top-ups, while larger companies are able and willing to pay higher wages. The deadlock in collective bargaining since 2011 and the subsequent freezing of collectively agreed wages in most sectors would theoretically have resulted in a growing importance of the national minimum wage. However, the freezing of the minimum wage since 2011 and its small increase in autumn 2014 (from €485 to €505) limited the impact.

Most employers' associations and trade unions opposed the restrictive regulation of the extension mechanism of 2012. The Confederation of Portuguese Business

²⁸ See Government of Portugal (2012), Resolution 90/2012. The new regulation allowed employers' associations who did not meet the threshold of 50 per cent to obtain an Extension Ordinance if they exempted SMEs from the extensions, but it seems that no employers' association made use of this legal option.

²⁹ See MoU (2011) section 4.7 on “Wage setting and competitiveness”, item ii: “... define clear criteria to be followed for the extension of collective agreements and commit to them. The representativeness of the negotiating organisations and the implications of the extension for the competitive position of non-affiliated firms will have to be among these criteria.”

³⁰ The overall organization.

³¹ The *princípio da irredutibilidade da retribuição* is guaranteed in art. 129-c of the Labour Code.

Table 4.2. Collective bargaining: Structures and coverage

| Year | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|--|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Number of employees covered by collective agreements published in each year (000s) | 1 465 | 1 453 | 1 396 | 1 386 | 1 512 | 600 | 1 125 | 1 419 | 1 570 | 1 704 | 1 303 | 1 407 | 1 237 | 328 | 187 | 246 | 490 | 749 |
| Number of employees (private sector) (000s) | 2 288 | 2 371 | 2 416 | 2 460 | 2 510 | 2 574 | 2 739 | 2 766 | 2 970 | 3 018 | 2 879 | 2 709 | 2 660 | 2 486 | 2 434 | 2 458 | 2 538 | 2 589 |
| Coverage of agreements published in the respective year | 64% | 61% | 58% | 56% | 60% | 23% | 41% | 51% | 53% | 56% | 45% | 52% | 47% | 13% | 8% | 10% | 19% | 29% |
| Number of employees covered by all existing collective agreements (000s) | 1 953 | 2 295 | – | – | 2 379 | 2 390 | 2 491 | 2 483 | 2 682 | 2 731 | 2 605 | 2 392 | 2 334 | 2 142 | 2 125 | 2 185 | 2 245 | – |
| Number of employees (private sector) (000s) | 2 288 | 2 371 | 2 416 | 2 460 | 2 510 | 2 574 | 2 739 | 2 766 | 2 970 | 3 018 | 2 879 | 2 709 | 2 660 | 2 486 | 2 434 | 2 458 | 2 538 | 2 589 |
| Accumulated coverage | 85% | 97% | – | – | 95% | 93% | 91% | 90% | 90% | 90% | 90% | 88% | 88% | 86% | 87% | 91% | 88% | – |

Note: The numbers of employees in 2001 and 2016 are estimates by the author.

Sources: GEP (2007–11); GEE (2012–14); DGERT, Variação média ponderada intertabelas [Average weighted variation between wage tables]; DGERT, Instrumentos de regulamentação colectiva de trabalho publicados (Published instruments of collective labour regulation); GEE [Strategy and Research Office], Boletim Estatístico [Statistical Bulletin], Jan. 2014, Jan. 2015 and Dec. 2016.

(CIP) stated that the comprehensive practice of extension had helped to avoid unfair competition and contain the informal sector of the economy. The CIP stated further that the extension mechanism had strengthened the employers' associations and that it was an essential factor in the collective bargaining system.³² Furthermore, the CIP, the Confederation of Commerce and Services of Portugal (CCP) and the General Union of Workers (UGT) criticized the suspension of extension orders since 2011 and claimed that the restrictive reregulation of 2012 was a clear violation of the tripartite agreement signed in 2012.³³

It is not yet possible to make a quantitative assessment of how the changes in extension affected the level of employer organization. Data from the Green Paper on Labour Relations (Dray, 2016) suggest that the organizational density of employers' associations was stable during the crisis while trade union density decreased during this period by 1.4 percentage points.³⁴ However, the membership structure of Portuguese employers' associations does not support the idea that they form a kind of "cartel", representing primarily the interests of large companies. In fact, they organize mostly SMEs. The average size of organized companies (20 employees) is double the average for all firms, but still most affiliated firms are very small. According to one of the interviewed officials of the employers' associations, during the talks over the regulation of the extension mechanism some officials of the Ministry of Labour had opined that employers' associations are oligarchic organizations that represent the interests of a minority of companies against the interests of smaller firms or newcomers.

The findings of Távora and González on the views of different types of companies in relation to extension in textiles and footwear (Távora and González, 2016, pp. 363–364) indicate a "complexity of firm relations and interest representation at the sectoral level" in which subcontracting between large and small firms plays a major role. The representatives of various employers' associations in textiles and footwear, interviewed in their study, stated that the sectoral pay table only sets the minimum and that many member firms often pay more if they can. The interviewed union representatives claimed instead that large firms that can afford to pay higher wages often do so, while benefiting in their relationship with subcontractors from the very low wage rates negotiated for the sector, and while applying strict cost pressures on small firms over which they have a high degree of control. This casts some doubt on the main justification of the employers' associations for extension that it prevents unfair competition among member and non-member firms. Further research is needed about the meaning of these allegations with regard to the claim that large firms are more able to afford set wages above the level that small firms can afford.

On resuming, it can be said that the restriction of the extension mechanism added to the deep crisis in collective bargaining that was caused by economic malaise

³² The CIP advocated this position in a meeting with a delegation from the Troika (13 Nov. 2012): see the CIP journal, *Indústria*, (2012, No. 94, Oct.–Dec.), p. 19.

³³ "Social partners against restriction of Extension Ordinances", *Diário Económico* (6 Mar. 2013), available at: www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=1&idsc=31624&ida=124024.

³⁴ The density rate of employers' associations, in terms of workers at the affiliated companies, was 39.6 per cent in 2010 and 39.2 per cent in 2014. Union density registered by the Ministry decreased during the same period from 10.6 to 9.2 per cent, but this is an underestimated value.

and political uncertainty. It is part of a broader political strategy – manifested in the Memorandum of Understanding signed with the Troika of the IMF, the European Commission and the European Central Bank – aimed at a weakening of collective bargaining at the sectoral level. The supporters of this policy argue that it is necessary to “decentralize” industrial relations and collective bargaining and that it is desirable to strengthen the role of the tripartite concertation at the cross-industry (macro) level in wage-setting.³⁵ This argument ignores the changes that took place by agreement with the social partners, especially in manufacturing, following the reforms of 2003 and 2009 and the missing institutional preconditions for an effective decentralization of collective bargaining at the company level. Union representation in the enterprise, works councils and managers able and willing to negotiate at the firm level – none of this exists in Portugal and is difficult to create overnight.

9. The reform of the reform

The pressure from the employers and unions forced the Government to amend its policy on extensions. Shortly after the early conclusion of the adjustment programme in June 2014 the Government adopted a new regulation (Resolution 43/2014). The 50 per cent threshold was maintained as the first criterion, but a second, alternative option was introduced: if 30 per cent of an employers’ association’s members are SMEs, extension may be granted even if the signatory employers’ association(s) represent less than 50 per cent of the sector’s employees. Considering that the companies affiliated with Portuguese employers’ associations have on average 20 employees, one can assume that almost all associations fulfil the new criterion.³⁶

After the revision of the majority threshold in June 2014 collective bargaining registered a modest recovery. The number of updated agreements rose from 94 in 2013 to 152 in 2014, 138 in 2015 and 146 in 2016. These were mostly agreements affecting SMEs, as can be inferred from the rather modest rise in the coverage rate of these updated agreements. The number of workers covered by these updated agreements increased from 187,000 in 2013 to 214,000 in 2014, 490,000 in 2015 and 749,000 in 2016. To what extent the recovery in collective bargaining can be attributed to the reregulation of extension is impossible to say. The improvement in the economic situation and more optimistic expectations among employers must also have played a role. The new regulation of the extension mechanism clearly supported the recovery of collective bargaining. Especially in 2015–16 there was strong growth in the number of Extension Ordinances (36/35, compared with 9 in 2013 and 13 in 2014), although this is still way below the number of extensions before 2011. The increase in the number of workers covered by updated collective agreements during 2015 and 2016 is relevant, but coverage of the agreements published each year is still only half of the number for the period before 2011. The crisis in collective bargaining is far from over.

³⁵ See the Memorandum of Understanding and its several revisions: Palma Ramalho (2013); Portugal and Vilares (2013).

³⁶ The new second criterion applied to the majority of the employers’ associations. By keeping, at the same time, the first criterion of the 50 per cent threshold, those associations that represented mostly large companies with more than half of the workforce in the respective sector still qualified for extension of their collective agreements.

10. The ongoing debate

Between 2011 and 2014 the Government implemented all of the measures in the original section in the Memorandum of Understanding on the Labour Market, namely: (a) a reduction in the maximum duration of unemployment insurance benefits and the capping of unemployment benefits; (b) a reduction in the legal employment protection by reducing severance payments and facilitating individual dismissals; (c) more flexible working time arrangements, particularly by drastically reducing the cost of overtime work; and (d) changes in the wage-setting mechanism by freezing the national minimum wage and introducing a more restrictive regulation of the extension of collective agreements.

The restrictive regulation of the extension mechanism was the only measure in the area of labour that was withdrawn by the Government that had implemented it, only two weeks after the cabinet had declared the end of the adjustment programme. The European Commission has criticized this retraction, stating that it does “not contribute to increase the responsiveness of wages to economic conditions at firm level” and is “likely to hinder efficient wage adjustment in lower-productivity firms” (European Union, 2014c, pp. 61–62). The central argument for this insistence on the continuation of the restrictive regulation of extensions is the Commission’s view that, despite “important labour market reforms”, the “scope for wage adjustment at firm level” remains “limited” and that further changes in wage setting are “key, in view of the need to achieve competitiveness gains to allow growth through net exports ...” (ibid, p. 61). On the other hand, the document explicitly welcomed the legislative changes in August 2014, which reduced the duration of collective agreements after their expiration from 18 to 12 months, as a measure with the “potential to induce greater dynamism in collective bargaining” (ibid, p. 61).

Manufacturing is the prime example for the exposure to international competition and for the creation of growth through net exports. Major reforms of collective bargaining triggered by the changes in the labour legislation of 2003/09 took place in this sector. The legislation of 2003/09 allowed employers to cancel their agreements without substitution, but almost all of them preferred to negotiate new agreements.³⁷ They did not consider the existence of sectoral agreements to be a problem for international competitiveness because their revision after 2003/09 had adapted them to the companies’ needs. It is true that firms with lower productivity who pay the lowest possible wages might have preferred the total abolition of collective bargaining, but this would also have been an incentive to keep relying on very low wages and low productivity (instead of a push to increase productivity and simultaneously the margin for higher wages). The average collectively agreed basic monthly wage in manufacturing (€691.45 in 2014) represents less than 70 per cent of the average monthly effective wage compensation in manufacturing (€1,003.09 in 2014), which suggests that there is considerable scope for adjustment.

In its Concluding Statement on the adjustment programme the IMF highlighted the need for “fresh reform ideas and initiatives”, especially in the improvement of managerial skills, and advocated “cooperative policy solutions” based on a

³⁷ See a detailed description of this process in European Union (2014b).

“more inclusive and transparent social dialogue” (IMF, 2015). Like the European Commission (European Union, 2014c) the IMF’s final assessment included a warning against inadequate increases in the national minimum wage, but it did not criticize the Portuguese Government’s measures on labour regulation and extension after the conclusion of the adjustment programme. The call for “cooperative policy solutions” is pertinent. Clearly, some of the reforms carried through under the Memorandum contrasted with the tripartite agreement signed by the Government in 2012. The restrictive regulation of the extension mechanism was a unilateral decision against the views and interests of the social partners. Instead, the revision of the Labour Code in 2009, though very controversial, had been prepared in a thoroughly organized process with the social partners’ participation (Dornelas, 2006; Comissão do Livro Branco das Relações Laborais, 2007; Conselho Económico e Social, 2008) and its embeddedness into a broader process of tripartite negotiations on minimum wages, vocational training and pensions made it a positive case of cooperative policy.

11. Conclusion

Have the policy objectives of the restrictive regulation of extensions demanded by the MoU and implemented by the Portuguese Government been realized? If the objective was to freeze collectively agreed wages and to weaken the institution of collective bargaining, the answer is “yes”. If the objective was the increase in downward wage flexibility, the decentralization of bargaining and the adaptation of existing agreements to new circumstances, the answer is “no”. The restrictive extension mechanism introduced in 2012 contributed to the collapse of collective bargaining, but as a result of several factors (in particular, the legal principle of irreversibility of wages and the mandatory minimum wage, which was set at a level above collectively agreed wages in the lowest pay categories in most of the older agreements), this did not represent a major contribution to downward wage flexibility. On the contrary, the deadlock in collective bargaining was a major obstacle to any qualitative renewal of collective agreements. In fact, the process of negotiated change during the period before the crisis (revision of collective agreements and conclusion of tripartite agreements) had produced important positive results and was interrupted by the adjustment programme and reforms.

During the period from 2005 to 2011 the Portuguese Government had mobilized most social partners to support the reform of the industrial relations system and obtained some positive and sustainable results. The imposition of the adjustment programme under the Memorandum of Understanding (2011–14) and the election of a right-of-centre government in 2011 changed the priorities. To obtain a financial bailout depended on compliance with the Troika’s demands, and social dialogue passed into second place. The end of the adjustment programme in 2014 and the election of a new, left-of-centre government, which is committed to a more participative policy approach (the present Minister of Labour, José Vieira da Silva, was responsible for the successful tripartite concertation during 2005–09) marks the beginning of a new period of negotiated change.

The analysis of the reduced regulatory capacity of many collective agreements suggests that it is necessary to improve the effectiveness of wage-setting and

collective bargaining. Such a move would also increase the impact of extensions. At a recent European Peer Review on the revitalization of collective bargaining in Portugal³⁸ the final debate generated the idea of creating a system of workers' representatives, elected by all salaried workers, that would determine the representativeness of trade unions and their right to sign binding collective agreements (similar to the system in Spain or France). Such a system would guarantee that the trade unions that are signatories to agreements have the support of a relevant section of the workforce, thus increasing the legitimacy of collective bargaining in general, and for the extension of agreements in particular.³⁹

Another important incentive for the revitalization of collective bargaining (and subsequently the increase in the number of extensions) would be to activate the already existing legal option of carrying out mandatory arbitration. The credible threat of the substitution of an existing agreement with a binding compromise solution, defined by arbitral jurisdiction, would be a strong incentive for employers and unions to increase their efforts to reach a settlement by themselves. A measure to prevent excessive use of this mechanism might be to limit the issues that can be regulated by arbitral decisions.

Tripartite negotiations at macro-level may create the necessary incentives for employers and unions to engage in such a reform. However, wage regulation via social concertation at macro level does not seem to be a promising path because it does not stimulate collective bargaining, and because of opposition from the larger trade union confederation, the General Confederation of Portuguese Workers (CGTP-IN). At best, there is a coordinating role at macro level.

The most important external factor for a revitalization of collective bargaining would be economic growth. The continuing economic uncertainty prevents employers from concluding agreements. Even a new and innovative approach by the national Government would be strongly limited in its prospects if the economy does not create the necessary “room for manoeuvre” for negotiations on wages and other issues, and subsequently for the use of the extension mechanism.

One lesson from the Portuguese experience with reregulation of the extension mechanism might be that the international institutions that define and monitor adjustment programmes learn to be more attentive in relation to the positive contribution that specific institutions can deliver if mobilized in a proper way. The Portuguese case suggests that the key word in this context is “negotiated change”. This does not mean that all actors must agree with all measures, but it is essential to get the most relevant actors “on board”, not only in the sense that they sign agreements that give political legitimacy to adjustment programmes, but also in the sense of their active involvement in the decision-making process about the content of the programme.

³⁸ Peer Review, “Towards a More Dynamic Collective Bargaining”, organized within the Mutual Learning Programme (MLP) under the European Employment Strategy (EES), organized by the Committee on Employment and Social Affairs (EMPL) in cooperation with the Portuguese Ministry of Labour (Lisbon, 23–24 Oct. 2017).

³⁹ This idea emerged during the debate at the Peer Review meeting; it had not been formulated in the Host Country Discussion Paper (Naumann, 2017) or in the official documents of the Portuguese Ministry of Labour.

With regard to the extension mechanism, the Portuguese case shows that it can help to avoid unfair competition by social dumping and to stabilize the collective bargaining system, as well as the organizations representing employers and workers. Collective bargaining at branch level and its extension does not seem to be a major factor for wage rigidity. The principle of the irreversibility of compensation guaranteed in Portuguese labour law may be a far more powerful stronghold against downward wage flexibility. Finally, one may question whether increased downward flexibility below the levels of existing collective agreements is really desirable in the Portuguese context. Wages set by collective agreements at sectoral level are already very low and decreasing them further may send the wrong signals to companies, reducing their efforts to increase labour productivity and invest in their staff qualification. It may also become an additional motive for workers to exit and join the growing ranks of emigrants, many of whom have qualifications above the average.

The new regulation of extension based on the alternative criteria of a general 50 per cent threshold in relation to the total workforce in the domain of the agreement, or the minimum of 30 per cent SME membership in the employers' association, was sufficient as a prerequisite for a positive Ministerial decision with regard to the request for an extension. It would have been important to introduce as a further (or as an alternative) minimum requirement for the transparency of the process, to oblige all requesting parties (employers and unions) to present evidence of their representativeness in the domain of the collective agreement for which they request extension. These figures could be annexed to the Extension Ordinance published in the official bulletin of the Ministry of Labour. Such a measure could be useful for an informed debate about the legitimacy of the extension mechanism in each case. The new government elected in 2015 made a move in the opposite direction. In its Resolution 82/2017 all prerequisites in terms of representativeness of the employers' associations were withdrawn and the new regulation was limited to stipulations regarding the tasks of the services of the Ministry of Labour (focussed on aspects of the previous impact assessment of extensions) and to the retroactivity of wage and other pay related parts of extended agreements. In practice this new regulation has no major impact.⁴⁰

If the efforts to revitalize collective bargaining should have the effect in the future that collectively agreed wages and work conditions are becoming considerably better than the minimum standards stipulated by law, the present extension mechanism might become a problem for a growing number of companies and would need to be reconsidered. This is not the case at the moment and will become a serious possibility only if major changes in the collective bargaining system are implemented.

⁴⁰ Government of Portugal (2017), Resolution 82/2017, in: *Diário da República*, 1.ª série — N.º 112 — 9 de junho de 2017, p. 2849.)

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5. Extension of collective agreements: The Nordic situation

Niklas Bruun

1. Introduction

Traditionally the Nordic countries comprise an area where the extension of collective bargaining was neither a relevant practice, nor even considered to be a relevant option. The obvious exception to this position is Finland, where extension of collective agreements has a long tradition dating back to the 1960s and which now has a relatively developed and comprehensive system. Norway introduced legislation to regulate its system of extension in 1993. Discussions in this area have recently been initiated in Denmark and Sweden, but the introduction of any such system has not yet taken place. On the other hand, both Denmark and Sweden have adopted a mechanism for wage-setting, which could be characterized as substitute mechanisms for extension.

Among the main reasons for the increased importance of extension mechanisms in the Nordic countries are the development of the European Union (EU) internal market, and the efforts to open up a common labour market and to promote free movement for service providers. It was, in particular, the extensive legal regime of public procurement in the EU, together with the EU Directive on the posting of workers in the EU, that indirectly brought pressure to introduce some form of extension mechanism, as will be explained below in the context of each country under consideration.¹

The common starting point for each of the Nordic countries is that collective agreements have normative mandatory effect in relation only to the signatory parties and members of their organizations. Through various mechanisms, however, employers bound by a collective agreement are normally obliged to apply similar conditions to non-unionized and unionized employees. One question that is addressed by the issue of extension is the possible effect of a collective agreement on “outside employers” – that is, employers who are not members of an organization bound by a collective agreement or have not concluded a collective agreement of their own. In discussing the situation of outside employers, it is in the interests of trade unions to control conditions for the supply of labour and to prevent social dumping. Traditionally the

¹ See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

discussion has focused on national employers not covered by collective agreements. Since the 1990s the focus of the discussion has shifted to competition from foreign employers temporarily operating in the country in question.

In Finland a comprehensive system for the extension of collective agreements was introduced by the Employment Contracts Act of 1970. The law was amended and further developed with the adoption of a new Employment Contracts Act in 2001. This later legislation requires the employer to apply the employment conditions prescribed in nationwide collective agreements, which have been declared generally binding (applicable) by a special board. The board will declare a collective agreement to be generally binding if the agreement is regarded as being representative of its sector. A collective agreement is considered to be representative if at least half of the employees in a particular sector are covered by the agreement. However, statistics alone are not the only determining factor. The board must also consider how established the collective agreement is in its sector, and the percentage of employers and employees organized in the branch. The provisions of the generally applicable collective agreement set a minimum standard; provisions in individual employment contracts that are inconsistent with generally binding agreements are void.

The advantages of the system of generally binding collective agreements have been disputed since the system was introduced in 1970. Employers have argued, for instance, that the regulation lacks reciprocity, since only the rights and not the obligations of the agreements are extended to employees. When the regulation was adopted in 1970 trade unions feared that it would reduce interest in union membership. It soon proved, however, that the extension system tended to increase the degree of organization on both sides: employees needed the trade unions to enforce their rights in the generally binding collective agreements, and employers needed the assistance of employers' organizations to interpret and administer the agreements (Ahlberg and Bruun, 1996). This was because the organizations had the best knowledge and understanding of what had actually been agreed in the collective agreements that had been made generally applicable by law.

In Norway a system of extension of collective agreements was introduced in 1993 with the adoption of Act No. 58 of 4 July 1993 on the extension of collective agreements (Evju, 2010). The reasoning behind the Act was to prevent foreign employers, performing work in Norway, from having a competitive advantage through lower costs of employment compared with domestic employers. The Act provides for a special board to declare a nationwide collective agreement, or a part of it, to be generally applicable to employees within the scope of application of the agreement. This procedure has been used in certain sectors since 2004 when the European labour market was significantly enlarged with new Member States from Central and Eastern Europe (CEE).

In Denmark and Sweden there are (with some minor exceptions) no rules concerning the extension of collective agreements (Kristiansen, 2015a; Kristiansen, 2015b). Nevertheless, it is not unusual for an outside employer and an employee to agree that the normative provisions of a specific collective agreement will govern the employment relationship, or that the employer should de facto apply the provisions of the agreement. Further, it should be noted that to some extent there are unwritten

(informal) norms, which have the character of presumptions of interpretation and which include a reference to the contractual usage manifested in the “most proximate” collective agreement. Judgment AD 1976 No. 65 of the Swedish Labour Court provides an example. The case concerned the fixing of overtime rates when an employment contract, which lacked any provision on the matter, was not covered by a collective agreement. The court held that the employee was entitled to overtime allowance in accordance with the current practice in the trade, and that this practice was to be found in the collective agreement the application of which was closest to hand. In Denmark there are similar judgments regarding notice periods (U74/481 H and U92/759 Ø) and minimum wages (where an individual employment contract contained no provision on wages) (U95/615 Ø). Finally, in establishing whether a provision in an employment contract should be adjusted in accordance with the general clause on unfair terms in contracts, the collective agreement for the work in question will often be regarded as the yardstick against which the fairness of the provision in the employment contract should be measured (Malmberg, 2002).

Legislation governing collective agreements in Sweden and Denmark provides no effective means for combating social dumping. Instead, to combat social dumping, trade unions conclude an “accession collective agreement” with outside employers. If an outside employer refuses to sign this agreement, the normal procedure is for the trade union to declare a boycott against that employer, resulting in members of the trade union refusing to be employed by the outside employer. To make the action more effective, the primary boycott is combined with “sympathy” (secondary) actions. These actions may be taken by the trade union itself, or by other trade unions. Such actions are typically aimed at preventing deliveries to and from the outside employer, and are usually very effective.

In Sweden and Denmark traditionally there has been relatively strong resistance to adopting a system of extension of collective agreements. The Danish and Swedish systems of labour law are clearly based on the idea of collective self-regulation, whereby the social partners determine and administer the rules of the labour market. Against this background we can conclude that the Nordic countries can be divided into two groups. In Finland and Iceland² extension has been an issue within the national labour market system as an internal integrated part of its institutional foundation. In the other Nordic countries it has predominantly been an issue that has been part of the changes brought about by the internationalization and Europeanization of the labour market. The outcome so far is that Sweden and Denmark have rejected the adoption of a straightforward extension system, while Norway has introduced such a system. The Finnish extension system also has important functions in relation to the internal EU market, but since the system has been in place for some time it has been comparatively easy to adjust to international developments.

² Collective agreements in Iceland (regulated by Act No. 55/1980) are automatically binding on all workers and employers operating within the occupational and geographical area of the relevant agreement. It is not a condition for the applicability of a collective agreement that the workers concerned are members of the signatory trade union or that those who employ them are members of the negotiating partner on the employers’ side. This law affects both domestic and foreign undertakings operating within the Icelandic labour market (Norðdahl, 2013, p. 10). Because of the particular features of the Icelandic labour market, the Icelandic extension system has not been considered further in this chapter.

2. The Finnish model

2.1. Background

The Finnish system for declaring collective agreements to be generally applicable has its roots in a system that was operated during the 1960s for workers cutting wood in Finnish forests. To avoid social dumping, a legal regime was introduced whereby all workers in this sector were entitled to minimum wages prescribed in the relevant collective agreement, which in fact applied to a relatively small number of employers. A general system for extension was introduced by the Employment Contracts Act in 1970.

2.2. The present system

A system of generally applicable collective agreements is now in place in Finland. The procedure for declaring a collective agreement to be generally applicable is regulated by the Act on Confirmation of the General Applicability of Collective Agreements (56/2001) enacted under the Employment Contracts Act of 2001. A specially constituted tripartite board makes the decision, which can then be challenged in the Labour Court. Under the Employment Contracts Act, the general applicability of collective agreements presupposes that the agreement is nationwide and can be deemed to be representative in the field in question. In considering these criteria several factors are taken into account, the point of departure being that approximately 50 per cent of the employees in the field are already covered by the agreement by virtue of the Collective Agreements Act. If these criteria are fulfilled and the agreement is declared to be generally applicable, its terms must be adopted as minimum conditions by all employers in the field, regardless of their membership of an employers' association. Only employers bound by another collective agreement, concluded with a nationwide trade union, are exempt from this obligation.

In accordance with the Act 56/2001, a special tripartite Commission is established to decide whether an agreement fulfils the legal requirements and is generally applicable. This Commission has competence to declare an agreement generally applicable; its decision is posted on the Ministry of Social Affairs website and made accessible for all employers and employees. In 2014 there were 114 generally applicable agreements posted on the website; more than 20 agreements were explicitly declared not to be generally applicable. The usual reason for a decision refusing general applicability is that the agreement does not reach the required threshold of around 50 per cent. These collective agreements typically cover specific groups of employees that are not so well unionized: examples of such agreements to be found online include the agreements covering workers in dairies, in removal services, and in film and television production companies. This method of online publication makes the agreements available also for non-organized employers. The numbers clearly show that the system of extension has general coverage in the Finnish labour market and is not just relevant in certain sectors.

The Commission examines three crucial criteria for extension: (i) the agreement must be nationwide; (ii) it must be deemed to be representative; and (iii) it must cover the field in question. The two latter requirements can raise difficulties. An appeal against

a decision with regard to a declaration of general applicability can be made by an organization or an employer to the Labour Court, which has the final say.

The scope of extension is relatively broad in Finland. The employer is required to apply the provisions of a national collective agreement to the terms and working conditions of the employment relationship. This means that, from the date on which the collective agreement was declared to be generally applicable, there is a mandatory obligation on the employer to apply the minimum conditions in the collective agreement in a situation where terms and conditions in the individual employment contract are less favourable to the employee. This obligation is unilateral and does not apply to obligations on the employee stipulated in the collective agreement. Peace obligations in a collective agreement cannot be declared to be generally applicable. It is therefore possible that a trade union could try to achieve better work conditions by resorting to collective action. In practice, this does not happen. There are no general exemptions from the system of extension for small and medium-sized enterprises (SMEs) or companies with very few employees; nor is exemption available for firms in difficulty to permit them to go below the minimum level in the agreement in situations of crisis.

2.3. Criticism

The main employers' association, Elinkeinoelämän Keskusliitto (EK) [Confederation of Finnish Industries], supports the system of general applicability as a means of guaranteeing fair competition between employers and therefore avoiding social dumping, but the organization for SMEs in Finland, Suomen Yrittäjät [Federation of Finnish Enterprises], is critical. The Federation recently published a report in which it argued that the system is strict, inflexible and questionable from the point of view of employers' fundamental rights. When the organization filed a complaint with the European Committee of Social Rights of the Council of Europe, relying on an interpretation of the European Social Charter, the Committee did not find that the system infringed the negative freedom of association or the right to remain outside employers' organizations.³

The main criticism towards the present Finnish extension system is that it actually discriminates against SMEs. With the increased decentralization of collective agreements there is an increase in the number of clauses in collective agreements which make it possible to deviate from minimum standards in the agreement by local parties. In some cases, this applies also to non-organized employers to whom the agreement is extended (Makkula, Rytkönen and Vanhanen, 2015). In that case, the use of these decentralization clauses is blocked if there is no local agreement due to

³ Federation of Finnish Enterprises (*Suomen Yrittäjät v. Finland* (2007)) Complaint No. 35/2006 (European Social Committee). The Committee held that Art. 5 of the Charter (the negative right to freedom of association) must be interpreted taking into account Art. 6 of the Charter (the positive right to bargain collectively). It follows from this that it is legitimate, in principle, that the legal rules applicable to working conditions are the result of collective bargaining. Such a system implies that employers may be treated differently depending on whether they are members of an organization. Therefore, in order to establish incompatibility with Art. 5 the different treatment has to affect the very substance of the right of freedom of association (see the judgment of the European Court of Human Rights in *Gustafsson v. Sweden* of 25 April 1998). In the present case the complainant organization was not able to demonstrate, nor did the Committee find that the impugned provisions were in conflict with the substance of the right of freedom of association; nor was it demonstrated that this freedom was affected in a more serious manner than that necessary for the effectiveness and coherence of the Finnish system of collective bargaining.

the absence of local union representation. The trade unions usually justify this with the argument that there is no real balance in local negotiations in small companies: there are often no competent shop stewards on the side of the employees, and the outcome of local negotiations in practice is likely to be dictated by the employers.

The present Finnish Government, which came into office in May 2015, has announced that it will increase the potential for local bargaining:

The Government will encourage social partners to adopt local agreement practices in workplaces and will ensure through legislative projects that conditions for local agreement are strengthened. ... The objective is that companies will be able more widely than at present to agree locally on improving competitiveness, strengthening employment, terms of employment such as pay, working hours, conditions for terminating employment, use of a working time bank, reduction of sick leave, and issues affecting wellbeing at work. The Government will initiate necessary reforms of working hours legislation and other labour legislation to support promotion of local agreements, ensure an equal position for employers in exceptional circumstances, and strengthen the position of personnel in companies' decision-making. The Government will appoint a rapporteur to prepare a proposal on developing local agreement.⁴

Whether this will lead to changes in the law relating to extending collective agreements is as yet unclear.

2.4. The Finnish system and the European Union

The Finnish system of generally applicable collective agreements is considered to have adapted well to EU law. The Finnish Posted Workers Act (1146/1999) implemented EU Directive 96/71/EC on the posting of workers in the framework of the provision of services (Posted Workers Directive). The Act stipulates that posted workers are to be paid a minimum rate of pay, to be determined by reference to remuneration specified in a generally applicable collective agreement as defined in the Employment Contracts Act (chapter 2, section 7). If there is no generally applicable collective agreement that covers the employment relationship of the posted worker, a reasonable wage, which is normal for the work involved, should be paid to the posted worker if the remuneration agreed between the employer and the worker is much lower than this. Social dumping is therefore restricted. The significance of the Finnish legislation was clarified in a decision of the Court of Justice of the European Union (CJEU) in February 2015.⁵

The factual background to this decision is as follows. Workers with employment contracts concluded under Polish law were contracted to carry out electrical installation work at the Olkiluoto construction site in Finland, operated by Elektrobudowa Spółka Akcyjna (Elektrobudowa). They were provided with accommodation in Eurajoki, some 15 kilometres from the construction site, and travelled daily to and from the site. On arriving at Olkiluoto, the Finnish Electrical Workers' Union informed the workers that their hourly wages were considerably lower than the minimum wages in the

⁴ Prime Minister's Office, Finland, "Finland, a land of solutions. Strategic programme of Prime Minister Juha Sipilä's Government", Government Publications 12.2015, 29 May 2015 (Helsinki), p. 16.

⁵ CJEU, *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, C-396/13, 12 Feb. 2015, n.y.r.

generally applicable Finnish collective agreement and that they were entitled to daily allowances, which the Polish employer did not pay. The 186 electricians employed on fixed-term contracts joined the Finnish union in order to gain its support in protecting and enforcing their rights under Finnish law. The Finnish union took legal action in the local Finnish district court to enforce the wage claims on behalf of the Polish workers, which in total amounted to some €2,900,000. Elektrobudowa contested all claims and argued that as the employment contracts were concluded in Poland under Polish law, the Finnish trade union lacked *locus standi*.

Furthermore, there was considerable difference of opinion on how to calculate minimum wages under the Posted Workers Directive and the Finnish legislation. Elektrobudowa argued that it should be the lowest minimum wage under the collective agreement, while the Finnish union argued that it should be the lowest wage for the specific category of work performed. Nor was there agreement on the method of assessing the various elements of compensation (such as for costs of accommodation, travelling time, daily allowances and holiday pay) owed to the employees under Finnish legislation and collective agreements.

The judgment introduced the discussion of minimum pay by exploring the background and purpose of the Posted Workers Directive on the basis of its wording in paragraphs 28 to 32. It notes the interests of both the employer and its personnel in having clearly specified terms and conditions regarding posting. The Court also noted the mandatory effect of Article 3(1) of the Posted Workers Directive in guaranteeing that posted workers should operate under the terms and conditions of employment of the relevant host state. The judgment differs from the Advocate General's argument (in paragraph 33 of the opinion) that a "paradigm shift" with regard to the interpretation of the Posted Workers Directive had occurred in the *Laval* case,⁶ which "shifted focus" from protection of the domestic labour market to freedom to provide services. The Court instead underlines the dual purpose of the Posted Workers Directive: to ensure that workers are protected in their terms and conditions of employment while posted, and to ensure a climate of fair competition between national undertakings and undertakings that provide services transnationally. The judgment plainly states that the wording of the second subparagraph of Article 3(1) of the Posted Workers Directive makes clear that minimum rates of pay are to be defined by the national law and/or practice of the Member State to whose territory the worker is posted. In this case the national Finnish legislation referred directly to the content of the collective agreement applicable by the extension mechanism. It is implicit in that wording that the method of calculating the rates and the criteria used in that respect are also a matter for the host Member State. Therefore, the means of differentiating minimum wages in generally applicable collective agreements must also be applied to posted workers who perform the functions regulated by the relevant collective agreement.

2.5. Public procurement and extension

The extension mechanism is important also in relation to public procurement. The Finnish Public Procurement Act 348/2007 (section 49.2) stipulates that a contract

⁶ CJEU, Case C-341/05, *Laval* [2007] ECR I-11767. See section 4.2 below.

between a central state administrative body and a private contractor must include a clause according to which all employment contracts entered into under that contract shall contain the minimum terms and conditions that must be observed in similar work under Finnish law. The background for this requirement is Finland's ratification of the International Labour Organization (ILO) Labour Clauses (Public Contracts) Convention, 1949 (No. 94) (Krüger, Nielsen and Bruun, 1998).

3. Norway and social dumping

The explicit aim of the Act on the extension of collective agreements is to prevent foreign employers, performing work in Norway, from having a competitive advantage through lower costs of employment compared with Norwegian employers (Evju, 2013). Foreign workers, therefore, are entitled to wage conditions similar to those applicable to Norwegian employees. Pursuant to the Act, a special board, the Tarifnemnda [Tariff Board for Collective Agreements] may declare a nationwide collective agreement, or a part of it, to be generally applicable to employees within the scope of application of the agreement. All terms and conditions relating to employment may be declared generally applicable, although in practice trade unions do not seek extension of the full agreement as they fear that it might remove incentives for trade union membership. Extension decisions that have been adopted so far have therefore been partial.

The decisions are taken by the Tariff Board for Collective Agreements, which has five members appointed by the Government. The chair and two members are independent: one member represents the trade unions (Landsorganisasjonen i Norge (LO) [Norwegian Confederation of Trade Unions]); the other, the employers' confederation ((Næringslivets Hovedorganisasjon (NHO) [Confederation of Norwegian Enterprise]). If other unions or employers' organizations submit a request for a declaration of general applicability they will, as parties to the collective agreement in question, also have a representative on the Board. The Tariff Board may declare a collective agreement to be generally applicable at the request of national organizations that are parties to a nationwide agreement, and may also reach a decision on its own initiative. The Board is an official national authority and is mandated to issue legally binding regulations.

The first application for a declaration of general applicability was made in 2003 when the Norwegian Confederation of Trade Unions applied for an extension of its collective agreements in the oil and petroleum sector, because foreign employees were being paid wages that were clearly below that stipulated in Norwegian collective agreements. It has since become common to declare as generally applicable parts of the collective agreements in the maritime construction industry, the construction sector, the sector for electricians, the cleaning and refuse collecting sector, and the sector for work in agriculture and horticulture. In 2015 several agreements in the transport sector were also extended.

The Tariff Board has adopted Regulations of 6 October 2008 concerning the partial general application of the collective agreement of engineers in the maritime construction industry, which were later superseded by corresponding regulations of 20 December 2010 (No. 1764). In accordance with these regulations non-organized and foreign employees acquired a right to wage and working conditions that are equal

to those that Norwegian employees have within the scope of the wage agreement. A group of industrial companies brought a legal action to invalidate the decision, arguing that Article 36 of the Agreement on the European Economic Area (EEA) and the Posted Workers Directive prevent the general application of contract conditions to posted employees regarding out-of-town allowances, working hours, overtime allowances and compensation for costs of overnight accommodation away from home. The Norwegian Supreme Court unanimously concluded, in its *STX Norway Offshore* judgment, that the conditions for general application contained in the Act relating to the General Application of Wage Agreements had been met, that the disputed provisions in the Regulations were compatible with Article 36 of the EEA Agreement and Article 3 of the Posted Workers Directive, and that the Regulations were therefore valid. The Supreme Court judgment was preceded by an advisory opinion from the EFTA Court, and the Supreme Court judgment included statements about the significance of advisory statements from the EFTA Court.⁷ In the aftermath of the Supreme Court decision the EFTA Surveillance Authority (ESA) is arguing that the Supreme Court judgment is contrary to the EEA Agreement and that Norway has failed to fulfil its obligations arising from the Posted Workers Directive. The case is pending.

Within the framework of public procurement the mechanism of extension is used as a linkage to working conditions. There is a specific regulation, in respect of construction and production plants, that requires public contractors to include a provision in contracts with subcontractors to explicitly commit themselves to apply the wage and working conditions of (sub)contracted workers in accordance with either the generally applicable collective agreement or – where no extension has taken place – with a nationwide collective agreement for the sector in question. The public authority also has an obligation to ensure that these conditions in practice are met.

4. The different scenes: Denmark and Sweden

4.1. Background

The difference in approach in the attitudes of Denmark and Sweden towards state intervention in collective bargaining norm-setting was shown in the late 1990s with the implementation of the Posted Workers Directive in respect of employment conditions for employees temporally performing work in another country (the host state). According to the Rome I Regulation⁸ the law of the host state will not normally apply to the employment contract. Nevertheless, the idea behind the Directive is that some of the rules governing employment in the host state will apply to work temporarily performed there. It followed from the *Rush Portuguesa* judgment of the CJEU⁹ that Community law did not preclude Member States from extending some parts of their labour legislation or collective agreements (at least those agreements having an *erga*

⁷ HR-2013-496-A, Case No. 2012/1447, Civil Appeal against Judgment. The preceding EFTA Court judgment is Case E-2/11, *STX Norway Offshore* [2012] EFTA Ct. Rep. 4.

⁸ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). This Regulation replaced the old Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

⁹ CJEU, C-113/89, *Rush Portuguesa v. Office National d'Immigration* [1990] ECR I-1417.

omnes effect) to any person who is temporarily employed within their territory. The Directive, however, went further and required Member States to ensure that certain basic standards of their own labour law (the so-called “hard core” provisions) apply to employees who are performing temporary work within their territory.

The standards that Member States are obliged to extend to posted workers are listed in Article 3 of the Posted Workers Directive, from which it follows that the standards:

- must be laid down in certain sources of law (namely “law, regulation or administrative provision”); and
- as regards the building industry, in collective agreements with an *erga omnes* effect; and
- concern certain aspects of the employment relationship (enumerated in Article 3.1), including minimum rates of pay.

Further, the Directive makes it optional for Member States to extend generally applicable terms and conditions of employment laid down in, inter alia, collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned and/or which have been concluded by the most representative employers’ and labour organizations at national level, and which are applied throughout national territory. It was usually held that this option refers to the kind of collective agreement concluded in Denmark and Sweden.

The objective of the Posted Workers Directive is at least partially to combat social dumping. However, the method employed in the Directive differs from that traditionally used in Denmark and Sweden, where the task of combating social dumping has traditionally been entrusted to the trade unions. It follows from the Directive that it is a task for the Member States to perform in the supervision of conditions of employment of workers not covered by national law and national collective agreements. Thus, it is not surprising that the Danish and Swedish legislators chose to implement the Posted Workers Directive in a somewhat minimalist way. This is most evident by the fact that neither country has used the option to extend collective agreements to posted workers. One argument for not taking this option was that the traditional method – forcing the outside employer to sign an accession collective agreement – was regarded as sufficiently effective. Further, the Swedish and Danish authorities did not want to introduce an *erga omnes* system through the back door. It follows from the Directive that companies that employ posted workers cannot be treated less favourably than domestic companies. If Denmark and Sweden had created an obligation for foreign companies to pay wages according to domestic collective agreements, they would also have had to extend this obligation to all national companies not bound by a collective agreement. On this point there was consensus between the Government, the employers and the unions. However, since there is no legislation on minimum wages or collective agreements with an *erga omnes* effect, probably the most important of the issues referred to in Article 3 of the Posted Workers Directive – minimum rates of pay – was omitted from the Swedish and Danish legislation on posted workers. The result of this was that legislation on collective agreements in neither Sweden nor Denmark provided any effective means for combating social

dumping. Instead (as mentioned above) the most prominent means of combating social dumping is for trade unions to conclude an “accession collective agreement” with outside employers. If the employer refuses to sign the agreement, the normal procedure is for the trade union to declare a boycott against that employer.

4.2. The *Laval* judgment of the CJEU and its aftermath

The background to the *Laval* case is as follows. A Riga-based company, Laval, had posted workers to Sweden in May 2004 to work on building sites operated by a Swedish company. The work on the building sites in this case was carried out by a subsidiary of Laval. The Swedish building workers’ trade union tried through industrial action to exert pressure on Laval to sign a collective agreement with it, but Laval instead signed a collective agreement with the Latvian building sector trade union, with which a majority of the posted workers were affiliated. The conflict made it impossible for Laval to perform work in Sweden and the posted workers were sent back to Latvia. The ensuing legal process ended in a preliminary ruling from the CJEU,¹⁰ which found that the industrial action taken was in conflict with the rules on free movement of services within the EU and, furthermore, that the Swedish national implementation of the Posted Workers Directive had not been performed in accordance with any of the methods expressly provided for by the Directive, and that no provisions on minimum rates of pay could be applied.

The consequence of the *Laval* judgment was that the EU legal regime regulating free movement of services was interpreted as a restriction of the right to take industrial action and to force a foreign service provider to sign a collective agreement in Denmark and Sweden. In response, the Danish Posting of Workers Act was revised, the revision coming into force at the beginning of 2009. The main content of the new stipulations is that trade unions may take industrial action against a foreign service provider on three conditions:

- the wage claims must be similar to those that Danish employers are required to meet;
- the wage claim is to be based on a collective agreement concluded by the most representative parties on the Danish labour market; and
- the wage claim must be clearly specified. In the preparatory works to this legislation it was established that the regulated wage is not a pure minimum wage concept, but includes various additional elements.

The *Laval* judgment from the CJEU also gave a strong blow to the Swedish labour market model, although the Court explicitly said that the Swedish Model was legitimate. The Court stated that since the purpose of the Posted Workers Directive is not to harmonize systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level that is not expressly mentioned among those provided for in that Directive, provided that it does not hinder the provision of services between Member States.¹¹

¹⁰ CJEU, Case C-341/05, *Laval* [2007] ECR I-11767.

¹¹ See the judgment in Case C-341/05, *Laval*, para. 68.

A Government committee was established in Sweden to prepare a response to the *Laval* judgment. The committee proposed new legislation, the Lex Laval, which was introduced in April 2010. The new legislation regulates situations in which it is permitted to use industrial action against an employer engaged in the cross-border posting of workers. The main condition for lawful industrial action is that the parties to a collective agreement must register the minimum wage terms in the agreement applicable to posted workers with the Work Environment Authority. Organizations may use industrial action against an employer in order to achieve a collective agreement for the posted employees. To be able to use industrial action the issue must concern:

- the minimum terms in a sectoral agreement (an agreement that is valid generally in the whole country for a particular sector);
- the valid terms for holidays, working hours, pay, and similar benefits;
- the terms in the collective agreement being more favourable than those already in force for the posted worker according to Swedish law.

The union may not lawfully call for industrial action to conclude or enter into a Swedish collective agreement if an employer can show that the employees are already included in terms and conditions that are at least as favourable as those in a Swedish central branch agreement.

As can be seen from this legal evolution, a kind of *sui generis* general applicability has been introduced for situations involving posting. The Lex Laval has been controversial in Sweden. The Swedish trade union confederations (Landsorganisationen i Sverige (LO) [Swedish Trade Union Confederation], and Tjänstemännens Centralorganisation (TCO) [Swedish Confederation of Professional Employees]) argued that it was not compatible with the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). They brought a complaint before the ILO, which was dealt with by the Committee of Experts on the Application of Conventions and Recommendations (CEACR).¹² The Committee took notice of the comments of the Swedish Trade Union Confederation and the Swedish Confederation of Professional Employees that the explicit purpose of the Swedish legislation prior to the *Laval* case – and, in particular, the previous *Lex Britannia* rule, which permitted industrial action for the purpose of compelling a foreign employer to enter into a collective agreement regardless of whether the employer was already bound by a collective agreement with a trade union in its home country – was to achieve equality of treatment on the Swedish labour market of foreign and Swedish companies and employees. The Committee further observed, with concern, that the amendments to the Posting of Employees Act restrict recourse to industrial action to conditions corresponding to the minimum conditions in the Posted Workers Directive and bar unions from taking industrial action, even if they have members working in the enterprise concerned and regardless of whether a collective agreement covers the workers concerned, provided that the employer can show that the employees' terms and conditions are as favourable as the minimum conditions in the central collective agreement. The Committee considered that foreign workers should have the right to

¹² Observation (CEACR), adopted 2012, published 102nd ILC session (2013).

be represented by the organization of their own choosing with a view to defending their occupational interests, and that the organization of their choice should be able to defend its members' interests, including by means of industrial action. The Committee therefore requested the Swedish Government to review with the social partners the 2010 amendments made to the Posting of Workers Act to ensure that workers' organizations representing foreign posted workers are not restricted in their rights simply because of the nationality of the enterprise.

4.3. Extension as a tool for implementing EU directives

During a long period of EU membership in Denmark extension has evolved as a tool to fully ensure its Member State responsibility for full coverage of the legal effects of implemented EU directives. The Danish policy in this respect started in the 1970s when Denmark implemented the Directive on equal pay in 1976 with legislation to apply in cases where collective agreements relating to equal pay were not in place. This is a particular form of extension as EU regulation is extended by law in a situation where primary implementation is achieved by collective agreements, and extension is the mechanism which guarantees full and complementary implementation of EU law. An example of this mechanism is the implementation of the EU Part Time Directive 97/81/EC of 15 December 1997. In 2001 Denmark adopted new legislation which extends the coverage of the major Danish collective agreements to all employees who are not otherwise covered by a collective agreement to ensure at least the same standard of protection as is provided for in the Directive. The process for implementation of this Directive was very challenging as the main labour market parties – the central employers' organization (Dansk Arbejdsgiverforening (DA) [Confederation of Danish Employers]) and the main union confederation (Landsorganisationen i Danmark (LO) [Danish Confederation of Trade Unions]), had different opinions on how it should be done (Kristiansen 2015a; p. 116). A similar technique, as a response to a reasoned opinion of the European Commission, was adopted in January 2002 to implement the Working Time Directive. In Denmark the Implementeringsudvalget [Implementation Committee] has been established to guide the Ministry in implementing EU labour law directives (Kristiansen 2015a; p. 186). This tripartite body gives advice to the Government; it has no decision-making power.

4.4. Public procurement and extension

There has been a tradition in both Denmark and Sweden that public procurement contracts include "linkages": an obligation to apply certain collective agreements, especially wage clauses, for the work that will be performed. In the procurements subject to Community law (procurements of cross-border interest) the question may also arise whether the Posted Workers Directive can be applied in parallel with the rules relating to procurement. The crucial issue is the extent to which the contracting public authority can prescribe the rates of pay and the employment conditions that must apply within the scope of the contract. This may involve conditions both for employees of the tenderer who wins the contract and employees of any subcontractors who may be engaged. The starting point, of course, is the possibility of indicating in the contract the requirements that should apply with regard to working conditions.

This is made expressly clear both by the EU procurement directives and by Swedish procurement legislation. Generally speaking, this is found to be informative and appropriate. It is usually non-contentious, especially with regard to requirements laid down by law or in statutory instruments (or international agreements), which are binding on all.

Sweden has chosen not to ratify the ILO Convention on Labour Clauses (Public Contracts), 1949 (No. 94). Initially there was consensus between the social partners that ratification was unnecessary, the interests that the Convention is designed to protect already being covered by the Swedish collective bargaining system. The decision against ratification, which was taken in 1950, was clearly founded on purely national deliberations. In recent years the unions have revised this view and the issue has been raised in Government Commission reports on public procurement (see the latest report SOU 2016:15, which recommends a cautious ratification of ILO Convention 94).¹³ Although Sweden has not pledged to give effect to the Convention, it has been a widespread practice among Swedish authorities to stipulate that contractors pay wages in accordance with current collective agreements.

As mentioned above (at 4.2.), the Swedish Posting of Workers Act was revised with effect from April 2010. Under the new rules the unions, if they intend to resort to industrial action, can only demand that foreign providers of services pay minimum wages, which are clearly defined in nationwide collective agreements. If the foreign operator is prepared to sign a Swedish collective agreement without pressure in the form of industrial action, then clearly no such limitations exist; in practice this happens frequently. Similarly, a foreign undertaking choosing to hire Swedish workers in Sweden is compelled as a rule to pay wages at the going rates as per the relevant collective agreement, but in this case the wages are fixed outside the procurement procedure.

What implications, then, does this hold for procurement by public authorities? First, it should be perfectly feasible to indicate in the tendering documentation the collective agreements that apply in the industry concerned. If the authority chooses to indicate a concrete wage amount, presumably it will be hard to indicate anything but the minimum wage in the tendering documentation, because the unions cannot enforce wage levels above the minimum by means of strike on foreign suppliers. The paradoxical outcome seems to be that to most tenderers the tendering documentation is made less transparent than it would have been if it was possible to indicate the current level of wages in the place where the work is to be performed. Second, there is nothing to prevent the authority from making performance of the contract conditional upon the operator and any subcontractors paying at least a minimum wage as defined in national collective agreements, that is, collective agreements that meet the requirements of the revised Swedish Posting of Workers Act. On the other hand, this presupposes that the relevant collective agreement clearly states lowest rates of pay. In that case it is the negotiated lowest rates of pay which can be adopted as contractual conditions for most industries in connection with procurement. In some sectors, for instance metal engineering, the absence of clear provisions on

¹³ SOU stands for *Statens offentliga utredningar*, which means that reports labelled “SOU” are officially commissioned by the Swedish Government.

lowest rates of pay might make it impossible to use this method; on the other hand, in those sectors where public procurement plays a significant role (such as construction, cleaning and transport) we usually find minimum wages in the Swedish collective agreements.

Again, we see a kind of indirect declaration of general applicability which formally is not extension, but in practice has the same purpose. In Denmark the situation is even clearer since Denmark has ratified ILO Convention 94 and, in accordance with a Government decree, basic terms and conditions in representative nationwide collective agreements must also be applied in the context of public procurement. Again, here we have a particular form of extension, which formally is not labelled as extension, although it creates a linkage to sectoral collective agreements. In fact, the increased internationalization and detailed EU regulation governing public procurement procedures are the reasons for a greater need to extend the application of the minimum terms and conditions in collective agreements to a public contractor.

In the context of the national implementation of the new 2014 EU directives on public procurement (such as Directive 2014/24/EU, 26 February 2014) the Swedish Government has adopted legislation, in force from 1 July 2017,¹⁴ which makes it obligatory to adopt labour clauses at least in branches or situations where there is a risk that competition between actors takes place in the form of low-wage practices and where the size of the project is above the threshold values set out in the directives. These clauses must cover at least wages, annual leave and working time. This mandatory system was proposed by a Swedish Committee of Inquiry, which presented its proposal on 1 September 2015 (see SOU 2015:78). The new legislation builds on the general principles of public procurement such as transparency, openness and equal treatment. For buying entities to be able to define wage costs in their tenders they must have access to the content of applicable collective agreements. In order to make it easier for buying entities to access adequate information, the proposal is that a special authority should provide such information, after having consulted the labour market parties. This, again, is not extension in the narrow sense of the term, but it indicates that the contractors must follow certain stipulations in collective agreements – to which they are not bound otherwise – on the basis of contractual terms in the procurement contract. These stipulations are defined as the minimum standard in central collective agreements applicable in the whole of Sweden to similar employees in the branch concerned.¹⁵ These obligations, in accordance with the Act, are also to be extended to subcontractors. All of these measures are actually envisaged in the new directives on public procurement, although the new legislation was not supported by all interest groups: in particular, employers' organizations and organizations for SMEs have questioned them. They argue that there is tension between the principle of equal treatment and the proposal, and that these measures will result in new administrative and economic burdens for SMEs.

¹⁴ The new legislation was proposed in Government Proposal 2016/17:163. It forms a part of the legislation on public procurement: *Lagen om offentlig upphandling* (Swedish Act on Public Procurement (2016:1143 as amended by a revision 2017:347)), p. 114, chapter 17.

¹⁵ *Ibid.*, p. 114 chapter 17, s. 3.

5. Concluding remarks

In the Nordic countries, legal regulation of the normative function of the collective agreement was first developed during the early decades of the twentieth century. Since then the structure of collective bargaining and the content of collective agreements have undergone major changes. From the 1950s bargaining was, to a large extent, centralized at the national sectoral and cross-sectoral levels. In recent decades, however, collective bargaining in the Nordic countries has undergone dramatic decentralization. This has manifested itself in an increased competence of local-level parties to negotiate various issues within the framework of general sectoral agreements. From the point of view of extension this development creates complications. An example of extension mechanisms becoming more complicated is represented by the so called “numberless agreements” where no minimum wage figures are even mentioned and decision-making on wages has been regulated only by procedural rules (Ahlberg and Bruun, 2005).

Therefore we can conclude that there seems to be a clear tension within collective bargaining and extension in the Nordic countries. EU regulation and globalization create the need to ensure that minimum terms and conditions in collective agreements are applied to all employers with employees performing work in these countries, whatever their origin or the country from which they operate. We observe a strong trend towards an increased application of extension or some other mechanism with similar effects. Here we can see a tendency towards convergence of the industrial relations systems in the EU (including the Nordic countries), which emanates from a need to adjust and defend the national voluntary collective bargaining system against EU free market regulation.

On the other hand, the preconditions for extension at the national level have not improved, but have become complicated in certain sectors, since collective agreements are very different today from what they were between 20 and 30 years ago. In the light of this development we might see a differentiation between various sectors with regard to extension. The Norwegian model in this respect is interesting because it differentiates between sectors. Extension of collective agreements might be used in situations where there is strong movement of workers and a risk of disruption in the national labour market. Such sectors might involve construction, transport and cleaning, as well as some sectors like software programming. At the same time extension might not be needed in sectors that lack these market challenges.

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6. Contested terrain: The extension of multi-employer collective agreements in South Africa

Shane Godfrey

1. Introduction

The extension of a collective agreement concluded in multi-employer collective bargaining involves the application of the agreement to all employers and employees within a defined area and sector. For this purpose a “sector” is defined mainly by a product market (or markets) rather than a labour market.¹ So, it is all the employers in an area that produce goods for a certain product market that are bound by the extended agreement. Effectively the agreement sets the minimum level of labour costs across the product market, therefore taking such costs out of competition. It is precisely this element that makes the extension of multi-employer collective agreements controversial, because it means that some employers are bound to a level of labour costs, set in negotiations by their competitors, to which they were not party. It is therefore a contested form of labour market regulation because the potential exists for a degree of collusion between some employers and trade unions with regard to labour costs. It is because of the potential for collusion that the state usually has a role to play. Where legislation makes provision for the extension of collective agreements reached in multi-employer bargaining, the state will act in the public interest with regard to the extension mechanism. This will generally involve the exercise of discretion as to whether or not to extend a collective agreement.

The extension of multi-employer collective agreements can be examined in a technical way, such as the legal nature of the extension mechanism, what are the legislative checks and balances, and so on. However, extension of agreements has much wider import: the concept was part of a philosophical approach to labour market regulation that had currency in the first half of the twentieth century. This approach saw collective bargaining as the means through which the economy would be democratized. Trade unions and employers would therefore jointly regulate or “govern” sectors of the economy through collective bargaining, which would produce agreements that could be legislated for an entire sector. The State retained an oversight role with regard to extension of the agreements so that it could protect the public interest, but the

¹ In other words, the ‘sector’ is defined more by the firms competing with each other than by the scope of trade unions or by a set of occupations.

emphasis of this regulatory approach was on bipartite industrial self-government.² It has been argued that:

[T]he extension of collective agreements possesses an importance which goes far beyond the mere regulation of working conditions. It constitutes the first chapter of a new legislative technique, that of legislation by accord. It shows that legislation can remain democratic even if, in order to secure rapid settlement and elasticity, it is drawn up without recourse to parliamentary procedure (Hamburger, 1939, p. 194).

By the 1950s, multi-employer collective bargaining (usually at a sectoral level), together with the extension of agreements, was widespread. The economic and technological conditions of that period were conducive to sectoral bargaining. In many industrialized countries there was close to full employment, productivity was rising rapidly, tariff barriers protected national product markets from international competition, and standards of living were improving. In this context the extension of multi-employer collective agreements did not attract a great deal of attention. The economic downturn from the early 1970s, however, put increasing pressure on labour market regulation, including sectoral bargaining arrangements and the extension of agreements. Since then centralization of collective bargaining has become a contested issue, with many employers advocating decentralization of bargaining.

2. The historical and legislative roots of the collective bargaining system

The current collective bargaining system in South Africa, in particular the legislative framework for bargaining councils, has long historical roots. National regulation of collective bargaining began with the Industrial Conciliation Act (11 of 1924). It was a relatively rudimentary statute, which introduced a skeletal framework for the voluntary establishment of industrial councils and conciliation boards. Industrial councils were permanent structures for multi-employer collective bargaining, which were registered for a defined area and sector, whereas conciliation boards were ad hoc forums established to settle particular disputes. The Act provided mechanisms whereby both industrial council agreements and agreements reached by conciliation boards could be extended. The criteria for the extension of an agreement was that the parties to the agreement were “sufficiently representative” of all employers and employees within the scope of the council and/or that the Minister deemed it expedient to extend the agreement. The term “sufficiently representative” was not defined in the Act.

In terms of long-term impact on the labour relations system, the key aspect of the Act was its exclusion of pass-bearing African workers from its definition of “employee”.³ This meant that most male African workers could not join trade unions registered under the Act and could not be represented in industrial council negotiations. This

² See, for example, the discussion by Dukes (2011) of Sinzheimer’s ideas, which influenced European approaches to labour market regulation. It seems that there was a separate but very similar concept of self-government in industry in England, which was exported to a number of Commonwealth countries, including South Africa, early in the twentieth century (Godfrey et al., 2010, pp. 18 (fn. 63), 33 and 43).

³ Male African workers were required to carry passes (permits) in accordance with one or other of the “Native Pass Laws” (indentured Indian labour was excluded). The exclusion was later extended to female African workers (while indentured Indian labour eventually disappeared) (Du Toit et al., 2015, p. 6, fn. 8).

exclusion led to “a convergence of employer interests ... and the interests of white workers”, and it “served to establish a ‘joint monopoly’ of employers and registered trade unions at the expense of African workers, who were excluded from the industrial conciliation negotiating machinery” (Webster, 1978, p. 68). The principle of industrial self-government that underpinned the collective bargaining model in the Act therefore mirrored the policy of racial exclusion that prevailed in the broader body politic.

In 1937 a new statute repealed and replaced the 1924 Industrial Conciliation Act.⁴ It was a far more substantial piece of legislation than its predecessor. The frameworks for the establishment of industrial councils and conciliation boards remained, as did the mechanisms for the extension of their agreements. The statute also provided for an exemption process, but this remained at the discretion of the relevant industrial council or conciliation board. Enforcement was modified: provision was made for inspectors to be appointed to enforce conciliation board agreements and agents to be appointed by industrial councils for the purpose of enforcing their agreements.

In 1956 a new Act was introduced.⁵ The Act, to a large extent, ignored the evidence of two “industrial commissions” appointed by the Government in 1935 and 1948–51 to investigate the emerging labour relations system.⁶ The commissions had highlighted two major problems in the system: the failure to create a coherent system of national industrial councils,⁷ and the extremely wide gap that had emerged in industrial council agreements between the wage levels of skilled and unskilled workers (which reflected the power of craft unions in the industrial council system and the predominance of African workers, who were not represented in industrial council negotiations, in unskilled categories). The only way to properly address the above problems would have been to include African workers in the definition of “employee” in order that they could participate fully in the labour relations system. However, this was not an option for the Government of the day. In fact, the aim of the Government was to use the new Act to deepen and refine racial divisions in the labour relations system. Besides introducing “job reservation”, with the purpose of securing specified occupations for White workers,⁸ the new Act sought to divide trade unions along racial lines (over and above the exclusion of African workers from the system).⁹ The additional racial divisions weakened trade unions, thereby making it more difficult for unions to organize and bargain nationally.

The booming post-war economy and increased repression of political opposition to the apartheid system ensured a period of labour relations stability through to the early 1970s. The number of industrial councils continued to rise during this period: in 1960

⁴ Act 36 of 1937.

⁵ Act 28 of 1956.

⁶ Generally referred to as the Van Reenen Commission (1935) and the Botha Commission (1948–51) after their chairpersons.

⁷ In 1935 there were 36 registered industrial councils, but only three were national councils. By 1950 the number of registered industrial councils had risen to 86, of which 11 were national councils (covering such diverse sectors as the iron, steel and engineering industry, and the ophthalmic optical manufacturing industry).

⁸ Section 77 of the 1956 Act provided that certain categories of work could be “reserved” for a particular racial group in order to “safeguard the economic welfare” of the relevant employees. The intention was to protect White workers.

⁹ For example, no trade union applying for registration could be registered in respect of both White and Coloured/Indian persons, unless the number of members from either group was too small to make a separate union. Existing unions that had a membership of White, Coloured and Indian workers were compelled to establish separate branches for White members and for Coloured/Indian members, and had to hold separate meetings.

there were 94 industrial councils; by 1973 the total had risen to 103. The number of national industrial councils, however, remained low, and some of the national councils covered narrow sub-sectors with not many employees. Most of the major industrial sectors were only partially covered by relatively small regional or local industrial councils.

A fundamental challenge to the racially exclusive labour relations system was signalled in 1973 when spontaneous strikes by African workers broke out in and around Durban, a large coastal city. The State responded by amending the Bantu Labour (Settlement of Disputes) Act of 1953 with the aim of providing African workers with a more manageable alternative to trade unionism in the form of liaison committees and works committees. The majority of African workers, however, rejected these bodies and instead gravitated to the “new” unions that emerged in the wake of the strikes.¹⁰ Most of these new unions sought to build strong shop floor structures and pioneered the “recognition agreement” with employers as the basis for establishing a collective bargaining relationship at the plant or enterprise level.¹¹ Over the next few years the spread of plant and enterprise bargaining led to the perception that an “unofficial” collective bargaining system was developing, which was undermining the statutory system of industrial councils.

As a result of the challenge being posed to the “official” collective bargaining system, the Government appointed a Commission of Enquiry in 1977 (the Wiehahn Commission) with a wide-ranging brief. One of the main focus areas of the Commission was the collective bargaining system, in particular the contradictions that had emerged between works and liaison committees (for African workers), enterprise-level bargaining (being pioneered by non-registered trade unions representing mainly African workers), and industrial council bargaining (in which White, Coloured and Indian workers were represented). In 1979 the Wiehahn Commission recommended that African workers should be included in the definition of “employee”. This would automatically allow them to form or join registered trade unions and participate directly in industrial council negotiations. The Government accepted the recommendation and amended the Act: it was a step that would have profound implications for labour relations.

The “new” trade unions were initially very wary of participation in industrial councils, but by the mid-1980s they had grown to such an extent that they had to reconsider their position. This led to these unions joining industrial councils, although many did so on the condition that they would continue to bargain at plant and enterprise levels. Industrial council negotiations, in the view of the unions, would therefore set minimum wages that could be extended to all workers in an industry, while plant and enterprise bargaining would set “actual” wages that would address the wage gap that had developed between skilled (White) workers and unskilled (African) workers over the last 50 years. Most employers, however, refused to bargain at two levels. Furthermore, some large employers began to advocate decentralization of bargaining to the plant or enterprise level. This move was in part a response to the union demand

¹⁰ The amendment was introduced by the Bantu Labour (Settlement of Disputes) Act, which was the new name for the Native Labour (Settlement of Disputes) Act, 48 of 1953, as amended by the Bantu Labour Relations Regulation Amendment Act, 70 of 1973. In 1977 the Act was again amended to grant liaison committees the right to negotiate plant-level agreements on wages and working conditions. The amendment had little impact.

¹¹ This was a procedural agreement that set out rights of access for union organizers, procedures for union meetings, the election of shop stewards and their duties, as well as the procedure for collective bargaining (Theron, Godfrey and Fergus, 2015, pp. 853–855).

for bargaining at two levels, but it was also informed by the arguments being used by business internationally in favour of decentralized bargaining. Arguably, however, employers simply wanted to avoid sitting down with unions that were bringing a far more aggressive style of bargaining to the negotiating table.

Many employers were therefore heartened by the Government's increasingly ambivalent approach to the industrial council system. In the face of slow economic growth and rising unemployment, the Government began to promote small businesses as the solution, although it became apparent that for the Government one aspect of promoting small businesses was deregulation of the labour market. A key target was the industrial council system, in particular the extension of industrial council agreements. As a result, in the mid-1980s the Department of Labour issued a number of circulars to industrial councils that "encouraged" them to cooperate with the Government's policy of removing regulatory constraints on small businesses. It was implied in these circulars that if councils did not cooperate then applications for the extension of agreements would be viewed less favourably (Du Toit et al., 1995, p. 19)

The industrial council system therefore went through a period of instability in the 1980s. During this period collective bargaining was taking place at three main levels. First, the predominant level of bargaining was multi-employer sectoral bargaining through industrial councils, but the voluntary nature of the system meant that industrial councils provided a patchwork coverage that left much of the economy and labour force uncovered. Second, a trade union in a sector or area not covered by an industrial council could apply for the establishment of a conciliation board, which could result in an agreement that was extended to a number of employers (like an industrial council agreement) for a prescribed period. However, only a few trade unions used conciliation boards. Third, collective bargaining took place at plant and enterprise levels, but this began to wane when the "new" unions shifted their focus to industrial councils (although the unions continued to pay lip service to the notion of dual-level bargaining). It is unknown how many employers and employees were covered by plant and enterprise-level collective agreements during this period.

3. The current legislative framework for multi-employer collective bargaining and the extension of agreements

Soon after the 1994 elections the new Government launched a programme to reform the system of labour market regulation inherited from the apartheid regime. The first major step in this reform process was the new Labour Relations Act (LRA).¹² Its main focus is collective labour relations, in particular collective bargaining. The Act went through an unprecedented tripartite negotiation process in the newly established National Economic Development and Labour Council (NEDLAC).¹³ The negotiations were difficult, but ultimately a statute was produced that appeared to satisfy organized business, labour and government.

¹² Act 66 of 1995.

¹³ NEDLAC was established by Act 35 of 1994 through the merger of the National Manpower Commission and the National Economic Forum.

The basic architecture of the legislative framework for industrial councils was retained but there were a number of changes to the details of the framework for collective bargaining. The task team that had drafted the new LRA had identified a range of problems with the earlier legislation as regards collective bargaining, including its encouragement of a patchwork system of industrial councils; the breadth of the Minister's discretion to extend industrial council agreements; the criteria for determining the representativeness of industrial councils; the bureaucratic structure of councils; procedures for granting exemptions from industrial council agreements; and the enforcement of council agreements by criminal prosecution (Explanatory Memorandum, 1995, p. 121).

The draft statute that the task team came up with did not find favour with trade unions. Labour had been pushing hard for the new Government to legislate a compulsory system of centralized bargaining institutions, but the draft proposed retaining a predominantly voluntarist collective bargaining system. This accorded with what business wanted and probably Government as well. The issue of the collective bargaining “model” therefore proved to be one of the most contentious in the NEDLAC negotiations. Ultimately a voluntarist system was retained, but as part of the compromise in NEDLAC the Act introduced an additional structure – the statutory council – which provides a degree of compulsion (discussed further below at 3.1.5). The centrepiece of the collective bargaining system promoted by the Act, however, was a framework for establishing bargaining councils.

As noted above, the Act's framework for establishing bargaining councils was much the same as that which had enabled the setting up of industrial councils, and the vast majority of the industrial councils in existence at that point applied for registration as bargaining councils in terms of the new Act. Bargaining councils are therefore established voluntarily by trade unions and employers' organizations. They are permanent structures for collective bargaining with a registered jurisdiction (that is, sectoral scope and geographical area); the agreements they reach may be sent to the Minister of Labour for extension to non-parties; they produce agreements setting minimum wages and other conditions of employment, while some establish social security schemes; and they employ staff to enforce their agreements. Further details of the framework for bargaining councils are discussed below.

The new LRA was followed a year later by the Basic Conditions of Employment Act (BCEA), which provides for the issue of administrative determinations that set wages and conditions of employment in sectors that are poorly organized. These determinations, known as sectoral determinations, effectively customize conditions for sectors, usually improving on the conditions in the Act, as well as providing minimum wages. As such, they fill many of the gaps in the economy where there are no bargaining councils and limited or no enterprise bargaining.

3.1. The 1995 Labour Relations Act

This section outlines the framework for establishing bargaining councils and some of the features of the system. It also provides data on how the system has developed in the period since the introduction of the new Act. Before getting into the legislative

detail and the broad contours of the system, it will be useful to outline briefly what a bargaining council (and an industrial council before it) looks like and how it functions.

A bargaining council is established by at least one employers' organization and at least one trade union. They do so together: it is voluntary. The council is registered for a defined sectoral scope and geographical area (its jurisdiction), within which the member organizations will generally be representative. Once established, the council comprises representatives of the employers' organization(s) and trade union(s) (equal numbers for each side), who meet periodically. They will appoint a secretary and staff for the council, which will usually comprise a number of agents (inspectors) and administrative staff to manage the finances of the council and any benefit funds that it establishes. The council will hire or buy the offices in which it is housed; in this sense the bargaining council becomes a permanent structure.

The most important function of the bargaining council is collective bargaining. The members of the council will therefore meet annually or biannually to negotiate collective agreements. All councils will usually have what is termed a "main agreement", which is an agreement that sets minimum wages and conditions of employment. Many councils will also negotiate agreements that establish a pension or provident fund and a sickness benefit fund. Some councils have other ancillary agreements. The council finances itself by a small levy on all employers and employees within its jurisdiction, supplemented by a fee for administering benefit funds. This income pays for the offices of the council, the employment of agents who police the council's agreements, and the payment of administrative staff who manage the benefit funds. The representatives of the member organizations will meet regularly to oversee the functioning of the bargaining council. However, the main function of the council is to produce collective agreements dealing with wages, conditions of work and benefits, and to ensure that these are implemented by all employers and employees within its jurisdiction.

Once established, the main interaction of a bargaining council with the State is the process through which it submits collective agreements to the Minister of Labour in order for them to be extended to all employers and employees within its jurisdiction. Employers that are not members of the employers' organization(s) on the council and employees who are not members of the trade union(s) on the council (so-called "non-parties") who fall within the jurisdiction of the council if its agreement is extended must comply with the terms of the agreement. The council's collective agreements that are extended therefore have the status of "subordinate legislation". To offset the "imposition" of the agreement on employers and employees who were not members of the organizations that negotiated it, the council is obliged to establish an exemptions committee and a procedure to consider applications for exemptions from one or more aspects of the agreement. Similarly, the council has an enforcement procedure through which its agents will proceed against employers who are not complying with any aspect of its agreements.

3.1.1. Bargaining councils and the extension of agreements

An application for the establishment of a bargaining council must be submitted to the Registrar of the Department of Labour. The applicant trade union(s) and employers' organization(s) must indicate for which sector(s) and area(s) the council

will be established and must provide data to support their claim to be “sufficiently representative” within the proposed jurisdiction of the council.¹⁴

The Registrar must publish the application and invite objections from the general public, including employers. The Act lists various grounds for objections, including that the applicants are not “sufficiently representative” of the proposed jurisdiction of the council.¹⁵ The applicants have an opportunity to respond to objections received, after which the application and related documentation is sent to NEDLAC.¹⁶ Section 29(8) requires NEDLAC to “consider the appropriateness of the sector and area in respect of which the application is made”, and “demarcate the appropriate sector and area in respect of which the bargaining council should be registered”.

NEDLAC could interpret its duties in one of two ways. It could adopt an expansive interpretation which would see it demarcating sectors and areas so that a more coherent set of national, sector-wide bargaining councils is established. This would see it tackling the “patchwork” system of industrial councils inherited from the previous dispensation. Alternatively, it could interpret its role narrowly, which entails ensuring that there is no overlap between the proposed jurisdiction of the applicant council and existing councils: its role is mainly to avoid demarcation disputes between councils. Research indicates that NEDLAC has adopted the latter approach (Godfrey et al., 2010, p. 104).

NEDLAC reports to the Registrar on completion of its deliberations. The Registrar must determine whether, among other things, “adequate provision is made in the constitution of the bargaining council for the representation of small and medium enterprises”, and “the parties to the bargaining council are sufficiently representative of the sector and area determined by NEDLAC or the Minister”.¹⁷ The first of the above questions is a formality: actual representation is not required, so bargaining councils simply make provision for the representation of small and medium enterprises in their constitutions. The second question is critical. The term “sufficiently representative” is not defined in the Act, nor has there been any case law under the new LRA that has quantified the term in respect of bargaining councils. Determining sufficient representativity for registering a council therefore falls entirely within the discretion of the Registrar.

Once registered, the primary function of bargaining councils is to negotiate collective agreements that regulate the terms and conditions of employment. As noted above, a council can refer such agreements to the Minister of Labour with the request that they are extended to all employers and employees within the council’s jurisdiction. If the council makes such a request, the Minister must extend the agreement within 60 days of receipt of the request provided that certain requirements have been

¹⁴ Section 27(1) of the LRA.

¹⁵ Sections 29(3) and 29(4) of the LRA.

¹⁶ Sections 29(6) and 29(7) of the LRA.

¹⁷ The Minister may demarcate the appropriate sector and area if NEDLAC fails to reach agreement on the demarcation.

met.¹⁸ The first requirement is that the parties meet a representativity threshold: the Minister must therefore be satisfied that after extension (i) the majority of all employees covered are members of the party trade union(s), and (ii) the members of the party employers' organization(s) employ the majority of all the employees.¹⁹ The section therefore sets clear quantitative ("majority") thresholds for the extension of agreements.²⁰

The reference point for determining representativity in terms of section 32 is "all employees" and the "total number" of employers and employees within the scope of the council. This is problematic as it is almost impossible to obtain accurate numbers because (a) there are many unregistered and informal employers and employees operating within the scope of bargaining councils, and (b) the classification of sectors in the Quarterly Labour Force Survey (QLFS) do not match the jurisdictions of most bargaining councils. This information has assumed great importance given a number of legal challenges to the extension of agreements on the grounds that the parties to a council are not representative. In 2002 an amendment was accordingly introduced (section 49(4)), which stated that a determination of representativeness in terms of section 49 is "sufficient proof of the representativeness of the council for the year following the determination". The section was further amended in 2014²¹ to clarify that such proof of representativeness held for any purpose in respect of the LRA, "including a decision by the Minister in terms of sections 32(3)(b), 32(3)(c) and 32(5)" (these sections refer to the determination of the representativity or sufficiently representativity of the parties). In effect, a certificate of representativity issued pursuant to section 49 should defend the Minister's decision to extend a bargaining council agreement against legal challenge.

Section 32(5) gives the Minister a discretion to extend an agreement, notwithstanding the parties' failure to meet the representativity thresholds, if the parties are "sufficiently representative within the registered scope of the bargaining council" and "the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level". As noted above, the criterion of "sufficient representativity" is not defined in the Act.²² However, given that the LRA aims to promote sectoral collective

¹⁸ Although the LRA requires the Minister of Labour to make the decision regarding extension of an agreement, she does so based on a report prepared by officials in her department. If the officials find that the parties to the agreement are representative in terms of section 32, the Minister must extend the agreement. If the parties are not representative the officials engage with the criteria in section 32 – namely whether the parties are "sufficiently representative" and whether failure to extend the agreement would pose a threat to bargaining at the sectoral level. They then report to the Minister and make a recommendation regarding extension of the agreement. Every application for extension is treated on its merits, but the officials are guided by two broad policy objectives: to maximize social protection (by covering unorganized and vulnerable workers), and to protect employers that are party to the agreement from undercutting by non-party competitors (that is, to "level the playing field" for all employers and to take labour costs out of competition). The main challenge faced by officials is declining trade union representativity. This is reflected in the rising proportion of agreements being referred to the Minister where the parties are only sufficiently representative. In past years Department of Labour officials used 45 per cent as a guideline for what constitutes a sufficiently representative party, but this is being edged downwards as unions struggle to keep their numbers up.

¹⁹ The failure to include a third criterion – that the party employers' organization(s) must represent at least 50 per cent of the total number of employers – is a disincentive for employers' organizations to organize more small firms.

²⁰ Furthermore, section 49(2) of the Act requires that a bargaining council that has an extended agreement must inform the registrar annually in writing of the number of employees who are: (i) covered by the collective agreement; (ii) members of the party trade union(s); and (iii) employed by members of the party employers' organization(s).

²¹ Labour Relations Amendment Act, 6 of 2014.

²² Previous case law has examined the term "sufficiently representative" in respect of organizational rights but not for the registration of a bargaining council or extension of an agreement.

bargaining and most council agreements should be extended because non-extension will always be a threat to sectoral collective bargaining, there is arguably a bias in the Act in favour of extension.²³

A newly introduced requirement for the Minister to factor in comments prior to extending an agreement (see below) will probably act as a counterweight to the above bias. The amendment to the LRA in 2014 provides that the Minister can exercise her discretion to extend an agreement where the parties do not meet the representativity thresholds only if she has published a notice in the *Government Gazette* stating:

- that an application for extension of a bargaining council agreement has been received;
- where a copy of the agreement may be obtained or inspected; and
- that comments may be made within 21 days from the date of the notice.

The amended section goes on to state that in determining whether the parties to the bargaining council are sufficiently representative, the Minister may take into account the composition of the workforce in the sector, including the extent to which there are employees of temporary employment services working in the sector, and the extent to which employees are engaged on fixed-term contracts or are part-time or in other forms of non-standard employment. The amendment requesting comments was the result of pressure from business with regard to the alleged negative impact of the extension of agreements on non-parties, in particular small businesses. It gives non-parties an avenue through which to bring their objections to an agreement to the attention of the Minister prior to her making the decision to extend it. On the other hand, the new provision that allows the Minister to consider the composition of the workforce in the sector probably reflects the concerns of organized labour about how the proliferation of non-standard forms of employment are undermining organization (and therefore the representativity of the unions). Presumably the section will allow the Minister to exclude non-standard employees, who are generally difficult to organize, from her calculation of whether the parties to an agreement are “sufficiently representative”. It is, however, unclear how the current Minister will go about this in practice because data relating to non-standard employment is generally not very reliable. This is perhaps the reason why the amendment did not impose a duty on her to factor the composition of the workforce into her decision.

The bargaining council system has undergone significant changes since the introduction of the new LRA in 1995. Table 6.1 below shows the steep decline in the number of bargaining councils between 1992 and 2014; this was in part as a result of the demise of some councils and the amalgamation of others. The total number of workers covered by bargaining councils, however, more than tripled in the same period. The main reason for the increased coverage was provision for bargaining councils in the public service in the new LRA. This led to the addition of five new bargaining councils and over a million employees. There has also been an increase in employees covered by private sector bargaining councils: up from 944,811 in 2004 to 1,207,162 in 2014.

²³ See footnote 18 above.

Table 6.1. Number of bargaining councils and total employee coverage, 1992–2013/14

| Year | Bargaining councils | Number of employees covered |
|-----------|---------------------|-----------------------------|
| 1992 | 7 | 735 533 |
| 1996 | 77 | 810 589 |
| 2004 | 48 | 2 358 012 |
| 2010 | 47 | 2 520 718 |
| 2013/2014 | 44 | 2 505 074 |

Source: Du Toit et al. (2015, p. 51, Table 2<TBV>)

However, 13 of the 38 private sector bargaining councils (of the total of 44 councils) did not have a published collective agreement at the end of 2014, which means that they do not have extended agreements. Eight of the 13 councils, furthermore, appear to be either defunct or are no longer functioning as collective bargaining institutions.²⁴ If the total coverage of these councils were taken out of the data in table 6.1 it would mean that the total coverage of private sector councils has declined over the last few years rather than increased.

As noted above, the representativity of the parties is the critical factor in determining whether an agreement is extended. In 2014 employers that are party to the agreement employed 62.9 per cent of all registered workers (compared with 63 per cent in 2004). On the other hand, trade union representativity has declined significantly from 60 per cent in 2004 to 52.4 per cent in 2014. Furthermore, there were nine bargaining councils at which unions that are party to the agreement represented less than 50 per cent, in some cases significantly less, which suggests that their agreements might not be extended. In another six bargaining councils the trade union parties represented 50 to 52 per cent of registered workers. Falling trade union representativity is therefore a serious threat to the bargaining council system.

The representativity data shows that 37 per cent of all workers covered by the bargaining council system are employed by non-party employers (this is the coverage of the extended agreement). Although this is over one third of all registered employees in the bargaining council system, it is a relatively insignificant figure when compared with 14 million employees in the labour market (excluding employment in private households). Using the latter figure as the reference point shows that towards the end of 2014 the 44 registered bargaining councils covered 18.6 per cent of all employees in the labour market, and that only 3.2 per cent of all employees are covered by extended agreements. It must be emphasized, however, that the data on the extended coverage of agreements represents total employment at registered non-party firms. Employment at unregistered firms, which is generally not known, is therefore omitted.

²⁴ They continue to exist in order to administer social benefit funds and/or provide dispute resolution services.

This means that the figure of 3.2 per cent underestimates the number of workers that in theory (or *de jure*) are covered by extended agreements.²⁵

Bargaining councils are in fact a significant presence in only three major sectors (as defined for statistical purposes): manufacturing; transport and storage; and community, social and personal services (which includes the public service bargaining councils, none of which extend their agreements). It is only in the manufacturing sector that more than 10 per cent of employees in a sector are covered by extended agreements. It is therefore evident that the extension of agreements does not cover a significant proportion of the labour market. Despite the above data, certain sections of business continue to express vigorous opposition to councils. In the last few years a number of legal challenges have been launched to the extension of bargaining council agreements, which have cast a spotlight on the issue of representativity and the decision-making process by the Minister of Labour (see further below).

3.1.2. Exemptions from bargaining council agreements

The counterweight to the extension of agreements is provided by the exemption system. Section 32 of the LRA requires that, before a bargaining council agreement can be extended, the Minister must be satisfied that the council has an effective procedure to deal with exemption applications by non-parties and is able to make a decision within 30 days.²⁶ Furthermore, the bargaining council agreement must make provision for an independent body to hear appeals against the refusal by the council of a non-party's application for exemption or the withdrawal of an exemption by the council, such hearing to take place within 30 days of the appeal being lodged.²⁷ The collective agreement to be extended must also include the criteria that will be applied by the independent body when it considers an appeal.²⁸ The intention of these provisions was to introduce greater objectivity, transparency and clarity with regard to the exemption processes of bargaining councils, which would counter the criticisms of bias against small businesses and non-parties.

Research by Holtzhausen and Mischke (2004, pp. 62–64) indicated that the above provisions had had a positive impact: bargaining councils introduced greater clarity with regard to the criteria for exemptions and, in some cases, a more rigorous process to evaluate applications. Similarly, research by Godfrey and co-authors concluded that the exemption systems of a sample of bargaining councils were operating effectively and efficiently. It was found that the number of applications for exemption

²⁵ The data must be treated with caution on a number of other grounds. First, the employment data provided by the QLFS includes employers and the self-employed as well as employment in occupational categories that generally fall outside the scope of bargaining councils (i.e. the bottom tier of management upwards). Second, as noted above, there are a number of registered bargaining councils that do not currently have published collective agreements, and some of these councils appear to be defunct. The coverage of these councils, however, has been included in the calculations.

²⁶ This provision was added by an amendment in 2014 (Labour Relations Amendment Act, 6 of 2014).

²⁷ The 30-day time limit was added by an amendment in 2014. The same amendment also provided that no representative, office-bearer or official of a trade union or employers' organization party to the bargaining council may be a member of or participate in the deliberations of the appeal body (Labour Relations Amendment Act, 6 of 2014).

²⁸ Each bargaining council decides on its own set of criteria, which range from four or five up to ten criteria. The criteria generally seek to assess the circumstances of the applicant employer, whether granting the exemption will prejudice other employers, and what the impact will be on employees of the applicant employer.

was rising; success rates for applications were high (above 70 per cent between 2000 and 2004, counting exemptions granted in full and in part); the success rate for small businesses was slightly higher than for all businesses; that the proportion of applications from non-parties was higher than from all parties; and the number of appeals was low (Godfrey, Maree and Theron, 2006, pp. 65–81).

Recent research has provided more data on exemptions. It found that in 21 bargaining councils in 2009 party applications exceeded non-party applications, and party applications had a higher success rate: 75.7 per cent of party applications were successful as against 62.7 per cent of non-party applications. Using data from ten bargaining councils for the years 2010 to 2012, and from 13 councils for 2013, it was found that there was fluctuation in the number of applications made in the four-year period, but with a slightly rising trend. Importantly, the proportion of exemptions granted was well above 80 per cent across the four years from 2010 to 2013 (Tridevworx, 2014, p. 101 (table 11); and pp. 107–110 (tables 13 and 14)). The research findings therefore support the conclusion of the earlier research (above) that many of the criticisms of the bargaining council exemption system are unwarranted. This is more explicit when one focuses on the data for three major national bargaining councils that have been the object of legal challenges to extensions. The success rate for exemption applications in 2013 was above 93 per cent for all the councils (Tridevworx, 2014, p. 121).

3.1.3. The accommodation of small businesses by bargaining councils

Over the last three decades a vociferous small business lobby has criticized the industrial and bargaining council systems, in particular the extension of agreements. The argument made is that extension of agreements stifles the creation and growth of small, medium and micro enterprises (SMMEs), and is therefore to blame for the persistence of high unemployment. One response to this criticism is the provision in the LRA that requires the constitution of every bargaining council to provide for “the representation of small and medium enterprises” (section 30(b)). The thinking behind the provision was sound. It proposes that small businesses should organize and participate in the system to represent their interests, rather than lobbying against the system from the outside. This should, in theory, lead to agreements that better accommodate the concerns of small businesses and would also improve the representative position of bargaining councils. In practice, however, the provision requires nothing more than an amendment to the constitution of a council and it appears not to have stimulated greater participation by small business in bargaining council negotiations.

Amendments to the LRA in 2002 focused greater attention on representation of small firms. Section 54(2)(f) requires bargaining councils to submit data to the Registrar with regard to small firms that fall within the scope of the council. The information includes the number of people employed by small firms, how many are trade union members, and how many small firms are members of the party employers’ organization(s), as well as data regarding exemption applications by small firms. It is unclear for what purpose this data is used. There is nothing in the section that indicates that the Minister will use this information in assessing requests for extension of agreements.

It is, however, possible that Department of Labour officials factor this information into their report and recommendation to the Minister for her decision.

Bargaining councils have adopted two main methods to better “accommodate” the problems that small businesses face in trying to comply with agreements. The first is with regard to representation in bargaining council negotiations. Research undertaken by Godfrey and co-authors in 2006 at nine major bargaining councils found that employer representatives at six of the councils had nominated one or two of their number specifically to represent small business interests on the council.²⁹ Interviewees at most of these councils indicated that such representation was generally quite effective, but it was also pointed out that the designated small business representatives were a minority and could always be outvoted. Interviewees were generally pessimistic about the ability of small businesses to ever organize themselves into an effective force on bargaining councils (Godfrey, Maree and Theron, 2006, p. 40). The other method that bargaining councils have used to accommodate small businesses is the exemption system. The Metal and Engineering Industries Bargaining Council (MEIBC), for example, has made provision for a special exemption process for small and struggling businesses and an expedited exemption procedure for small businesses. A more popular approach, however, is the so-called blanket exemption, through which small and/or new businesses are automatically exempted from complying with a bargaining council’s agreement(s) based on their employment size (such as five or fewer employees) and/or the period in operation (such as one year or less) (Godfrey, Maree and Theron, 2006, pp. 41–42).

The exemption systems of bargaining councils, however, are clearly not viewed as an option by many small businesses, which prefer to not register and operate “under the radar”. Although we do not know how many such firms there are, the estimates made by some key informants indicate that the number is sizeable. The proliferation of outsourcing and subcontracting arrangements to small firms that tend not to register with bargaining councils (see below) has added to the number. Therefore while the small business lobby make well-publicized criticisms of the bargaining council system and litigation is pursued against the extension of agreements, on the ground there are many firms that oppose the system in a much less visible way. The victims have been the increasing number of workers who are de facto not protected by bargaining council agreements.

The traditional way in which councils deal with non-registration is through enforcement. Bargaining councils appoint “designated agents” (inspectors) to police their agreements and track down unregistered firms. Amendments to the LRA have given bargaining council agents increased powers and have sought to streamline the enforcement process, but inspections are essentially a reactive strategy that will never entirely solve this problem. Furthermore, given the extremely high level of structural unemployment in South Africa, many workers are reluctant to participate in actively enforcing their rights because this would pose a threat to their jobs.

²⁹ Only one bargaining council had an employers’ organization that represented small businesses.

3.1.4. Bargaining councils and vulnerable workers

Informal employment has been growing rapidly in South Africa. The growth has been facilitated by an increase in subcontracting, outsourcing and homeworking arrangements, the growing use of temporary employment services, and schemes to turn employees into independent contractors.³⁰ Most bargaining councils seek to regulate these arrangements, by not producing agreements that exclude such working arrangements and the vulnerable employees that are engaged in them. In fact, research indicates that bargaining councils are probably far more effective at regulating these arrangements than is legislation. This was in a way acknowledged in the 2014 amendment to the LRA, which provided that the Minister may now take into account the composition of the workforce in a sector when making a decision about extending a bargaining council agreement where one or both parties are not representative. As noted above, the presence of a significant number of non-standard and informal workers in a sector would presumably introduce greater “flexibility” into determining what constitutes “sufficiently representative” for the purpose of extension. However, it is too soon since the amendment to assess what its impact will be in practice.

The 2002 amendments to the LRA suggested an alternative approach to providing better coverage for vulnerable workers: namely for bargaining councils to persuade unregistered firms to register and comply with agreements by offering value-added services. The first amendment therefore gave bargaining councils the power “to provide industrial support services within the sector”. The second amendment provides that a bargaining council has the power “to extend the services and functions of the bargaining council to workers in the informal sector and home workers”. The two new powers are clearly envisaged as working in tandem: in the future councils will extend the support services to informal firms along with its traditional functions of minimum standards, its benefit funds and dispute resolution. To access the support services, the informal firms will need to register and start complying with the council's agreements. However, it does not appear that the amendments have had any effect. It is probable that few bargaining councils have the capacity to offer support services as well as extend their policing of agreements into the informal economy.

Non-standard employees fall within the jurisdiction of bargaining councils and are covered by their agreements (although trade unions on councils generally do not put much effort into organizing such workers and probably do not represent their interests very effectively in council negotiations). The agreement for the Building Industry Bargaining Council (Cape of Good Hope), for example, specifically includes within its ambit “temporary employment services, labour-only contractors, working partners, working directors, principals, contractors and working members of close corporations”. The agreement goes on to duplicate section 200A of the LRA, introduced by an amendment in 2002, which lists seven rebuttable presumptions

³⁰ These schemes were addressed in major amendments to the LRA in 2002 (Labour Relations Amendment Act, 12 of 2002).

that an employment relationship exists – for example, “the manner in which the person works is subject to the control or direction of another person”. Only one of the presumptions need apply to prove an employment relationship. In order to regulate the extensive use of subcontracting in the industry – often used as a way of evading the bargaining council agreement and thereby lowering labour costs – the agreement provides that no employer may subcontract any work that falls within the definition of the “building industry” to a subcontractor, unless both the subcontracting party and the subcontractor are registered with the bargaining council. The agreement goes on to hold the subcontracting party and the subcontractor jointly and severally liable if the subcontractor contravenes the agreement (or any other council agreement).

The current main agreement of the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) provides similar examples of attempts to regulate non-standard employment. It specifically regulates owner-drivers and the employees of owner-drivers, and includes a procedure that must be followed by an employer that is contemplating subcontracting where it will lead to a reduction in employment levels or a lowering of terms and conditions of employment. The employer, furthermore, will be jointly and severally liable with the subcontractor for any contraventions of the agreement. The agreement also provides specific regulation for part-time employees, relief employees, seasonal workers, short-time work and temporary employment services. Some of these provisions anticipate the 2014 amendments to the LRA to better regulate non-standard employment, particularly in respect of part-time employees and temporary employment services. However, in some respects the agreement goes beyond the LRA amendments. There is, for example, a restriction on the number of part-time employees an employer may employ (30 per cent of the employer’s average monthly workforce over a 12-month period).

An employee of a temporary employment service provided to a client for more than two months “is deemed to be an ordinary employee” and all relevant provisions of the bargaining council agreement are applicable. This provision is similar to the tightened regulation of temporary employment services in the LRA, but sets a shorter limit on such temporary employment (two months rather than the three months). Similarly, the employee of a temporary employment service that contravenes the agreement may hold the employer to whom the employee was supplied liable for complying with the agreement. This goes beyond the joint and several liability of the LRA. The council, furthermore, requires all temporary employment services operating within the scope of the council to be registered with the council and for all client employers of temporary employment services to notify the council in writing of any worker placed. As with part-time and relief workers, the number of workers with which an employer may be supplied by a temporary employment service must never exceed 30 per cent of the employer’s workforce.

Some councils, however, have excluded vulnerable categories of employees. The National Leather Bargaining Council, for example, was being undermined by job shedding and informalization in the footwear subsector as a result of cheap imports. In an effort to stabilize the bargaining council the parties divided all employers into three categories: formal, semi-formal and informal. Eight criteria are used to classify the firms into these categories. The effect of the categorization of firms is to exclude informal firms from the agreement (although such firms must still register with the

council), while semi-formal firms are obliged to pay only 75 per cent of the minimum wage rate. On the face of it, the council has sacrificed the regulation of vulnerable workers in the interest of stability, but the council argues that it was in any event unable to enforce its agreements against informal employers (Godfrey, Theron and Visser, 2007, pp. 29–30).

3.1.5. Statutory councils

The 1995 LRA introduced statutory councils, which require lower representativity by a party and may be established by only one party. In terms of the Act a statutory council can be established on application by either a “representative” trade union or employers’ organization. A “representative” trade union is a registered union (or two or more acting jointly) that has as its membership at least 30 per cent of the employees in the sector and area for which it wishes the statutory council to be established. Similarly, the member firms of a “representative” employers’ organization must employ at least 30 per cent of the workers in the relevant sector or area. If an applicant union or employers’ organization is representative and complies with certain formalities, the Registrar must establish the statutory council. A process then follows to get other parties to participate on the council, either through agreement or appointment by the Minister, which then leads to registration of the council.

Once established, the parties to a statutory council have a limited bargaining agenda prescribed by the Act,³¹ although the parties may expand the agenda by agreement. Collective agreements reached at statutory councils are extended through the Basic Conditions of Employment Act, using the procedure for the issue of sectoral determinations (see further below). The idea behind the statutory council model therefore is that it will provide a starting point for centralized bargaining over a limited set of issues. Over time the parties should increase their representativity and will expand the bargaining agenda, until the statutory council can be upgraded to a fully fledged bargaining council.

The statutory council model, however, has not been a success for various reasons. Only four statutory councils have been registered in just over 20 years and only one has had a collective agreement extended; it established a provident fund. The remaining statutory councils have produced collective agreements dealing with levies and dispute resolution, but these have not been extended. Recently, however, one statutory council made the step up to a fully fledged bargaining council.

3.2. The 1997 Basic Conditions of Employment Act

3.2.1. Sectoral determinations

The new Basic Conditions of Employment Act (BCEA) is not directly concerned with collective bargaining. It provides a set of minimum standards (but does not include a legislated national minimum wage) for all employees, as well as enabling the issue of sectoral determinations which prescribe wages and minimum standards specific

³¹ Statutory councils may conclude collective agreements in respect of dispute resolution functions, establishing training and education schemes, and setting up social security schemes.

to sectors. The sectoral determinations are drawn up via an administrative process that involves the Department of Labour and the Employment Conditions Commission. The intention is that sectoral determinations will set wages and minimum conditions in sectors where there are low levels of union organization and little or no collective bargaining takes place.

The BCEA interacts with the bargaining and statutory council systems in two ways. First, the Act provides for “variation” of some its minimum conditions by collective bargaining, including a bargaining council agreement. Section 49 stipulates that a bargaining council may “alter, replace or exclude any basic condition of employment if the collective agreement is consistent” with the purpose of the BCEA. The section goes on to specify a limited range of conditions which a bargaining council agreement may not vary, leaving the rest of the conditions in the Act open to variation by a council. Such agreements with variations will be extended by the Minister in the usual way.

Second, the LRA provides that agreements produced by statutory councils that are not sufficiently representative may be submitted to the Minister of Labour, who may declare the agreement to be a sectoral determination in accordance with section 54 of the BCEA.³² This would effectively extend the agreement to all employers and employees within the registered scope of the statutory council. The determination must include criteria for exemptions that are fair and promote the objects of the LRA, and it must provide for exemptions to be considered by an independent body appointed by the Minister.

Some years ago the Minister of Labour introduced an innovation in three sectors in which centralized bargaining forums had been established: contract cleaning, private security and civil engineering. In all three cases trade union representativity was too low to establish a statutory council, but the relevant employers’ organizations and trade unions involved in the forums wanted their agreements to be extended. In all three sectors there were also sectoral determinations that set wages and minimum standards of employment, which are reviewed every few years. As part of the investigation conducted by the Department of Labour for the review of sectoral determinations, the Minister incorporated the collective agreements that were reached in the forums into the revised sectoral determinations in the three sectors.

This step effectively extended agreements concluded by non-statutory and unrepresentative bargaining forums to the entire sector. In the case of the civil engineering sector this practice had the effect of encouraging the establishment of a bargaining council, while there are moves afoot to establish a national bargaining council in the contract cleaning sector.³³

This was an unexpected innovation on the part of the Minister. However, no changes were made to either the LRA or the BCEA to provide a legislative underpinning for the arrangement. Such extensions therefore took place at the pleasure of the former

³² Statutory councils that are sufficiently representative will use the same procedure used by bargaining councils when applying for extension of their agreements.

³³ There is currently a bargaining council for the contract cleaning sector but its scope is limited to one province.

Minister and since his replacement it is not known whether the current Minister has continued the practice.

4. Conclusion: Ongoing challenges to the extension of bargaining council agreements

The South Africa Government is strongly committed to multi-employer bargaining at the sector level, both as a vehicle for the management of labour relations and as a key part of labour market regulation. Key to this commitment is the extension of bargaining council agreements in order to protect centralized bargaining arrangements from disintegration and widen the scope of protection for workers. Bargaining councils remain critical for addressing the legacy of low wages for African workers and the skilled/unskilled wage gap that was entrenched in the labour market by craft unions and racial exclusion in the previous century. In fact, the continuing contestation over the extension of agreements is arguably motivated by the difficulty firms still find in dealing with the challenge by trade unions to the so-called apartheid wage gap. At the same time, however, the Government faces structural pressures, primarily in the form of slow economic growth and persistently high unemployment. It also has to take account of how changes in employment arrangements and the labour market are impacting on trade union organization and representativity.

It is a difficult balancing act in the face of continual lobbying and litigation from small business groupings and free market ideologues. In recent years there has been a spate of legal challenges to the extension of bargaining council agreements. The key case was a constitutional challenge by the Free Market Foundation to various subsections of section 32 of the LRA, dealing with the extension of agreements.³⁴ The plaintiff's main targets were the provision for automatic extension of agreements reached by representative parties and the discretion of the Minister of Labour to extend agreements if the parties are not representative (they are only "sufficiently representative") (Du Toit, 2014, pp. 2642–2644). These are key mechanisms in the legislative framework for bargaining councils and if the plaintiff had been successful in challenging their constitutionality it is very likely that the bargaining council system would have quickly unravelled. The judgment, delivered recently, against the Free Market Foundation was therefore a relief for organized labour and government. It is unlikely, however, that this is the end of the challenge to the extension of agreements.

Importantly, the litigation is not part of a groundswell of opposition by employers to the bargaining council system. We have seen above that employer party representativity remains relatively healthy: in 2014 it stood at 62.9 per cent. Most of these employers are relatively small. There is also no evidence of a concerted withdrawal by employers from bargaining councils. A large number of employers therefore continue to support the bargaining council system, not least because the extension of agreements applies minimum wages and a floor of employment conditions to their competitors.

³⁴ *Free Market Foundation v. Minister of Labour and Others* (Case No. 13762/2013).

It is the structural factors that pose the most serious threat to multi-employer bargaining at the sector level and the extension of agreements. Continuing high unemployment, the seemingly growing number of small informal firms that do not register with bargaining councils and – posing the most immediate threat – declining trade union representativity in the private sector are together creating a context in which the Government will find it increasingly difficult to justify the extension of bargaining council agreements.

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7. Collective bargaining and extension in Brazil

Adalberto Cardoso

1. Introduction

There is agreement in the specialized literature that the process of the social and political incorporation of workers in the Brazilian societal dynamics had its turning point in the 1930 Revolution, which brought Getúlio Vargas to presidency (Erickson, 1977; Schmitter, 1971; Collier and Collier, 1991). The “Revolution” was more properly an accommodation within existing power elites, which resulted in the displacement of the traditional agrarian oligarchies from State power with no major effects on their economic and social capital (Weffort, 1970; Fausto, 1997; Werneck, 1999). However, subsequent major changes in the country’s economy and social structure have consolidated the scholarly wisdom, according to which 1930 marks the beginning of a turning point in the pattern of economic, political and social development in Brazil. The regulation of the labour market as a means of attaining social peace was a central aspect of the revolutionaries’ project. For Vargas and his allies “the regulation of work was considered important both for the political stability and for the urban-industrial development of the country (...). It wasn’t enough to merely protect workers. It was important to forge a society based on the harmony of interests of capital and labour” (Oliveira, 2002, p. 50).

The system of labour relations that resulted from this project has been fairly stable over time. Most of the individual and collective labour rights were (and still are) constitutionalized, and regulated by the Consolidation of Labour Laws (CLT),¹ enacted in 1943 and comprising the rights to strike, to unionize and to bargain collectively, as well as the regulation of working hours, minimum wage, protection of women and adolescents, overtime work, severance pay, paid vacations and many other aspects.

Authoritarian corporatism was the prevailing ideology.² State regulation granted unions the monopoly of representation within a given jurisdiction (the minimum

¹ *Consolidacao das Leis do Trabalho* (CLT), Decree No. 5452, 1 May 1943.

² The authoritarian 1937 Constitution, imposed by Vargas, was inspired partly by the Italian fascist *Carta del Lavoro* (Moraes Filho, 1952). Corporatism was a sort of “spirit of the time” in the 1920s and 1930s in Europe, as shown by Schmitter (1974). The author conceptualizes the Brazilian model as “state corporatism”, in contrast to the European “societal corporatism” (such as existed in Sweden, Norway, Denmark, the Netherlands, among others).

size was – and still is – the municipality), and unions were (and still are) financed by a tax charged on all workers in that jurisdiction. Unions represented all workers irrespective of their affiliation. The law forbade strikes during Vargas' dictatorial years (1937–45), and for the following decades the legislation that regulated strikes, if applied, would have made them virtually impossible. However, state control of union actions has varied intensely throughout history. Broadly speaking, authoritarian regimes (Vargas' *Estado Novo* [New State] from 1937 to 1945, and the military regimes from 1964 to 1981) applied the restrictive laws fully, while democratic regimes have mostly ignored the most authoritarian of the laws, especially those that prohibited strikes.

For the purposes of this study, the Labour Justice in 1941 created a court system with, until 1999, labour (“lay”) representation and far-reaching powers to arbitrate and impose regulations. This is the most important feature of the system of corporatist conflict resolution left by the “Vargas era”. Ideologists and apologists for the *Estado Novo*, Vargas included, have always rejected (or even denied) class conflict. Labour and capital were treated as partners of the State in its project of constructing an independent and autonomous developed nation, and class conflict was euphemistically named *dissídio coletivo* (collective dissension), a term sanitized of the labour movement's worldly historical legacy. The term “collective bargaining” was absent from the 1943 CLT, which regulated the “collective work contract” (Peixoto, 1945, Vol. 1, pp. 575 ff.) and created the powerful Labour Justice system. The law mandated that *dissídios* should be resolved, first, in *Juntas de Conciliação e Julgamento* [Conciliation and Judgment Offices], administrative bodies of the Ministry of Labour, and after 1941 by the Labour Justice. Originally an administrative organ of the Ministry, the Labour Justice became part of the judiciary in 1946. For this reason, the main feature of the Brazilian system is that the law and its agents (the Labour Justice apparatus), rather than collective bargaining, have played the major role in the regulation of state/labour/capital relations (Noronha, 2000). Collective bargaining was (and is) obviously present, and its role in wage setting is sometimes very important. Most non-wage issues are applications of provisions in the very extensive body of labour law, codified in the CLT. Only the strong unions in banking, oil, chemicals, metallurgy and a few other industries have managed to negotiate new individual and collective rights (Horn, 2009). For most of the others, collective bargaining is synonymous with wage bargaining, and the labour courts have always played a major role in it until very recently. This model began to change in the 1980s, but most of its original design still holds.

In this chapter I will elucidate the country's system of bargaining and extension. I start with a brief historical assessment of the labour court system (the Labour Justice), and explain the difference between collective bargaining and collective *dissídios*. Section 3 describes the bargaining parties, beginning with the enactment of the union law of 1939, the core structure of which still exists. Section 4 analyses bargaining practices since the 1988 change to the Constitution, and elucidates the scope and limits of extension. Section 5 investigates the labour market outcomes of collective bargaining, showing that collective bargaining has apparently played an important role in the reduction of income inequality. The main arguments are summarized in the conclusion, with some recommendations.

2. The Labour Justice and collective bargaining: A brief historical assessment

The Brazilian Constitution of 1934 authorized the creation of a justice system specifically to adjudicate labour-capital conflicts. Those who idealized the new institution saw it as a special justice system, distinct from the regular judiciary. It should also have capital and “lay” representatives on the bench as part of the judicial process (the “classist representatives”), along with professional judges; and it would have *normative power* in the sense that its decisions on wages and work conditions would be binding on all workers and employers represented in the courts (Oliveira Vianna, 1983[1938]). Judges would effectively act as legislators in resolving conflicts of interest. President Getúlio Vargas installed the Labour Justice in 1941.

From the outset, the arguments in favour of the Labour Justice’s normative power embraced the need for the compulsory extension of collective bargaining results to members of the same profession, including those that had not taken part in the conflict (*dissídio*) and were not affiliated with the dissenting unions (Oliveira Vianna, 1983[1938], p. 42). Vargas’ Labour Justice Decrees became Titles VIII to X of the CLT, which regulate the Labour Justice and its procedures. This means that the labour code regulated work conditions, the representative institutions of labour and capital, as well as the judicial system created to mediate and give a final resolution (the “normative award”) to their individual and collective *dissídios*. These are the backbones of the Brazilian *legislated* system: the newly created Labour Justice was, from the outset, an integral part of the protection of workers’ individual and collective rights (Noronha, 2000).

Collective agreements were governed by Title VI of the 1943 CLT. The bargaining process was loosely regulated: it was not mandatory, there was no prescription of bargaining in good faith, and the Ministry of Labour, Industry and Commerce retained control over the outcomes of negotiations. The collective agreement had to be approved by the Ministry (article 615 CLT), and registered with the National Department of Labour. According to article 612 CLT the concluded collective agreement was binding only on workers and employers who are *members* or *associates* of their respective organizations (called *sindicatos*, or “unions” in Brazil, in the case of both workers and employers), but the agreement could be extended to the entire categories represented by these unions of workers and employers in their given (economic or professional) jurisdiction or territorial base, at the discretion of the Minister of Labour, Industry and Commerce, contingent on the “public interest” of the extension (article 616 CLT; Peixoto, 1945, Vol. 1, p. 576). If a collective agreement was not concluded autonomously by the parties, any one of them could appeal to the Labour Justice to request a *dissídio coletivo*. The court’s ruling has normative power.

Title VIII of the CLT (“On the Labour Justice”) states that this special system of justice will settle disputes between employers and employees. Chapter IV regulates the Regional Labour Councils, and its article 678 asserts that it is in their competence “to judge and conciliate, originally [at the first instance], the collective *dissídios* that occur in their jurisdiction”; to “extend their decisions” as provided for in the articles discussed below; to “conciliate and judge the dissent on collective work contracts”. This substantially expanded the Labour Justice’s power of intervention, for it could

settle *any* dispute concerning collective agreements, and not only in respect of their approval, validation or extension, as provided in Title VI. The ensuing articles of the 1943 CLT regulated (and, in part, still regulate) the extension of judicial decisions (Art 868).

Article 869 CLT allows the extension of these rights, either on request or following a judicial decision:

Art. 869. The decision on new working conditions can also be extended to all employees of the same professional category under the court's jurisdiction:

- a) by request of one or more employers, or of their unions;
- b) by request of one or more workers' unions;
- c) "ex officio", by the court that made the decision;
- d) by request of the Labour Justice Attorney (Peixoto, 1945, Vol 2, pp. 150–151).

So, collective agreements could be extended to parties other than the bargaining parties at the discretion of the Minister of Labour, the administrative authority responsible for endorsing the contracts, and *dissídio* outcomes could be extended to others whenever it was deemed just and convenient by the labour court. The administrative authority, of course, determined the meaning of "public interest", and the labour court the meaning of "justice standards". Be that as it may, extension was possible only to workers and employers *in the jurisdiction of the bargaining parties, or in the court's jurisdiction*. Enlargement (as defined in Chapter 1) was excluded.

The CLT was reformed by decree in 1946, as a result of which the Labour Justice became an institution of the judiciary. Title X, chapter IV of the CLT has not been touched in 73 years and the rules relating to extension of the *dissídios* decisions are still the same. What did change profoundly was Title VI, as part of a major reform of the CLT during the military rule in 1967. Decree No. 299 reformed, among many others, articles 611 to 625, which regulated collective agreements, by introducing a distinction between two kinds of agreement:

- the collective *convention* negotiated between associations (unions) representing workers and employers in specific economic and professional categories, which is mandatorily applicable to everybody (*erga omnes*) in the territorial jurisdiction of both the employers' and the workers' associations; and
- the collective *contract* between a workers' union and one or more firms within the territorial jurisdiction of that union.

Collective conventions involve employers' associations and are comparable with what elsewhere in the world is known as sectoral bargaining. These agreements are "generally applicable" or automatically extended (as defined in Chapter 1). Collective contracts, as defined in Brazilian law, do not involve the participation or intermediation of employers' associations and are closer to what is elsewhere known as enterprise or company-level bargaining. These agreements are applied *erga omnes* but they cannot be extended. They bind only the firm (or firms) and its workers, while a collective

convention binds all firms and their employees in a territorial base. The 1967 reform did not change the provisions on extension (articles 868 and 869, above). It did make extension, in the case of collective conventions, more or less automatic. Thus, while the reform moved the authority to issue an extension order from the Minister to the Labour Justice, the built-in automatic nature of extension reduced the discretion of the Labour Justice. Finally, the 1967 reform made collective bargaining mandatory and no party has the right to refuse. If it does, it would either be replaced by a higher order representative (a federation or confederation) or the Labour Justice could be activated to arbitrate a collective *dissídio*. These rules are still valid.

3. The bargaining parties

A central element of the whole system was the definition of who had the right to negotiate or to appeal to the labour courts, and which collective entities were entitled to the legal or conventional labour rights thus negotiated or arbitrated by the State. To understand the bargaining mechanisms defined in 1943, one must grasp the intricate legal framework by which economic and professional categories were (and are) legally defined and became officially entitled to build a union with representative rights in a given sectoral or professional category, or territorial base. It is crucial to describe this in some detail, for most of the original mechanisms still hold.

The Brazilian union structure was defined in 1939 on the same corporatist pattern that guided the establishment of the Labour Justice and the consolidated labour code (CLT) of 1943. The Organic Law of Professional Unionization (Decree 1.402/39) set up the Ministry of Labour as the controller and guarantor of the whole system. Existing associations of employers and workers had to register with and seek recognition by the Ministry of Labour, which had the prerogative of delimiting the association's territorial base and issuing the *Carta Sindical* (union credential), which entitled the association to be the sole representative of employers or workers in a given jurisdiction, the size of which could not be smaller than the municipality.

To ensure the “representational monopoly” (*unicidade sindical*) – that only one association represents a professional category (in the case of workers) or economic activity (in the case of employers) in a given jurisdiction – the Minister of Labour maintained a Comissão de Enquadramento Sindical [Commission of Union Classification] with the responsibility for maintaining a *classification of professions and economic activities* and the prerogative to resolve all disputes concerning demarcation. The associations could only represent and negotiate in the name of those persons and organizations that the Minister of Labour had deemed to be in their jurisdiction. The classification table was (and still is) symmetric (employers' associations on one side, workers' unions on the other). Whether it was possible to have one workers' union representing several productive groups (say, food workers) confronting employers that organized separately for each product group (say, wheat, soy, corn and manioc producers) was a matter for the Commission of Union Classification of the Ministry to decide. This made the Commission a very powerful player. Although its members were appointed by the Minister of Labour, the Commission had some discretion in its decision-making. The demarcation of its territorial base and professional category was (and still is) crucial for any union for gaining access to the so-called “union tax”

(*imposto sindical*), which was until it was abolished in November 2017 equal to one workday of salary per year and is charged on all workers in the union's jurisdiction, irrespective of actual union membership. This tax, along with the monopoly status in a given jurisdiction, gave unions a stable income and shielded them from competition from other unions. Political disputes occurred only over the control of these official unions and competition could be fierce (Santana, 2001; Negro, 2004). A similar system existed on the employers' side.

Most of the definitions in the CLT, consolidated in 1943 and amended over the years, still hold. The 1988 Constitution broadened the scope of the constitutional labour rights and freed unions from State control. The Ministry of Labour had, in 1967, lost its control and repressive prerogatives; it became a mere administrative authority with a minor role in collective bargaining and with no power to make decisions on the extension of agreements. However, the new Constitution maintained the union tax and the principle of union monopoly principle. Because union creation was deemed to be freely available (according to article 8(2) of the Constitution) but those two elements were left intact, in 2002 the Tribunal Superior do Trabalho [Superior Labour Court] determined that it was the task of the Ministry of Labour "to guarantee the monopoly principle" (Cardoso and Gindin, 2009). This decision was a consequence of a myriad of disputes over jurisdiction in the courts resulting from the creation of new unions in the territorial base of traditional unions; the new unions claimed to represent parts of their constituencies and the right to collect the union tax (Cardoso, 2003). Ten years earlier, the Federal Supreme Court had ruled that articles 511 to 577 CLT (regulating union structure), were fully compatible with the new norms defining freedom of association. Since jurisdiction disputes were decided by the Labour Justices – at least until the Superior Labour Court decision in 2002, which transferred the responsibility to the Ministry of Labour – their decisions must be based on the CLT, which (in article 577) stipulates that unions are to be classified according to the Classification Table of Activities and Professions. The Classification Commission no longer exists, but the Classification Table still guides the process of union creation and registration by the Ministry, which is now supervised by a Working Group in which the central federations are represented. Thus the labour movement *and* the Ministry of Labour jointly analyse requests from new unions and grant the union credentials. Unlike the time when the Ministry of Labour controlled and contained the fragmentation of workers' representation, the new procedure has not put a brake on the creation of new unions and further fragmentation (Cardoso, 2015).³

The 1988 Constitution also increased the representational prerogatives of the unions. Before 1988 the procedure under the CLT on individual labour rights accepted only individual petitions. Even if a firm had infringed the rights of all of its workers, each worker individually would need to bring a claim in the labour courts. Article 8(III) of the Constitution states that unions act as "substitutes" in the courts, acting in defence of the *individual or collective rights and interests* of their represented categories. Until 2006 the Labour Justice's decisions (*acórdãos*) accepted collective judicial actions only for workers who were *nominally* represented by their unions, with their names mentioned in the original petition. Following a 2006 Federal Supreme Court decision

³ In 1988 there were about 4,000 unions; in 2013 there were over 15,000 (Barral, 2014, p. 7). The number of union members has not increased but has remained at around 16 million (Visser, 2015).

the courts began to accept that unions represent all workers of a category in its territorial base (based on the legislation on diffuse and collective rights also granted by the Constitution), and thus accepted that decisions may be extended to all workers when requested either by the union or by the individual worker. Although not directly related to collective bargaining but to *collective petitions* concerning individual labour rights, this created a new representational prerogative of the unions and a new type of judicial approach.

4. Bargaining in practice

Today a typical bargaining process goes along the following lines. The parties should renegotiate their collective conventions on an annual basis. Some parties do this every two years but the vast majority negotiate on a yearly basis. They meet either privately (the majority of bargaining is in private, and the parties can resort to private arbitration) or at the Delegacia Regional do Trabalho (DRT) [Regional Labour Delegacy] of the Ministry of Labour, which heads a “round table” with workers’ and employers’ representatives mediated by a Ministry of Labour delegate. This delegate is only a mediator and not an arbitrator, but if no agreement is reached, the parties may call for arbitration. Bargaining typically involves: (i) a union of the professions of a particular economic activity; and (ii) the employers’ union of that same activity. For instance, the São Paulo City Metal Workers Union represents nearly 150,000 workers in the entire Economic Group 19 of the Classification Table of Activities and Professions, which consists of metallurgic, electric material and metal-mechanic manufacturing industries in the cities of São Paulo and Mogi, and it usually negotiates with the São Paulo State Federation of Manufacturing Industries (FIESP). The resulting convention is valid *erga omnes* for all workers in the union’s territorial base (the cities of São Paulo and Mogi).

Bargaining issues most often relate to wages and fringe benefits. The law requires working hours also to be collectively bargained. Other working conditions and work organization issues are negotiated only by the stronger unions (Horn, 2009), which have consolidated plant-level representation and can negotiate collective contracts on a firm-by-firm basis. Most of the other unions negotiate only minor extensions of CLT provisions on issues such as health and safety, the protection of women and overtime work (Noronha, 2000). If no agreement is reached (with or without arbitration), both parties must agree to appeal to the Labour Justice for the arbitration of a *dissídio*.⁴ In court, lawyers can represent the parties, but most often the union presidents themselves take part in the negotiations, sometimes assisted by their lawyers. The judge is expected to use his or her expertise to bring about conciliation, but very often a normative award will be granted, which has the binding force of the law. Between 2000 and 2014 the Labour Justice received 10,600 *dissídio* petitions, which in 79 per cent of the cases led to a normative award.⁵ The average of 707 *dissídios* per year

⁴ This is a change imposed by Constitutional Amendment No. 45 of 2004, according to which the appeal to the Labour Justice must be jointly agreed by the parties. Before 2004 each party could appeal individually during the bargaining process.

⁵ Source: Tribunal Superior do Trabalho (TST) [Superior Labour Court].

over the last 14 years must be set against more than 30,000 bargaining exercises that take place every year, according to the Ministry of Labour (Cardoso, 2015).

If agreement is reached, privately or in court, other unions may choose to adhere voluntarily to all or some of its clauses, but this is unusual for a simple reason: if an employers' association (or a single firm) proposes to adhere to a third party's convention, it is because it judges the clauses to be more favourable to them than the probable outcome of negotiations with the workers' union. The same applies if a workers' union proposes to adopt a convention negotiated by a union that is stronger than itself. According to the CLT, a *dissídio* can be extended to parties other than the bargaining parties if the judge considers it proper or in the public interest, the definition of which is in the judge's discretion. Beyond the automatic *erga omnes* application of sectoral agreements (conventions) to every worker within the union's jurisdiction, the extension of enterprise agreements (contracts) to others (strictly speaking, the 'enlargement' of the contract to other jurisdictions, as defined in Chapter 1) hardly plays a role in Brazil. Such an extension is often requested by way of individual judicial petitions from workers, alone or together and with or without the support of a union. In fact, the Superior Labour Court receives hundreds of appeals every year from the lower courts from individual workers requesting the extension of judicial decisions.⁶ Most appeals concern the extension of collective contracts agreed judicially between a union and a firm to workers of a different firm in the same jurisdiction as the union, but who did not take part in the agreement. These petitions are invariably refused by the Superior Labour Court on two main grounds. First, a judicial award is a matter that has already been adjudicated (*res judicata*) and, as such, can be changed only in very limited situations (for example, if the implementation of the award results in an infringement of a constitutional principle). Second, the Court will invariably deny the extension of economic clauses (such as wages, sharing in profits, fringe benefits) to the entire jurisdiction of workers' unions contained in collective contracts judicially negotiated with one or more large firms, basing its refusal on a principle of equity: small firms do not have the same economic capacity as larger firms.

There is, however, one special case in which extension is the norm, and this is when professionals scattered in small numbers across many firms are involved. This can amount to hundreds of firms covering very diverse economic activities, represented by different employers' associations in a given jurisdiction of a workers' union. If the agreement is reached in court (in other words, if it is a *dissídio* between the workers' union and one or a group of firms), the Supreme Labour Court has consolidated jurisprudence in favour of extending the results of wage bargaining to the entire workers' category in their union's jurisdiction, including employers' unions and firms that did not take part in the bargaining.⁷ This is the case for work areas such as secretaries, navy carpenters, chauffeurs, marketing professionals and many others classified as "differentiated categories" by the Classification Table of Activities and Professions.

⁶ An archive of decisions issued by appeal courts, consisting of groups of judges, can be found at www.jusbrasil.com.br (accessed Dec. 2017).

⁷ See Official Diary of 20 Aug. 2009, pp. 139–146, available at: www.jusbrasil.com.br/diarios/12742301/pg-139-tribunal-superior-do-trabalho-tst-de-20-08-2009.

In sum, judicial extension beyond the automatic *erga omnes* application of conventions is restricted to the *dissídios*, which amount to some 700 per year in the whole country and a small set of cases related to professionals. Moreover, the Labour Justice nowadays operates within strict limits based on the Constitution: collective contracts bind only the bargaining parties; if other parties wish to adhere collectively to it, they must do so on their own free will. Extension to individuals is most often restricted to the parties' jurisdictions. The main exceptions are the professionals who would otherwise have to bargain with hundreds of employers.

5. Labour market outcomes

As a result of economic changes and social policies, Brazil has in recent years achieved a significant reduction in socio-economic inequalities. The family income per capita Gini index fell from 0.599 in 1997 to 0.538 in 2009. Soares (2011) and Rocha (2012), among others, show that:

- (i) 68.7 per cent of this decrease was caused by changes in work income;
- (ii) the remaining portion is explained by social policies such as family sponsorship (*bolsa família*) and continued allowance subsidy (*benefício de prestação continuada*), both directed towards the poor (accounting for 18 per cent of the decrease); and
- (iii) retirement income (4.9 per cent) and other sources (8.2 per cent).

Behind this were important labour market changes. According to the Instituto Brasileiro de Geografia e Estatística (IBGE) [Geographical and Statistical Office of Brazil], during the period 2002–11 the proportion of workers in the informal economy fell from 43 per cent to 32 per cent of the total employed population. Unemployment reached a historical low, with 5.5 per cent of the working population without a job.⁸ Economic growth and credit policies to stimulate consumption boosted job creation in the formal sector and helped to reduce the informal sector. During the 2000s, eight out of every ten new jobs was in the formal sector, whereas in the 1990s the opposite was true (Ribeiro et al., 2014). Informality was sharply reduced (Krein and Manzano, 2014). Second, the minimum wage recovery policy increased the real income of the lower tier of income distribution. The rise in the minimum wage alone accounted for 16.4 per cent of the Gini index fall, according to Rocha (2012), while real wages of the upper tier fell as a result of a significant decline in the returns for higher education, resulting, third, from the improvement in schooling of the labour force starting from very poor levels and the increase of the proportion of workers with higher education (Ribeiro, 2014).⁹

What is striking about these findings is that 51 per cent of the reduction in the Gini index results from work income or earnings that are not indexed to the minimum wage

⁸ Geographical and Statistical Office of Brazil, Pesquisa Nacional por Amostra de Domicílios (PNAD) [National Sample Survey of Households], 2012.

⁹ Gini was reduced as a result of improvement in retirement income (point (iii) above) and also in the minimum wage policy: 60 per cent of retired workers earn exactly the minimum wage, and 18.8 per cent of the families' income were as a result of the retirement of one of their members in 2009 (Rocha, 2012, p. 636).

(Rocha, 2012). The increase in the rate of formalization must have something to do with this, but there is no econometric work on the subject yet. The wages in the formal job sector are negotiated collectively and most unions are effective in setting professional salaries above the minimum. In addition, since the mid-2000s at least 85 per cent of the collective conventions have negotiated wage increases above the inflation rate (Cardoso, 2015). Thus, a good part of the fall in the Gini index is most certainly the result of collective bargaining, but we still need econometric evidence on the matter.

Literature on labour market outcomes of collective bargaining in Brazil is scarce. Economists Jorge Arbache and Francisco Carneiro are among the few researchers who have published on this, in particular on the impact of unions on wage dispersion by industry in the 1990s (Arbache, 1997, 1999; Arbache and Carneiro, 1999; Carneiro and Henley, 1998). However, Arbache's approach is problematic. In his 1999 paper he stresses that "literature on the impact of unions on wages has established that unionized workers earn a wage premium when compared to their non-union counterparts and that the dispersion of wages within the union sector is lower than in the non-union sector" (Arbache, 1999, p. 425). He then applies a methodology, consolidated in the specialized literature, which compares real wages and wage dispersion in union and non-union sectors. The problem is what Arbache considers to be the union and non-union sectors. His reference database is the annual National Household Sample Survey, which asks the occupied person if he or she is affiliated with a union. He then takes formal workers in manufacturing aged from 18 to 65 years and defines the "union sector" as the group of affiliated workers in this subsample, while non-affiliates are grouped as non-union. This is clearly wrong, for what defines a "union sector" in Brazil is precisely the formal labour market. Every worker with a formal labour contract is represented by a union even if he or she is not a member, and his or her wages are determined through bargaining, covered by conventions that are generally applicable. A similar problem has complicated econometric studies on the union premium in European countries with high coverage rates, and makes these studies incomparable with work on the American labour market, with its sharp distinction between the union and non-union sectors.

Arbache's work touches an important, albeit unintended, point. Trade unions in Brazil do not have the ability to reduce income inequality across industries – on the contrary. The structure of wage bargaining is strongly decentralized and fragmented, and one trade union usually negotiates different wages with different employers' unions. For instance, the union that represents secretarial workers in seven cities in the São Paulo Metropolitan Region negotiated a base-level contractual wage (*piso salarial*) of 1,600 Brazilian reals (BRL) in 2014 with the federation of employers in commerce in the São Paulo State (Fecomercio), and a *piso* of BRL1,450 with the employers' association that represents hospitals (SindHosp) in the same State. Thus secretaries in commerce earn 10 per cent more than hospital secretaries, notwithstanding being represented by the same workers' union.¹⁰ By the same token, one employers'

¹⁰ Since it is only judicial *dissídios* and judicially endorsed agreements that can be extended, employers strongly resist the judicialization of negotiating with "differentiated categories". A "good" *dissídio* that sets better wages for secretaries in another field of activity in the jurisdiction of the same workers' union will be the object of a request for extension by the union to its entire territorial base.

Table 7.1. Entry-level wages of workers in health facilities in selected cities in São Paulo State, 2015 (in Brazilian reais (BRL))

| Profession | Franca | Campinas | São Paulo(*) | Guarulhos | Ourinhos | Piracicaba |
|--------------------|--------|----------|--------------|-----------|----------|------------|
| Support | 920 | 967 | 920 | 1 034 | 920 | 920 |
| Administration | 935 | 1 075 | 943 | | 932 | 936 |
| Nursing auxiliary | 992 | 1 472 | 1 020 | 1 270 | 980 | 1 075 |
| Nursing technician | 1 080 | 1 526 | | 1 548 | 1 050 | 1 220 |

Source: Field work

(*) The São Paulo Union represents health workers in 44 cities.

association usually negotiates different wages with workers of a particular profession represented by different unions. The same SindHosp negotiated 41 collective conventions with various workers unions during the 2014–15 period, 16 of which were health workers unions in different São Paulo cities. Table 7.1 shows a small sample of the category's negotiated entry-level wages. Entry-level wages of qualified nurses can vary by as much as 50 per cent (compare São Paulo and Guarulhos), and in most cases the lowest salary is equivalent to the State minimum wage, which was BRL920 in 2015 for service workers.¹¹

Sectoral collective agreements (conventions) in services and commerce usually define different labour standards for small and medium enterprises. The figures in table 7.1 are for workers in hospitals with 21 employees or more. They are lower (3 to 10 per cent depending on the city) for those with 20 or fewer employees. The lower salaries tend to be close to the State's minimum wage (BRL920), except for Campinas and Guarulhos, where the unions are stronger. This means that stronger unions tend to set wages which depart from the legal minimum, thus increasing income inequality within the same profession. Furthermore, the wages set in sectoral collective agreements (conventions) are actually *minimum* wages, in the sense that the stronger unions will try and conclude more favourable enterprise collective agreements (collective contracts) with richer hospitals, further increasing wage inequalities. Arbache's findings in 1999 are strong evidence of this. The higher the union density, the more dispersed industrial wages are. Union affiliation does not define a "union sector", but the rate of union density denotes union power, which increases diversity across industries.

6. Conclusion and recommendations

In Brazil the bargaining actors and institutions have been the same for decades, but the role of the administrative authorities has become less interventionist. The Labour Justice's normative power is now residual; the Ministry of Labour retains a role as

¹¹ In 2000 the federal States were given the prerogative to define their own minimum wages, which was formerly an exclusive prerogative of the federal Government. While the national minimum wage was 788 Brazilian reais (BRL) in 2015, in São Paulo it was BRL905 for domestic workers and BRL920 for bricklayers, telemarketing operators and other occupations. In Rio de Janeiro there were three levels: BRL906.13 for forest and agricultural workers; BRL953.47 for domestic workers; and BRL2,432.73 for professionals with a higher-education diploma.

coordinator of collective bargaining between labour and capital in tripartite bodies under its responsibility. It can also be mobilized to mediate a negotiating exercise in its “round tables”, but the vast majority of collective bargaining involves labour and capital only. Still, the territorial base of any union and employers’ association is defined by the “union credentials” issued by the Ministry of Labour, the minimum size of which is the municipality. A workers’ union will represent all workers of a given profession or group of professions in the corresponding economic activity, both (professions and activities) being defined by the Classification Table of Professions and Activities. The *profession* or *group of professions* and the *territorial base* of the workers’ union define the union’s jurisdiction. It can negotiate only for workers in this jurisdiction, and the results of negotiations are valid *erga omnes* for the represented professions or group of professions only. The Classification Table also defines the employers’ association(s) with which the workers’ union must negotiate. This results in a *collective convention*, comparable with a territorially (locally or regionally) demarcated sectoral or professional agreement in other countries (such as Spain or France). However, a workers’ union can also negotiate an enterprise-level agreement, known as a *collective contract* in Brazil, with one or more firms in the same jurisdiction, in an attempt to improve the terms negotiated in the convention.

Conventions are *ex lege* generally applicable to workers within the union’s jurisdiction, irrespective of actual membership. During the 1990s the labour courts (Labour Justice) consolidated their jurisprudence according to which extension cannot be made outside the jurisdiction of the bargaining parties. In particular, this affects enterprise-level collective contracts, which cannot be enlarged to other jurisdictions. This means that extension through what is referred to as ‘enlargement’ – once an important aspect of the court’s normative power – is now the exception. The Labour Justice uses its prerogatives on collective petitions in a restrained way and no longer extends rights based on diffuse and substantive collective rights when deciding appeals from unions as substitutes for groups of workers. Finally, workers’ unions and employers’ associations can always voluntarily adhere to an existing collective convention negotiated by other parties instead of negotiating a new one, though this is rather the exception.

In Brazil, therefore, extension has always been and still is a matter for judicial decision. The main feature of the system is the central role played by the law and the Labour Justice in the definition and effectiveness of individual and collective rights and duties.¹² Nowadays, if one or both parties request extension of the collective agreement during the judicial bargaining (or *dissídio*) process, the affected workers and/or employers not represented in the bargaining process must be consulted and agree with the extension. *Res judicata* can be extended under very strict conditions, almost always restricted to the bargaining parties’ jurisdictions. The existence of a national workers’ union does not mean that it can request extension to the entire country of judicial decisions involving a single firm or a local (municipal or State) employers’ association. The limiting of extension practices to the unions’ jurisdiction

¹² Take, for instance, individual petitions. Every year the Labour Justice’s first instance courts receive between two and three million petitions from workers requesting the overhaul of denied individual legal rights (such as severance pay, paid vacations and overtime compensation). This is 10 to 14 per cent of the total number of annual layoffs (Cardoso and Lage, 2007).

would be less of a problem if employers' and workers' representatives were organized in wider territorial bases. In 2001 (the most recent year with census data on this aspect) among the 7,400 urban workers' unions that were then in existence, only 45 had a national territorial base, and only 2,000 comprised a state. The result is that more than 5,000, or 73 per cent of all unions were municipal or inter-municipal unions. This fragmentation has continued since and favours inequalities both within and across industries. On the other hand, there is evidence that suggests that collective bargaining has contributed to the reduction in the overall inequality of income by increasing wages in the lower strata of the distribution. It is possible that the *erga omnes* application of agreements in the union's jurisdiction, however restricted, has increased union bargaining power, since it makes it impossible for employers to pay newly hired or existing workers less than the rate set in the agreement. Extension in the more limited sense of applying local agreements to other jurisdictions would work against the intense degree of fragmentation, but it has not played a contributory role since it has become a residual mechanism in Brazilian labour relations.

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8. Extension of collective agreements in Argentina

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1. Introduction

This chapter analyses the characteristics of extension of the collective bargaining system in Argentina, identifying three historical stages. The analysis starts in Section 2 with a discussion of the scope of extension on the basis of the legal regulations that cover the private sector, also making reference to the characteristics of the public sector framework. Section 3 looks at how the extension mechanism works, what is extended, the exemptions that exist and the views of labour actors. Collective bargaining is described in Section 4, along with its coverage of vulnerable sectors of the workforce and the impact of the minimum wage in promoting greater income equality. Statistical data are presented in Section 5, which explain the potential of collective bargaining for improving income distribution. The concluding section considers the advantages and disadvantages of automatic extension in Argentina, rounding off with the opinions of various actors from the unions and employers' associations.

2. Collective bargaining in Argentina

The system of labour relations in Argentina has been categorized in academic literature as a “corporatist system” (Schmitter, 1982; Bensusán, 2005; Murillo, 1997; Etchemendy and Collier, 2006). The current labour institutions in Argentina were consolidated in the mid-twentieth century, and are marked by the political experience of the Peronist movement.²

In Argentina the relationships between unions and employers, and between each of them and the State, are tightly regulated by law. Together, these three actors determine most employment conditions, including wages, with considerable state intervention. Not only is there an extensive body of law laying down detailed labour regulations, but all agreements between workers' representatives and business associations must be ratified by the State in order to be legally binding. The three organized actors therefore interact closely in setting employment conditions and wages. Collective

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² The first governments of Juan D. Perón, as the President of Argentina, were from 1946 to 1955. His political movement was known as the Justicialist Party.

bargaining, ratified by the State, sets both wages and working conditions, and covers a significant part of the workforce.

Collective bargaining in Argentina covers registered employees in the private and public sectors, which means workers who receive welfare benefits and social security and belong to the formal economy. The formal economy is composed of 11,981,000 employed workers in the private sector and 2,237,000 in the public sector (PSH, 2007). According to data from the Argentinian Integrated Social Security System (SIPA), during the period 2002–14 around 5.8 million registered jobs were created, which were mainly in the private sector; out of that a total of 1.1 million jobs, almost one-fifth, were newly created in the public sector, distributed between the national, provincial and municipal levels of the State. While employment in the formal economy increased, the number of workers affected by collective bargaining also increased, in both the public and private spheres. In the formal sector, the public and private spheres are covered by different regulations, although they share similar wage bargaining mechanisms.

As we shall see below, regulation of the private sector has been stable since 1943; in contrast, the norms introduced in the public sector are more recent. The first Public Service Law dates from 1980. It was not until 1999 – with Law No. 25.164 on the Regulatory Framework for National Public Sector Employment – that the various aspects of the relationship between public sector employees and the State as their employer, for instance the general conditions of employment and collective bargaining, became regulated (Villaroel et al., 2013). Labour relations in the public sector do not form a tripartite system of relationships between employers, workers and the State as auditor, as the State assumes both the role of employer and auditor (Oyarzo, 2015).

Collective bargaining does not cover unregistered workers. Workers in the private and public sectors who are not registered by their employers for the purpose of social security and taxes are excluded. This means that they belong to the informal sector, which is understood to include all those activities that generate profit but are not regulated by the State (Roca, 2013). This group of workers still represents a very large percentage of the working population, although it has decreased from 49 per cent of the working population in 2012 to 34.3 per cent by 2015. Hence, a large proportion of the population works in conditions with little protection from bargaining coverage. No studies have yet been conducted to analyse the extent of collective bargaining coverage of “non-registered” workers. It is highly probable that employers fail to comply with the terms of the agreements for the whole workforce since they also fail to meet their obligations to register employment contracts with the relevant administrative bodies. However, employees have the right to demand, through the judicial system, that their employer meets his obligations in respect of the employment relationship between them.

Officially ratified collective agreements apply obligatorily *erga omnes* to all workers in both the public and private sectors who fall within the scope of union and employer representation, regardless of whether the workers have actually taken up union membership. As this implies that also non-affiliated employers must apply the collective agreement, this results in wide-ranging and semi-automatic extension of collective agreements.

In the public sector, which includes employees in public administration, health and education at national, provincial and municipal levels, collective bargaining coverage is fairly universal. Collective agreements apply to the entire public sector workforce in the formal economy, including employees in managerial positions, with the exception of the armed forces, police and security staff, which are legally excluded from collective bargaining. In the private sector the collective agreement in any branch or company applies to all registered workers who are not affiliated with any union, unless they occupy a managerial position. In general, employees in the private sector with managerial and supervisory roles fall outside the scope of the collective agreement, although exceptionally in some industries (such as telecommunications and metal trades) such employees are also covered by the collective agreements. Here it can be observed that the bargaining structure is highly conditioned by a tightly defined institutional framework, which regulates the bargaining process itself as well as the approval or rejection of the outcome. It is interesting to highlight that, as we shall see below, even if the modality of negotiations has varied over time, this institutional framework has remained virtually intact.

2.1. The three stages

With a relatively stable framework, Argentina has experienced three different stages of collective bargaining. The first period, from 1953 to 1988, saw the establishment of the majority of the most emblematic laws regarding collective bargaining agreements. Almost every branch of economic activity had its own working conditions, wages and work categories determined in collective agreements. Those agreements were concluded at a time when the trade unions enjoyed high levels of acceptance in an era of import substitution industrialization. During this period, there was a moment of *competitive* bargaining between the trade union leaders in order to improve their position in terms of relative wage increases for their members (Marshall and Perelman, 2004). A context of almost full employment and the creation of new jobs undeniably placed the unions in a strong bargaining position when it came to negotiating and determining working conditions. Bargaining coverage embraced almost the entire national workforce.

During the second period, from 1991 to 2003, collective bargaining was strongly affected by the economic policies of the 1990s informed by neoliberal ideologies of the time: economic deregulation, an intense process of economic concentration, and privatization of many services. With regard to regulation it is notable that, even though there were no significant changes in the regulation of collective rights, the reforms in labour flexibility affected employment and, as a consequence, these reforms affected the unions and their representational capacity. Government policies, with a marked neoliberal orientation, favoured decentralization on the one hand, and the de-industrialization of sectors that were uncompetitive in the international market on the other. This led to an almost structural increase in unemployment in Argentina until the sharp institutional and political crisis of 2001. In this context, given that the majority of the agreements were exclusively company-by-company, bargaining coverage levels fell substantially as a result of two factors: first, single-employer coverage always affects a small number of workers – those directly involved with the firm; and, second, the high rate of unemployment led to a nearly 50 per

cent increase in the informal workforce which, as mentioned above, in Argentina is not covered by the *erga omnes* application of (extended) collective agreements. Thus, bargaining coverage fell drastically during this period. One of the main consequences, which persists even up to the current period, is the expansion of the informal sector of the economy.

The third period stretched from 2003 to the end of 2015.³ After the Argentinean default and the political and social crisis of 2001 some variables began to change, which led to a reversal of the tendency towards decentralization. Economic recovery and changes in employment rights legislation⁴ – especially the Government's orientation towards greater inclusion of trade union actors in order to encourage social dialogue – led to a recovery in collective bargaining. Even though the great majority of collective bargaining agreements are at company level, almost every sector annually negotiates wages at the branch level, thus affecting a great proportion of the workforce. Depending on the level of negotiation, collective bargaining has a varying impact on the population of workers covered by it. At times when most agreements are negotiated in a centralized way at sector level, the concluded agreements cover the majority of the workforce. By contrast, agreements negotiated at company level cover far fewer workers, even though these agreements also require ratification by the Government in order to achieve legal status and are applied *erga omnes* to all workers employed by the firm.

In the private sector there are three groups that have their employment conditions and wages determined by mechanisms other than collective bargaining. In their case tripartite bargaining, participation or consultation mechanisms play a significant role. These groups are:

- i. workers in the agricultural sector (6 per cent of registered employees in the private sector), whose working conditions are established through the Comisión Nacional de Trabajo Agrario (CNTA) [National Commission for Agricultural Labour]⁵ (405,600 jobs, according to Ohaco, 2012);
- ii. private sector teachers (3 per cent of registered workers in the private sector), whose salaries and working conditions are regulated by the Teachers' Statutes and the Committee of Teachers in the Private Education Union, a body with tripartite representation; and
- iii. domestic service workers and domestic workers in private households, who receive wage increases through the administrative provisions of the Ministerio de Trabajo, Empleo y Seguridad Social [Ministry of Labour, Employment and Social Security (MLESS)] (1,101,000 workers according to the Permanent Survey of Households (PSH, 2007; Palomino and Trajtemberg, 2007)).

³ We are currently in an atypical period as a result of the recent change of Government and its change of political and economic orientation.

⁴ In 2004 temporary contracts and compensation for dismissal were re-regulated pursuant to the Labour Regulation Law (Law No. 25.877). This law affected the rights of individual workers. Most of the liberal reforms that were introduced during the 1990s were either weakened or abolished.

⁵ The National Committee for Agricultural Labour (CNTA) is a tripartite committee composed of the Ministry of Labour, Employment and Social Security (MLESS), four employers' associations (Rural Society of Argentina, Rural Confederations of Argentina, the Inter-cooperative Farming Confederation, and the Agrarian Federation of Argentina) and, representing the workers in the sector, the Argentine Union of Rural Workers and Dockers (UATRE).

3. Extension of collective bargaining agreements: The automatic *erga omnes* clause

With regard to the norms that regulate collective bargaining in the private sector, the main laws are (i) the Law of Collective Labour Agreements (Law No. 14.250, adopted in 1953), and (ii) the Law of Collective Bargaining Procedures (Law No. 23.546, adopted in 1987), which enable negotiation by the branch of activity and grant bargaining authority to recognized trade unions. Article 4 of the 1953 law established:

The norms which have originated from the collective agreements ratified by the Ministry of Labour, Employment and Social Security, in its capacity as authority for application, will govern with respect to *all the workers in the branch of activity* or belonging to the category within the limits that these agreements refer to; when an agreement is aimed at more than one employer, *they will cover all those included in their particular sphere of activity*. All the above is without prejudice to whether or not the workers and employers have affiliated with the respective signatory associations.⁶

This principle was reiterated in 2004, when the Labour Regulation Law clarified that “the collective labour agreements must be ratified by the MLESS. Upon fulfilment of this requirement, not only will they be obligatory for those who sign them, but also for all the workers and employers operating in that economic branch”. Therefore, according to the legal framework, where a collective agreement is formalized its provisions cover all workers within its jurisdiction. In other words, collective agreements in Argentina cover the totality of workers in the formal sector of the economy who perform the activity specified in the agreement (Valdovinos et al., 2008).

Unions and employers can freely choose the level of negotiation: sector, one or more branches of activity, trade or profession agreements, company (or state-owned company) agreements. However, it is useful to point out that until the 1990s the predominant level of bargaining was at the sector or branch level, in spite of there being no legal impediment to forming company unions. In this way, through the sectoral agreements a greater representation of the workers was achieved. During the 1990s, the decade that witnessed significant increases in flexibility, the little collective bargaining that did take place occurred at the company level.

With regard to the *union actors*, it is not difficult to identify the union with which negotiations should be conducted. There is only one union per sector or branch of activity that has the authority to sign legally binding collective agreements. One of the current regulations that best reflects state intervention is the Law of Trade Union Associations (Law No. 23.551, adopted in 1943) and Decree No. 467 of 1988. This law establishes “union recognition”,⁷ through which the Government, in its role as enforcement authority, awards the “monopoly of representation” to the union with the largest number of affiliates in each branch of activity or company. A union with recognition status must include in its membership a minimum of 20 per cent of

⁶ Emphasis added.

⁷ Some unions have only “union registration”, and their rights are defined by article 23 of the Law of Trade Union Associations. Union registration means State recognition during the stage prior to the award of union recognition for collective bargaining purposes. However, a union with registration does not always obtain recognition.

the workers that it seeks to represent.⁸ Recognition of the union as the only actor authorized to sign collective agreements is one of the rights associated with the act of union recognition. The union is also recognized as having jurisdiction to represent the collective and individual interests of workers, including those who are not members, to collect union dues through deduction by employers from salaries, and to administer its own social security schemes.

As mentioned above, most of the unions are organized by economic activity or by specific trade, and the greater part of the union structure was formally constituted during the 1940s and 1950s. Based on the pyramidal internal structures, three levels of union organization can be distinguished:

- i. first level: unions or associations;
- ii. second level: federations formed by the unions or associations; and
- iii. third level: confederations formed by the federations.

The first- and second-level organizations play a central role in negotiations to the extent that they are the entities that sign the collective bargaining agreements. It is important to emphasize that Argentinian trade unions enjoy a significant union presence in factories and workplaces⁹ (Trajtemberg, Senén González and Medwid, 2009). The Confederación General del Trabajo de la República Argentina (CGT) [General Confederation of Labour of the Argentine Republic] is a third-level organization with official union recognition that represents the vast majority of workers. Both federations and unions affiliate with the Confederation. Although the Confederation does not negotiate wages or working conditions directly, it plays a significant political role. On the one hand, it negotiates with the State to win concessions and shape the definition of economic, employment and social policies with national scope. On the other hand, it delegates the responsibility for negotiating with company representatives on working conditions and specific wages of each sector within the trade unions specific to each sector. It acts more as a “political agent”, as a space within which to debate which line to follow, than as an organization with the ability to control its members. Currently there are other third-level union confederations, and the Confederation of Labour is in a state of fragmentation. It is worth noting that the Central de Trabajadores de la Argentina (CTA) [Central Union of Argentinian Workers] has opted for a more inclusive mode of representing workers, in which movements of unemployed workers

⁸ A union organization that seeks to acquire official recognition must have a minimum of 20 per cent of the workers as members, and be able to demonstrate that it is the most representative considering the number of paying affiliates among the workers that it wishes to represent. Unions with registered status must have been in existence for six months prior to the petition for official recognition. The Ministry of Labour, Employment and Social Security has the administrative authority to resolve disputes over representation of certain groups of workers. The most representative federations acquire official recognition when the first-level organizations affiliated to it have the highest number of members within their scope, and confederations when their affiliated federations have the highest proportion of contributors.

⁹ During recent years the presence of the unions in the workplace has been significant (61 per cent of the large companies have union representation). According to the law there can only be one union per type of representation in each workplace and the overall representation of the workers is the responsibility of the union that represents the main activity of the workplace in a situation where there is more than one activity. This has generated repeated conflicts between various unions to claim the representation of an ascertained group of workers (Trajtemberg, Senén González and Medwid, 2009).

and workers from the informal economy are included. The Central Union is an autonomous federation founded in 1992; it was legally recognized in 1997 by the MLESS, although it does not have union recognition for bargaining purposes.¹⁰

Although any union association that wishes to do so may register itself, only in a very few cases has a union association managed to win union recognition status from another entity through secession. The union model supposes that changes of this type can be produced only through union democracy. In cases in which groups from different levels of union organization (in the workplaces, in the unions, or in the federations) do not agree with the union leadership, they should hold elections in order to win the representation of the workers. In this way the fragmentation of union actors is avoided, which would otherwise take away bargaining power from the workers. Unfortunately, in practice, this method of electoral recall and re-establishment of representativity among workers does not operate so clearly.

The configuration of the *business actor* is not problematic where it concerns single-employer (company) bargaining. The configuration of representation for multi-employer bargaining at sector level, however, is rather ambiguous. The current law that regulates employer representation with regard to collective bargaining (Law No. 14.250 and Law No. 25.877) was founded on a model of associations that existed in 1975, but has obviously changed since (Valdovinos et al., 2008). Although the law is very specific as to which union must negotiate the sector or branch agreement, it does not go into much detail as to why one employers' association may bargain and another may not. However, employers have rarely disputed the established representativity; nor have they appealed to the courts against their obligation to incorporate terms negotiated by another employers' association in which they had no part in the negotiations.

3.1. How the extension mechanism works

Once both parties have concluded an agreement, if they wish it to be legally binding they must register the agreement with the MLESS in order to qualify for the automatic extension mechanism. The MLESS must proceed to ratify the agreement in order for it to become an instrument that requires obligatory compliance by the trade unions and employers that are represented in the sector or company covered by the agreement (Palomino and Senén González, 2006; Tribuzio, 2004; Simón, 2006). Ratification of a collective bargaining agreement is a public policy act by which the MLESS recognizes the legitimacy of the agreement and establishes that it is not contrary to the public interest.¹¹ Once these conditions are met, the agreement is awarded *erga omnes* status, which means that it is applicable to all workers and employers within its scope, even if they are not affiliated with the union or the employers' associations involved with the agreement. The act of ratification indicates, first, the extent of application of the agreement to all personnel regardless of their affiliate status with

¹⁰ The Association of State Employees, the Association of Metro Workers, the Association of Argentina Actors, and regional unions such as the Villa Constitution Workers' Union, are some of the unions affiliated to the Central Union of Argentinian Workers.

¹¹ For example, in relation to wage negotiations, the MLESS does not always ratify the agreed percentage increases agreed, in order to avoid raising inflation.

the signatories to the agreement. Second, ratification includes accreditation of the signatories to the agreement, publicizes the content of the agreement and establishes its territorial extension and the validity, which starts once it is ratified. The act of ratification is obligatory for sector and branch (or occupational) agreements. Single-company agreements are ratified only on request.

3.2. What is extended automatically?

Collective agreements, ratified by the State, are extended in their entirety – not simply with regard to wages but also with regard to working conditions. Given that the sector or branch agreement must take into consideration the position of various types of companies – small, medium and large – the large companies do often negotiate superior wage rates above those agreed in the sector or branch agreement. Centralized collective bargaining establishes the desirable and feasible minimum wage for each sector; thereafter, according to its financial ability, the specific wages for each company or sector are established.

In sum, as table 8.1 shows, all collective agreements ratified by the State through its awarding authority, the MLESS, are automatically extended to the whole workforce included in the agreement regardless of the union membership status of individual members of the workforce. According to Law No. 1.250, neither the worker nor the employer can set conditions that are inferior (for example, a lower wage rate or longer working day) to those agreed in the prior collective bargaining agreement. Nor are they permitted to modify the applicability of the collective bargaining agreement: the agreements do not provide clauses that can be changed or circumvented by employers. The agreement becomes legally binding no later than 45 days from its ratification.

Table 8.1. The law and practice relating to the extension of collective bargaining agreements (CBAs) in Argentina

| | |
|-----------------------------|---|
| Criteria | Public interest |
| Initiating party | Once agreed, one or both parties can request ratification and therefore automatic extension from the Ministry of Labour, Employment and Social Security (MLESS) |
| Awarding authority | The MLESS |
| Scope of extension | By occupation and region |
| Content | No limitations – full CBA |
| Contingency measures | No contingency measures provided. CBAs do not contain exemption clauses. |

3.3. Exceptions

There are three exemptions from the rules concerning the general application of collective agreements described above.

The first is the Crisis Prevention Procedure (CPP). When a crisis is declared, employers and unions may negotiate a new agreement with conditions that differ from those in the earlier agreement. The CPP, created by the National Employment Law (Law No. 24.013) in 1991, creates an exception in relation to collective dismissals with an obligatory character, on the communication of such dismissals or suspensions on the grounds of *force majeure* for economic or technological reasons. This does not mean, however, that sectoral agreements can be ignored completely. With the aim of not destroying jobs and maintaining employment, and under very specific circumstances, the employer, by agreement with the union(s), can ask the Government for financial aid and some forms of exemption with regard to working hours. Recently, the number of companies that have declared themselves to be in crisis has increased significantly. The crisis agreement concluded as a result of this process is incorporated into a collective agreement.

The CPP is invoked by the MLESS on the petition of the employers' association or the workers' union. The MLESS has the authority to convene an initial hearing within five days once 48 hours have passed after the request for the CPP has been made and transmitted to the parties concerned. Once the CPP is initiated the parties may not carry out any measure that would be contrary to this process: employers are not permitted to impose dismissals and workers are not able to employ direct action measures (such as strikes) until the conclusion of the procedure. The crisis agreement ratified by the MLESS has the effect of validating for the employer all of the working conditions and wages that have been agreed with the relevant recognized bargaining parties, thus allowing modification of the provisions of the applicable collective bargaining agreement. Since 2003 this procedure has been used very rarely as economic growth directed the dynamics of collective bargaining, although since the crisis of 2008 it has been used in some sectors, such as the automotive and cold-storage industries. The CPP is quite effective in avoiding job losses in the short term, basically because employers are forced to retain their employees if they are to maintain the government subsidy to pay wages. However, looking at the long-term position, the CPP does not improve the employer's situation: it helps only during difficult times by way of the receipt of an economic incentive to keep the firm operating. There is little current official statistical data on how the benefits of the CPP are distributed, but earlier research has shown that the manufacturing sector has profited mostly from it and that workers from larger firms (in terms of employment) have been the most frequent target of this policy.

The second exception is provided for by Law No. 24.522 in relation to a declaration of bankruptcy of the employer. The initiation of bankruptcy proceedings annuls the current collective bargaining agreement and the workers have two options: either to be guided by the law or to sign a specific type of collective bargaining agreement, known as a "crisis agreement".

The third exception is found in three articles of Law No. 2.467 relating to small and medium-sized enterprises (SMEs). Articles 90 and 92 allow an SME, by negotiation

with the union, to suspend the terms of the sectoral agreement with regard to two clauses: (i) the duration and dates of vacations, and (ii) the dates of payment of the mid-year and end-of-year bonuses. By contrast, the third article of this Law provides for a “productive restructuring”, which allows the SME to propose to the union the modification of some of the clauses in the agreement for technological or organizational reasons, or as a result of the exigencies of the market. In such a case, agreement with the union is necessary in order to be able to effect these changes. Although no studies have been made to assess the impact of these exceptions, in interviews some legal advisers confirmed that the exceptions have been invoked only on rare occasions.

3.4. The views of labour actors on the extension of collective bargaining agreements

The issue of the extension of collective bargaining has received considerable attention in the academic literature in Argentina, and in the last few years there have been numerous studies on collective bargaining (Valdovinos et al., 2008, among others). We interviewed several business and union actors for our research to ascertain their opinions on the extension of clauses; their responses, in general, leaned towards criticizing some components of the Argentinian union model, but we received no responses about the applicability and consequences of *erga omnes* itself. The union representatives we interviewed shared the view that the *erga omnes* extension of collective agreements is of great value for the unions and is an instrument of law that works for the benefit of all workers. However, they criticized the concept of “union recognition”, which is related to the monopoly of representation and the subsequent application of the negotiated clauses to the whole workforce. In this sense, as has been mentioned, Argentinian law imposes a restriction on unions that are not formally recognized given that they cannot negotiate on behalf of all the workers. In these cases, the unions are not opposed to automatic extension but to the process of defining who has the legal authority to enter into collective bargaining. In any event, if trade union pluralism were to be legally recognized, the *erga omnes* application of collective agreements would be extremely complex unless the unions were to accept negotiating jointly with the employers, as is, for instance, the case in the Netherlands and Belgium.

As far as business actors are concerned, the *erga omnes* clause has been inscribed in Argentinian legislation since the 1940s. They view the clause as positive because it covers all workers, whether they are members of a union in that sector or not. Thus, if a wage increase is negotiated for the sector, it is put into effect for all workers. Our interviewees who represented the employers’ perspective did not hold negative opinions of automatic extension itself, but they disagreed over the method of defining which actor – on behalf of the workers or employers – can enter into collective bargaining. In relation to the union actor, on some occasions employers would prefer to negotiate with a union other than the union stipulated by law. One interviewee argued that it would be useful to have a legal regime that contemplates union plurality, as opposed to the current regime of representational monopoly, with unity of representation during collective bargaining. Some large companies – multinationals, in particular – choose to employ human resource strategies that ignore the union

presence and conduct negotiations within the context of the company. These negotiations are conducted between the employer's human resources department and the workers, and produce informal, often unwritten, agreements which do not require state recognition.

With regard to the business actor organized in employers' federations or chambers of commerce, the opinions offered a more diffuse picture.¹² On occasions such actors question negotiations conducted by the chambers with the greatest level of representation (for example, they cover various companies in the same sector across a whole region and not just a single city) because in that way the articulation of the interests and objectives of the associations with a lower level of representation is reduced. However, this criticism has not yet led to any formal legal complaint to question what has been negotiated by the chambers of commerce. In relation to managers of small businesses, there has in recent years been active wage bargaining and the complaints filed have not been about the wage levels agreed by the chambers but rather about the benefits, which represent a very high percentage of the salary, that they must contribute to the workers. In other words, even though the employers may be against the behaviour of some chambers and their fictitious claim to represent all employers, there are in fact no pending legal actions to challenge their representativity.

4. Collective agreements and vulnerable workers

It is impossible to establish precisely how regulation affects the more vulnerable workers. As these workers are distributed over wide geographical areas, difficulties of organization and collective action, together with a lack of local union representation, makes them vulnerable. The extension law applies, but for the reasons stated above and others, control and regulation of its application is problematic. The available data relate only to workers in the formal sector, who receive a salary with social security contributions, health and welfare insurance, and in some cases with trade union membership. With regard to workers in small or medium-sized companies, the impact of the regulation is all-encompassing to the extent that the companies in question have registered the workers. There are some governmental and/or union (or joint) initiatives that attempt to give greater visibility and rights to these workers, especially in the case of agricultural workers, and workers in private households (such as domestic workers and child carers). For both groups of workers, the laws regulating their activities have been reformed in recent years in an effort to extend the rights of workers covered by the Employment Contract Law¹³ to these vulnerable individuals.

¹² The chambers are employers' organizational bodies, which gather together companies engaged in the same economic activity. In turn, they are grouped together in larger chambers, or federations, by sector and region. The latter may articulate themselves and form third-level employers' associations. They constitute the counterpart of the unions in collective bargaining processes.

¹³ The Employment Contract Law (Law No. 20.744), dating from 1974, is the main basic enactment that regulates individual employment rights. It is oriented towards protection of the workers, in that it stipulates the prevalence of practices and customs that are more favourable to the worker in relation to the regulatory mechanisms of the law, the collective agreement or individual contract.

In 2003 a general wage for formally contracted rural workers was established. For this purpose, the tripartite National Commission for Agricultural Labour (CNTA)¹⁴ is important. The general wage set by the Commission functions as an index for the other wages in the sector and the Commission regulates agricultural activity, particularly working conditions that had never been negotiated before, with the participation of union representatives. Among the most significant achievements are the limitation of the working day to eight hours (48 hours a week), and the determination of living, working and housing conditions for seasonal and casual workers (Etchemendy, 2011). Additionally, the new Statute for Rural Workers, (Law No. 26.727) signed in 2011, replaced the regulation sanctioned during the military dictatorship that had reduced the rights and forms of protection available to this group of workers.¹⁵ For workers in private households the State sets a minimum hourly and daily wage by decree. The “market” wage, the amount that is actually paid, is usually higher than this. The workers in this sector are covered by a new legal regulatory framework, which protects their wages and labour rights such as pensions and health insurance. Although there is a recently founded domestic workers’ union that represents this group, their working conditions and wages are determined by the State rather than through collective bargaining, and wage increases are decided by decree. In this case representation of the employers’ sector is rather complex and there is no business association that could legitimately assume the role of representing employers in the sector. This is probably as a result of the large number and dispersal of the employers in question, which in many cases are individual family households. However, some progress has been made in the direction of collective bargaining and in 2015 the first *paritaria* (negotiation by representatives) between workers and employers in this sector took place.

In relation to other workers in the informal sector – as discussed above in Section 2, 34.3 per cent of the total workforce – the composition of the workforce is broad and diffuse, and includes, for example, street sellers, delivery workers and seamstresses. In addition, many workers in sectors such as construction, textiles, confectionery and retail are characterized by triangular forms of labour contracting through, for example, work agencies, subcontracting and casual work. However, these workers are able to join the Central Union of Argentinian Workers (CTA), which has attempted to represent workers excluded from the formal sector of the economy (such as the unemployed and informal workers) and accepts direct membership from any worker, irrespective of occupational category. However, the Central Union does not have the power to negotiate wages with employers directly, except in the case of the Consejo Nacional del Empleo, la Productividad y el Salario Mínimo, Vital y Móvil (CNEPS) [National Council for Employment, Productivity and the Minimum (Living and Mobile) Wage]. This organization constitutes a tripartite dialogue and has reopened a labour institute that had for a long time been inactive. It is not considered to be collective bargaining as such and its results are not collective agreements; however, it is another way in which the main labour relations actors negotiate better wages.

¹⁴ Created in 1976, it introduced the three-part constitution for the wages negotiations of the sector. In 2003 it was revived, as mentioned above.

¹⁵ At the time of submitting this chapter there had recently been a shift in power with the election of a right-of-centre President. The law which changed the status of agricultural workers was vetoed. However, it is too soon to draw any conclusions regarding the situation of these vulnerable workers at present.

It promotes active participation of union and employers in parallel with the MLESS. The main leaders of the General Confederation of Labour of the Argentine Republic (the CGT) participate in the Council, along with the opposition union federation, the Central Union of Argentinian Workers (CTA), in addition to the most representative of the employers' associations (the Unión Industrial Argentina (UIA) [Industrial Union of Argentina] and the Cámara Argentina de Comercio y Servicios (CAC) [Argentinian Chamber of Commerce]). Since the National Council for Employment, Productivity and the Minimum (Living and Mobile) Wage began to operate, and after ten years of stagnation, the real minimum wage began to increase. According to Maurizio (2014), between 2003 and 2012 the real minimum wage rose by 200 per cent. The new minimum wage currently stands at 4,400 Argentinian pesos – equivalent to US\$520.¹⁶

5. Collective bargaining coverage

Regulatory frameworks have different impacts according to the stage in the economic cycle. In the case of Argentina, the greater part of the regulation related to collective bargaining has remained stable over time. As was shown in the previous section, during the 1990s the agreements and settlements signed at company level without state intervention dominated those signed at sector level, with the result that bargaining coverage decreased. In 2003, the election of President Nestor Kirchner¹⁷ produced a shift in economic, social and legal policies, signalling the return of the State to its interventionist role in the economy and the market. As part of this new political orientation, the alliance between the Government and the main trade union leaders marked the start of a new phase, which the Government would continue until the end of 2015, when a new right-of-centre Government was elected. The reactivation of collective bargaining, principally by the industrial branch, has during this period been stimulated by the Government, starting by strengthening its own role as regulator, followed by the active reappearance of the unions on the political stage.

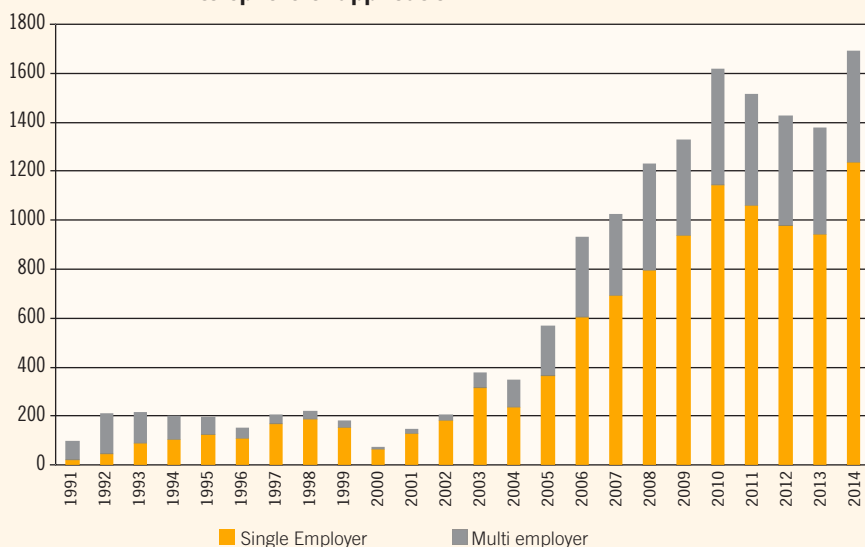
Figure 8.1 shows that in the year 2014 alone, 1,691 collective agreements were ratified in Argentina, more than the 1,598 agreements negotiated between 1991 and 1999 (an average of 177 per year). After 2003 there was a gradual increase in bargaining activity following the consolidation of economic growth during this period. In 2003 the number of ratified collective agreements jumped to 380 agreements, followed by 348 in 2004, with 568 collective agreements in 2005, rising to 930 in 2006.

We estimate that approximately 6.7 million salaried workers were covered by a collective labour agreement between 2010 and 2013. Unfortunately, with the available information it is difficult to construct tables of historical data to enable us to compare the evolution of workers covered by collective bargaining since the 1990s. From 1998 the unemployment rate in Argentina rose significantly, generating a mass of workers who turned to the informal sector to find work. What we can confirm is that, given the predominance of company-level agreements in the 1990s, the number of workers directly affected by collective bargaining was hugely inferior to the number affected today.

¹⁶ *Official Gazette*, Resolution 3/2014, from the National Council for Employment, Productivity and the Minimum (Living and Mobile) Wage.

¹⁷ Also a representative of the Justicialist Party.

Figure 8.1. Number of settlements and agreements according to sphere of application

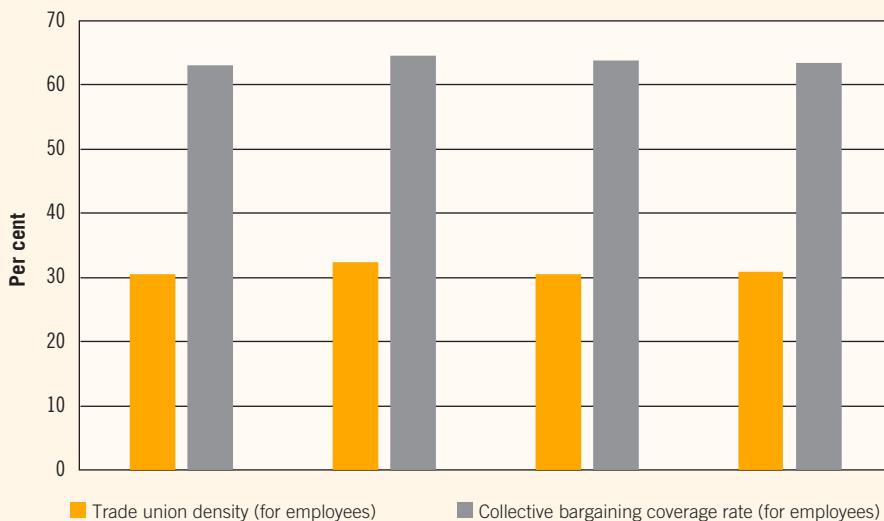


Source: Departamento de Estudios de Relaciones Laborales, Subsecretaría de Programación Económica y Estudios Laborales, Ministerio de Trabajo, Empleo y Seguridad Social [Department of Labour Relations Studies, Subsecretariat of Planning and Labour Studies, Ministry of Labour, Employment and Social Security (MLESS)].

The figure of 6.7 million does not include salaried workers in rural centres who work mainly in the farming and livestock sector and have their wages determined in the tripartite consultation process. Adjusted for these workers, and for those excluded from collective bargaining (mainly the armed forces and security personnel, some workers in managerial positions, and domestic service workers), bargaining coverage in Argentina reaches 63 per cent of the salaried workforce in the formal economy (not counting non-registered workers). The number of workers covered exceeds the number of trade union members by an estimated three million salaried workers in the public and private sectors. In spite of not being affiliated to any union, these workers receive benefits and are affected by regulations determined by the unions and employers through collective bargaining. In other words, roughly half of the employees covered by collective labour agreements are unionized, while the other half receive the benefits of collective bargaining agreements as a consequence of the *erga omnes* application of the agreements within firms and the extension of agreements to non-organized firms in most sectors (see figure 8.2).

With the estimate of about one-third of the labour force working in the informal economy and thus deprived of insurance rights and collective bargaining coverage, it transpires that in the formal sector bargaining coverage is very comprehensive. The adjusted coverage figure for the formal sector lies at around 84 per cent. According to company size, the coverage of workers in the private sector, if we take into account only the formal sector of the economy, was 87 per cent for the smaller-sized companies, 84 per cent for medium-sized and 81 per cent for the largest. Only 3 per cent of companies

Figure 8.2. Percentage of workers covered by collective bargaining, and union density



Source: Departamento de Estudios de Relaciones Laborales, Subsecretaría de Programación Económica y Estudios Laborales, Ministerio de Trabajo, Empleo y Seguridad Social [Department of Labour Relations Studies, Subsecretariat of Planning and Labour Studies, MLESS].

had a company-level collective bargaining agreement, which represents roughly 14 per cent of the workers in companies with ten or more employees.

In addition to the increase in bargaining coverage within the formal sector, the expansion of the formal sector of the economy through the creation of registered jobs, with the protection of labour rights regulation, collective bargaining and mandatory minimum wages, are other characteristics of the period between 2003 and 2014. From 2003 to 2005 the rate of growth in registered employment was above 10 per cent annually, slightly lowering to a still impressive 8 per cent in 2006 and 2007. A marked deceleration was seen in 2008 in the growth of employment to 3 per cent. In 2014 the number of registered workers doubled those of 2003 and more than 7 million workers were covered by collective bargaining agreements (Department of Labour Relations Studies, Subsecretariat of Planning and Labour Studies, MLESS). In brief, 5.8 million registered jobs were created between 2003 and 2014.

6. Conclusions: Advantages and disadvantages of automatic extension in Argentina

Collective bargaining in Argentina is a mechanism that was designed in the context of a mid-twentieth-century welfare state and aimed to achieve an inclusive policy that would embrace workers and their unions who, until then, had not enjoyed any concrete institutional channels for representation of their interests. From then on,

collective bargaining has applied to almost the entire workforce in the formal economy. Although there have been changes in the regulation of some of the institutions, they have been regulated in a similar way within the historical legal framework in which the Argentinian union model is engraved, characterized by unions organized along the lines of national branches of economic activity and by collective agreements with a national scope.

However, this framework appears to be an inappropriate tool for promoting the inclusion of groups of vulnerable workers, given that 34.6 per cent of the workforce are informal workers. The unions, with the exception of some attempts by the Central Union of Argentinian Workers (CTA), continue to represent workers in the formal economy exclusively. An exception is the union that represents street vendors, organized by the Confederación de Trabajadores de la Economía Popular (CTEP) [Confederation of Workers of the Popular Economy], founded in 2011, which brings together autonomous workers who trade goods in the streets. However, the employment relationship for this particular group of workers is complex, since they have no employers from whom to request wage increases and other forms of labour protection. In their case, the State has encouraged union formation and has adopted the role of “employer” in negotiations. Vulnerable workers are included through a set of policies promoted by the State, such as the national minimum wage, universal child allowance, registration of domestic employees, and a series of other policies which aim to broaden the section of workers represented through collective bargaining.

Collective bargaining allows for the reduction of economic inequality among workers in the formal labour market. In addition to the consensus over minimum wage increases, collective bargaining appears to have worked in favour of the weakest unions, providing them with a wage “floor” that is higher than it would otherwise have been (Palomino, 2009). This tendency to increase wages through collective bargaining agreements in the context of economic growth and the expansion of formal salaried employment is decisive in social terms: it implies a strengthening of the unions and an appreciable improvement in the proportion of wages in national income distribution.

As has been demonstrated, the overall effectiveness of collective bargaining based on sectoral bargaining, *erga omnes* application and its extension to non-organized firms in the formal sector is anchored in the law, with a tightly defined supervisory role of the Argentinian Ministry of Labour, Employment and Social Security (MLESS). Neither unions nor employers appear to question these features and, as is to be expected, the unions in particular are more inclined to point out the advantages of this arrangement. However, on both sides there are doubts, questions and concerns with regard to the restrictions resulting from the Argentinian legal framework based on the monopoly of representation (unions) and the low level of representativity of the actors (employers).

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Personal interviews

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