



COLLECTIVE BENEFIT
Harnessing the power of
representation for economic
and social progress

Author:

Alan Eustace, Trinity College Dublin

With thanks to other contributors who assisted with the research:

Dáire McCormack-George, Trinity College Dublin
Kevin Duffy, former Chair of the Labour Court
Kevin Callinan, Fórsa general secretary
Joe O'Connor, Fórsa director of campaigning

Also thanks to:

Anna Heverin and Kevin Donoghue from Fórsa,
and Ross Murray from Maynooth University
for their assistance.

Contents

Executive summary	4
Introduction	7
Part I: International law	9
Part II: Ireland as an outlier in Europe	14
Why is Ireland an outlier?	17
Part III: Comparative analysis	22
Methodology	23
Denmark	27
Analysis	27
Lessons for Ireland	31
France	32
Analysis	32
Lessons for Ireland	37
Belgium	39
Analysis	39
Lessons for Ireland	43
The Netherlands	44
Analysis	44
Lessons for Ireland	50
Part IV: Collective Bargaining in EU law	51
1. Fundamental rights and the Treaties	54
2. Economic norms	56
3. Participation directives	59
Proposed directive on adequate minimum wage	61
Summary of EU law	63
Conclusion	64

Executive summary

This report is being published at a time of political and economic change in Ireland, across Europe, and around the world. Although collective bargaining coverage and trade union density have reached their respective nadirs in many developed economies (including our own), there is renewed political and civil society interest in collective bargaining and organised labour. The Government of Ireland is conducting an examination into collective bargaining practices, and how the Irish legal position can be changed to protect the fundamental right of workers to collective representation and bargaining. At the same time, the European Commission is pioneering two initiatives to enhance collective bargaining rights and coverage, as part of reforms of minimum wages and competition law.

This report offers four distinct but related contributions to the ongoing policy debate as to how effective collective bargaining can be supported in Ireland. First, it considers Ireland's obligations under international human rights law to promote and protect the right of workers to bargain collectively. It highlights the relevant legal instruments of the International Labour Organisation, the European Convention on Human Rights and the European Social Charter to conclude that Ireland is in danger of breaching international law unless collective bargaining processes are strengthened.

Second, the report discusses Ireland's position relative to the rest of Europe, concluding that we are a clear outlier in having weak industrial relations machinery and low collective bargaining coverage. Ireland performs below the EU average in respect of industrial democracy and associational governance, key metrics used by the EU agency Eurofound to measure the quality of national industrial relations systems and economic performance. We are near the bottom on worker representation and participation in economic decision-making. The picture is particularly bleak when Ireland is compared only to the 'EU14': those states that were members of the EU before the 2004 eastern expansion, minus the UK. These are clearly the closest comparators to Ireland, accounting for levels of economic development and integration to the global economy. Ireland's rate of collective bargaining coverage (33.5%) is the second-lowest in the EU14, ahead of only Greece, and less than half the EU14 average of 73%.

The report suggests reasons for why this is the case: the effects of the Financial Crisis, decisions of Irish courts which have struck down industrial relations legislation as unconstitutional, and the voluntarist tradition of industrial relations in this jurisdiction. Of these, the report argues the latter is the most significant. The report demonstrates that voluntarist systems, where the state does not intervene in the bargaining process and there are no legal obligations on employers to negotiate with unions, can only secure high bargaining coverage where trade union membership is also high. This is not the case in Ireland, with only 24.4% of workers unionised (private-sector unionisation is even lower, at 18%). As such, the report recommends the state intervene in industrial relations to promote collective bargaining and increase union density.

Third, to discern what measures may be taken to accomplish the goal of increasing bargaining coverage, the report conducts a comparative study of four European states, each with different traditions of and approaches to collective bargaining. The comparators selected are Denmark, France, Belgium and the Netherlands. The methodology for selection is provided in Part III of the report: in summary, these states were chosen because they have high bargaining coverage but varying levels of trade union density, and their economies are structurally similar to Ireland's. In particular, care was taken to focus on countries with open, competitive economies, who score highly on the World Bank's ease of doing business metric (including, in some cases, higher than Ireland despite much greater bargaining coverage).

The states reviewed in this report are economically, politically and institutionally diverse in all but one respect - workers in each of them enjoy much higher rates of collective bargaining coverage than here in Ireland. Nevertheless, some commonalities may be observed in how their governments support collective bargaining, from which Ireland should learn. The key findings of the comparative section of this report are therefore as follows:

1. Importance of sectoral bargaining and extension of agreements

In all of the states considered, sectoral bargaining has been key to both high coverage rates and the quality of the bargaining process. There are a number of incentives deployed to encourage employers to bargain at the sectoral level. The most critical of these is to extend at least some obligations of the collective agreement to non-signatory employers. Employers are thus encouraged to engage in bargaining to shape the terms of the obligations. The state can either make extension automatic upon certain conditions being met (such as the 'representativeness' of the parties), or use extension selectively to pursue economic and social priorities. The state can also make use of public procurement as a sort of 'de facto extension' mechanism to require compliance with collective agreements. Denmark and the Netherlands are European leaders in the deployment of such 'social clauses' in the public procurement process.

2. Incentivising trade union membership

Extension can have consequences for trade union density. In France and the Netherlands, extension has generated a large number of 'free-riders' who obtain the benefits of collective bargaining without needing to join a union. The effect of this free-rider problem for unions can be a significant loss of financial resources and independence from both the state and employers. To counterbalance this, other countries use various measures to incentivise union membership. These include making union dues tax-deductible for workers, reserving some benefits of collective agreements to union members, and the Ghent system of decentralised distribution of social welfare and unemployment benefits through unions.

3. Collective bargaining secures industrial peace, economic stability and flexibility

In the absence of support for membership and collective bargaining, the evidence is that unions need to resort to radical industrial action to remain relevant and drive the bargaining agenda, like in France. Other states have seen off this prospect by encouraging bargaining, and employers have seen the obvious rewards for industrial peace and economic stability that accompany widespread bargaining. This has engendered a culture shift among employers, who appreciate collective bargaining as a means to boost productivity and demand in the economy and prevent their businesses being undercut by unfair competition on wages rather than product quality and innovation. They also prefer their businesses to be regulated by a collective bargaining process in which they have a direct say, and that can be flexibly tailored to the needs of their businesses, rather than by state intervention.

4. Importance of union presence and worker representation in the enterprise

Another way for unions to increase membership along with collective bargaining coverage is to improve their on-the-ground presence. The state can support this by mandating paid time off work and enhanced protections against dismissal for union representatives, and by promoting other forms of worker representation that unions can engage with. The states studied in this report have a mixture of works councils and members of boards of directors that represent workers alongside unions. Ireland, by contrast, largely still subscribes to the 'single-channel' model of representation inherited from the UK tradition of industrial relations. There are clear benefits to both workers and businesses associated with formal institutions of co-determination at the enterprise level, and these can be of great benefit to unions as well, depending on the system design. For example, France gives unions the exclusive right to nominate candidates for election to their equivalent of works councils. These and other institutional rights of unions can be reserved for those that pass a threshold of 'representativeness'. Such an approach encourages consolidation among unions and vigorous recruitment to keep membership rates sufficiently high. This has advantages for the efficiency of the collective bargaining process and the ultimate stability of agreements.

Finally, EU law both imposes obligations to promote collective bargaining and offers opportunities by which to do so, through the implementation of EU legal instruments. Fears about the incompatibility of collective bargaining with the internal market and competition law of the EU are misplaced with respect to Ireland at least. There is also a clear recent shift in political and legal direction at EU level in support of collective bargaining, which Ireland can build on domestically. In particular, the report contains an analysis of the Commission proposal for a directive on adequate minimum wages, which would impose on member states with less than 70% bargaining coverage an obligation to promote collective bargaining. The report argues that not only is there is no impediment under EU law for Ireland to take pre-emptive action in respect of promoting collective bargaining, but indeed there is a legal obligation to do so, with certain techniques better suited to protecting the integrity of the internal market and respecting EU competition law than others. To the extent that there are impediments under national law and tradition to effective state intervention in the sphere of collective bargaining, existing EU law grants ample scope to adopt domestic legislation that expands collective bargaining rights and/or develops complementary channels of worker representation and co-determination. There should be strong institutional links between such mechanisms and trade unions.

In order to comply with our obligations under international human rights law and EU law, to reduce the gap between us and our European neighbours in respect of industrial democracy and workers' rights, and to protect our competitive economy and promote innovation in conditions of economic stability, we need to strengthen collective bargaining in this country. The report recommends the Government of Ireland introduces legal measures and economic incentives along the lines of those adopted by the countries studied herein, and take advantage of the opportunities offered by EU law to reshape the Irish industrial relations landscape.



Introduction

This report is being published at a time of political and economic change in Ireland, across Europe, and around the world. Although collective bargaining coverage and trade union density have reached their respective nadirs in many developed economies (including our own),¹ there is renewed political and civil society interest in collective bargaining and organised labour². The Government of Ireland is conducting an examination into collective bargaining practices, and how the Irish legal position can be changed to protect the fundamental right of workers to bargain collectively.³

The report operates from the definition of collective bargaining from the International Labour Organisation:

[T]he term 'collective bargaining' extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:

- a) determining working conditions and terms of employment; and/or
- b) regulating relations between employers and workers; and/or
- c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.⁴

Further reference will be made in Part I to the interpretation of the rights to freedom of association and to bargain collectively by the ILO, the European Committee for Social Rights and the European Court of Human Rights. However, the report does engage with alternative forms of worker participation and representation in the enterprise, and the interplay between these and traditional collective bargaining. Across Europe, there is a clear overlap between the activities of trade unions and other forms of representation like works councils and worker representatives on corporate boards of directors, which can be mutually beneficial.

It is widely recognised that collective bargaining has benefits for both working conditions and economic productivity and growth.⁶ In particular, there is strong evidence that widespread collective bargaining reduces economic and social inequality. Recent research demonstrates the effect this has on demand within the economy, and on economic stability in which businesses can make investments in productivity.⁷ As the European Commission has pointed out:

Collective bargaining plays a key role for adequate minimum wage protection. The countries with high collective bargaining coverage tend to display a lower share of low-wage workers, higher minimum wages relative to the median wage, lower wage inequality and higher wages than the others... By affecting general wage developments, collective bargaining ensures wages above the minimum level set by law and induces improvements in the latter. It also pushes increases in productivity.⁸

1 For an overview of the current state of European industrial relations, see: <<https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Collective-Bargaining2>> and <<https://stats.oecd.org/Index.aspx?DataSetCode=CBC>> both accessed 26 April 2021. For a recent study of the situation in Ireland, see Aiden Regan and Liam Kneafsey, *Understanding Collective Bargaining Coordination: A Network Relational Approach: The Case of Ireland* (NETWIR Research Report 2020).

2 See, for example, the European Pillar of Social Rights, available at <https://ec.europa.eu/info/sites/info/files/social-summit-european-pillar-social-rights-booklet_en.pdf> and the associated European Commission, 'The European Pillar of Social Rights Action Plan' (2021), <https://ec.europa.eu/info/files/european-pillar-social-rights-action-plan_en>; European Commission Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN>>; deliberations of the Citizens' Assembly, reported at: <<https://suptu.medium.com/siptu-welcomes-citizens-assembly-call-for-legal-right-to-collective-bargaining-a8cedfb1422f>> all accessed 26 April 2021.

3 Martin Wall, 'Review of industrial relations timely, says Varadkar' (*The Irish Times*, 30 March 2021) <<https://www.irishtimes.com/business/work/review-of-industrial-relations-timely-says-varadkar-1.4524349>> accessed 27 April 2021.

4 ILO Convention 154, article 2.

6 Frank Manzo IV and Robert Bruno, *Promoting Good Jobs and a Stronger Economy* (Illinois Economic and Policy Institute 2021), available at <<https://illinoiseipi.files.wordpress.com/2020/05/ilepi-pmcr-promoting-good-jobs-and-a-stronger-economy-final.pdf>> accessed 26 April 2021.

7 Sian Moore and others, 'The Resilience of Collective Bargaining – a Renewed Logic for Joint Regulation?' (2019) 41 *Employee Relations* 279.

8 European Commission Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682, 2-3.

Engagement between representatives of workers and management also offers the following benefits for industry: more information is available to management, workers are happier, staff turnover is reduced, intellectual capital is developed within the enterprise,⁹ long-term business decisions and investments can be made, industrial unrest is reduced, demand is boosted within the economy, and general economic conditions are stabilised so competition can take place from a level playing field.¹⁰

This study reveals the extent to which business culture matters in the success of the collective bargaining models discussed herein, but also how culture can be shaped by state support and economic incentives.¹¹ Across Europe, business leaders recognise the value of collective bargaining and engagement with worker representatives, for both overall economic health and the success of their own businesses.¹² Employers (and governments, and the wider public) also value the stability and industrial peace that effective collective bargaining can bring. Where collective bargaining delivers economic growth, productivity and industrial stability, employers are often strongly supportive of measures like extension of collective agreements.¹³

In this context, the report contains four parts. Part I explores the fundamental human right of workers to collective representation, and the instruments of international law that oblige Ireland to protect this right. Part II examines Ireland's position relative to its closest comparators in Europe. As will be seen from the first section, Ireland is an extreme outlier in its low rate of collective bargaining coverage. This includes many member states of the EU whose economies are just as open, competitive, innovative and connected to global supply and investment chains as we are – if not more so. The next section suggests reasons for Ireland's outlier status, including the lack of domestic legal support for collective bargaining.

Part III conducts a comparative survey of four comparable states in Europe: Denmark, France, Belgium and the Netherlands. In respect of each, the report provides an overview of the state's industrial relations framework, focusing on legislative and policy techniques used to promote collective bargaining and keep coverage rates high. It considers the prevalence of mandatory recognition of unions, sectoral and national bargaining, tripartite social dialogue, extension of collective agreements and other policy mechanisms, and the effect of these on both coverage and trade union density. Although the comparative study reveals divergences in practice across the selected comparator states, a number of key insights and lessons for Ireland are distilled from the experience of other countries.

Finally, Part IV examines the position in EU law of collective bargaining. It is clear that EU law both imposes obligations to promote collective bargaining, and offers opportunities to do so in the implementation of EU legislative instruments. There has been criticism of the EU, particularly over the past 15 years, for undermining national industrial relations machinery and workers' rights.¹⁴ However, this section of the report argues these concerns are exaggerated, at least with respect to Ireland, and that there is plenty of scope to use EU law to further develop our domestic collective bargaining infrastructure and increase coverage rates. The report concludes by examining the burgeoning progress at EU level to strengthen collective bargaining rights, including the proposed Directive on adequate minimum wages, which would impose on member states with less than 70% bargaining coverage an obligation to promote collective bargaining, and proposals to allow some self-employed workers to bargain collectively within the confines of competition law. This clear policy shift at EU level from the time of the Financial Crisis offers a great opportunity for Ireland to enhance collective bargaining rights while respecting the autonomy of the social partners and protecting economic competitiveness.

9 Jan Kees Looise, Nicole Torca and Stefan Zagelmeyer, 'Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 249, 264-65.

10 Annette van den Berg, Arjen van Witteloostuijn and Olivier van der Brempt, 'Employee Workplace Representation in Belgium: Effects on Firm Performance' (2017) 38 *International Journal of Manpower* 130, 133-34.

11 Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29; Antoine Bevoirt, 'Negotiated versus Adversarial Patterns of Social Democracy: A Comparison between the Netherlands and France' (2016) 22 *Transfer: European Review of Labour and Research* 63.

12 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 538; Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 269.

13 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 534, 538-40.

14 See, for example: Nikolett Hos, 'The Principle of Proportionality in Viking and Laval: An Appropriate Standard of Judicial Review?' (2010) 1 *European Labour Law Journal* 236; Marco Rocca, 'Enemy at the (Flood) Gates: EU Exceptionalism in Recent Tensions with the International Protection of Social Rights' (2016) 7 *European Labour Law Journal* 52; Alan Bogg and KD Ewing, 'The Continuing Evolution of European Labor Law and the Changing Context for Trade Union Organizing Global Barriers to Union Organizing' (2016) 38 *Comparative Labor Law & Policy Journal* 211.

Part I:

International law

Ireland is subject to a number of provisions of international law which oblige the state to protect the right of workers and trade unions to engage in collective bargaining. As will be explained further below, even those international legal instruments that are not specifically binding on Ireland may be taken into account in the interpretation of other instruments that are binding. This section will highlight the obligations under the International Labour Organisation (ILO), European Social Charter (ESC) and European Convention on Human Rights (ECHR).

(a) International Labour Organisation

The most important instruments of the ILO on collective bargaining are Conventions 98 and 154. Convention 98 is one of the fundamental conventions of the ILO,¹⁵ compliance with which is necessitated by membership of the ILO irrespective of whether a state has ratified it. Article 4 of Convention 98 provides:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Ireland ratified Convention 98 in 1955. It is subject to regular monitoring by the ILO on its compliance with this Convention; in its most recent report for 2018,¹⁶ the ILO noted a number of concerns expressed by both ICTU and IBEC in respect of the operation of the Competition (Amendment) Act 2017 and the Industrial Relations (Amendment) Act 2015, and requested further information from the government in respect of their practical effects on collective bargaining. This response is due in 2021.¹⁷ In respect of past complaints to the ILO about Ireland's compliance with Convention 98,¹⁸ the ILO has requested the government to carry out an independent investigation into the anti-trade-union behaviour of one employer in 2012,¹⁹ but otherwise not found Ireland in breach. In particular, it has welcomed the enactment of the Industrial Relations (Amendment) Act 2015 and the Workplace Relations Act 2015.²⁰

As set out in the introduction to this report, Convention 154 defines collective bargaining,²¹ and goes on to impose the following obligations on contracting parties:

1. Measures adapted to national conditions shall be taken to promote collective bargaining.
2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:
 - (a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
 - (b) collective bargaining should be progressively extended to all matters [related to the regulation of terms of employment and relations between employers, workers, and their respective organisations];

15 For more information on the fundamental conventions, see Philip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15(3) European Journal of International Law 457; Brian Langille, 'Core Labour Rights - the True Story (Reply to Alston)' (2006) 16(3) European Journal of International Law 409.

16 Direct Request (CEACR) on Convention 98 (ILO 2019), available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3962776:NO> accessed 5 March 2021.

17 See the provisional reporting schedule: <https://www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102901> accessed 5 March 2021.

18 Case no 455 (1965); case no 1387 (1986); case no 2780 (2010); case no 3353 (2019).

19 Namely Ryanair - see case no 2780 (2010).

20 Case no 2780 (2010).

21 Article 2.

- (c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;
- (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;
- (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.²²

Ireland has not ratified Convention 154. However, it should be observed that Ireland has ratified Convention 87 on Freedom of Association, and the ILO Committee on Freedom of Association (which is empowered to make binding determinations on the requirements of ILO conventions under its purview) has held the following:

The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent.²³

As such, the principles of the conventions on collective bargaining may be imported into the general right to freedom of association. The ILO has also issued two important recommendations on collective bargaining. Recommendation 91 provides:

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 stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.²⁴

Although extension of collective agreements is not explicitly required by any ILO convention, the ILO has repeatedly expressed support for this approach to promoting collective bargaining.²⁵

In respect of recognition of trade unions for the purposes of collective bargaining, Recommendation 163 provides:

In so far as necessary, measures adapted to national conditions should be taken to facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations.²⁶

As appropriate and necessary, measures adapted to national conditions should be taken so that... representative employers' and workers' organisations are recognised for the purposes of collective bargaining...²⁷

Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.²⁸

The Committee on Freedom of Association has repeatedly expressed support for employer recognition of trade unions for the purposes of collective bargaining,²⁹ as 'the very basis for any procedure for collective bargaining on conditions of employment'.³⁰

22 Article 5.

23 Compilation of decisions of the Committee on Freedom of Association (6th edn, ILO 2018) [1232].

24 Article 5. It should be noted, however, that the Committee on Freedom of Association has held that a failure to extend collective agreements does not, in itself, amount to a breach of any ILO convention: see Compilation of decisions of the Committee on Freedom of Association (6th edn, ILO 2018) [1287], [1317] ff.

25 See, for example: Report of the Committee of Experts on the Application of Conventions and Recommendations on the Application of International Labour Standards 2020 (ILO 2020) 114, 173; Report of the Committee of Experts on the Application of Conventions and Recommendations 2016 (ILO 2016) 115, 117. See also Gaye Baycik, 'Extension in European Union Member States and Recommendations for Turkey' (ILO 2019).

26 Article 2.

27 Article 3.

28 Article 4.

29 Compilation of decisions of the Committee on Freedom of Association (6th edn, ILO 2018) [1350] ff.

30 Compilation of decisions of the Committee on Freedom of Association (6th edn, ILO 2018) [1355].

(b) European Social Charter

Part I (6) ESC provides that '[a]ll workers and employers have the right to bargain collectively.' Article 6 (2) ESC provides:

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake... to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements...

In its recent decision in *ICTU v Ireland*,³¹ the European Committee on Social Rights (ECSR) observed:

[T]he Committee has constantly held that domestic law must recognise that employers' and workers' organisations may regulate their relations by collective agreement. If necessary and useful, and in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements.³²

The ECSR has also expressed support for extension of collective agreements, subject to 'tripartite analysis of the consequences it would have on the sector to which it is applied.'³³

(c) European Convention on Human Rights

Article 11 ECHR protects the right to freedom of association. In *Demir and Baykara v Turkey*,³⁴ the Court held:

...having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention...³⁵

Thus far, the Court has not found a 'requirement under the Convention that an employer enters into, or remains in, any particular collective bargaining arrangement or accede to the requests of a union on behalf of its members.'³⁶ Nor has it determined that Art 11 requires any particular 'mandatory statutory mechanism for collective bargaining.'³⁷ However, the Court held in *Demir* that generally applicable practices in the field of collective bargaining shared throughout Europe may be binding on contracting states who do not follow those practices.³⁸ This is the case even where a contracting party has not itself ratified any international legal instruments underpinning those practices, where those instruments represent the settled practice throughout Europe and can assist the Court in interpreting the ECHR.³⁹ In particular, the Court has relied on the relevant provisions of the ESC to elucidate the requirements of Art 11 ECHR.⁴⁰

The Court in *Demir* also stressed that it 'takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation' in determining whether the absence of any specific measure to support collective bargaining constitutes a violation of Art 11.⁴¹ It further insisted:

31 Complaint no 123/2016.

32 Complaint no 123/2016, [93].

33 Digest of the Case Law of the European Committee of Social Rights (Council of Europe 2018) 100.

34 Application no 34503/97.

35 Application no 34503/97, [154].

36 Guide on Article 11 of the European Convention on Human Rights (Council of Europe 2020) [256], citing *UNISON v UK* (application no 53574/99).

37 Guide on Article 11 of the European Convention on Human Rights (Council of Europe 2020) [257], citing *Unite the Union v UK* (application no 65397/13) and *Wilson and others v UK* (applications no 30668/96, 30671/96 and 30678/96).

38 Application no 34503/97, [52], [151].

39 Application no 34503/97, [149]-[151]. This is the so-called 'integrated approach to interpretation' followed by the ECtHR in recent decades. See for discussion Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 Human Rights Law Review 529.

40 Application no 34503/97, [45], [49]-[50], [57], [76]-[77], [153].

41 Application no 34503/97, [144].

Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision...⁴²

This list [of requirements of Art 11] is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection, it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.⁴³

Thus the Court has signalled willingness to further widen the scope of rights of workers and unions under Art 11, in line with developments in international law and European practice. There is evidence this has already taken place in respect of the right to strike.⁴⁴ In *Geotech Kancev GmbH v Germany*,⁴⁵ the Court held that the extension of a collective agreement did not constitute an interference with the right to freedom of association of non-signatory employers.⁴⁶ Therefore, it is necessary that Ireland consider the international and European context for collective bargaining rights, and the overall effect of its legal regime rather than any specific mechanism, in order to remain compliant with Art 11 ECHR. This applies with equal force to international legal instruments Ireland has not yet ratified: 'The Court observes... that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.'⁴⁷ Therefore, the mere fact Ireland has not ratified ILO Convention 154, for example, may not preclude the state from being bound by its requirements insofar as these are used to interpret Art 11 ECHR.

There are further requirements of EU law in respect of collective bargaining that are binding on Ireland. These will be discussed in further detail in Part IV.



42 Application no 34503/97, [76].

43 Application no 34503/97, [146].

44 See, for example, *Enerji Yapı-Yol Sen v Turkey* (application no 68959/01), *RMT v UK* (application no 31045/10) and *Hrvatski Liječnički Sindikat v Croatia* (application no 36701/09).

45 Application no 23646/09.

46 Application no 23646/09, [51]-[59]. Although the Court found there was an interference with the applicant company's property rights under Article 1 of Protocol no 1, it held this interference was proportionate and thus rejected the application; see [65]-[74].

47 Application no 34503/97, [78].

Part II:

Ireland as an outlier in Europe

It was highlighted above that, under the case law of the European Court of Human Rights, Ireland's obligations as a matter of international law may vary over time in accordance with developments in other European states. Therefore, it is necessary to consider whether there are any 'settled practices' in respect of collective bargaining in Europe, and the extent to which Ireland is an outlier. This is particularly important in the context of the internal market of the EU, where variations in the rights of trade unions and other protections for workers can have a detrimental effect on competition and trade, creating an 'un-level playing field'.⁴⁸ This section will give an overview of European trends in collective bargaining. The comparative section of the project will examine these in greater detail.

Eurofound has compiled extensive data on industrial relations in Europe for the purposes of ranking each state in the EU on the Industrial Relations Index.⁴⁹ The Index reflects member states' performance in respect of industrial democracy, industrial competitiveness, social justice, and quality of work and employment.⁵⁰ Ireland places 10th on this index, with a country score of 56.09. This compares favourably to the EU average of 53.3.⁵¹ However, this headline data is misleading for present purposes in the following respects: first, the UK is included in the data because it was compiled most recently in 2017. The UK performs poorly on several metrics, and drags the average down, making Ireland look better by comparison. The data set out below excludes the UK on the basis that it is no longer a member of the EU nor the internal market.

Second, collective bargaining is only one indicator within the sub-dimension of associational governance within the metric of industrial democracy, which itself is only one of four metrics that make up the Industrial Relations Index.⁵² Ireland scores highly on other dimensions that are related to the performance of the economy more generally, which brings up its overall score on the Index. On the specific industrial democracy metric, Ireland is below the EU average of 51.81 with a score of 46.05. That places Ireland 15th in the EU for industrial democracy. In terms of associational governance in particular (which reflects trade union density, collective bargaining coverage, robustness of bargaining institutions, and government consultation with social partners), Ireland scores 36.83, below the EU average of 42.06. Ireland also scores very poorly on the dimension of representation and participation, with a score of 44.44 compared to the EU average of 63.69, which is joint 18th with four other countries (one of which is the UK).⁵³

The third respect in which it is misleading to compare Ireland to the EU28 (as it was when the Industrial Relations Index was compiled) is that the data shows significant bifurcation between pre- and post-2004 expansion member states (ie, Western and Eastern Europe).⁵⁴ Most post-2004 expansion states perform very poorly on several metrics. It is unreasonable to compare Ireland to the post-2004 expansion states, given the significant divergence in economic development, structure of economy, cost of living, etc, across the EU.

48 See the comments of the CJEU in C-620/18 *Hungary v Parliament and Council*.

49 Eurofound, *Measuring Varieties of Industrial Relations in Europe: A Quantitative Analysis* (Publications Office of the European Union 2018).

50 For further explanation of these variables, see Eurofound, *Measuring Varieties of Industrial Relations in Europe: A Quantitative Analysis* (Publications Office of the European Union 2018) 20-21.

51 Eurofound, *Measuring Varieties of Industrial Relations in Europe: A Quantitative Analysis* (Publications Office of the European Union 2018) 26.

52 Eurofound, *Measuring Varieties of Industrial Relations in Europe: A Quantitative Analysis* (Publications Office of the European Union 2018) 21.

53 Eurofound, *Measuring Varieties of Industrial Relations in Europe: A Quantitative Analysis* (Publications Office of the European Union 2018) 27.

54 See also Eurofound, *Collective Bargaining in Europe in the 21st Century* (Publications Office of the European Union 2015). It should be noted, however, that this division is not watertight: some post-2004 expansion states score higher than Ireland on many of the relevant metrics (eg Slovenia).

Among the pre-2004 expansion states and omitting the UK, Ireland is a noticeable outlier. Ireland again scores 10th on the Industrial Relations Index, ahead of only Spain, Italy, Portugal, and Greece,⁵⁵ and its score of 56.09 is below the average of 60.83. But even this does not give the full picture, because the performance of the four countries below Ireland is hampered by their low scores on the general economic metrics referred to above. On industrial democracy specifically, Ireland is 12th, ahead of only Portugal and Greece. In respect of associational governance, Ireland's score of 36.83 is significantly below the average of 56.28. The situation is even worse in respect of representation and participation: Ireland is joint worst performer (with Greece) among these 14 countries, with a score of 44.44 compared to an average of 76.98. The Eurofound report observes that Ireland is among those states that have recorded a 'deterioration in the level of industrial democracy' since 2008.⁵⁶

Ireland has a collective bargaining coverage rate of 33.5% of the workforce. This compares very unfavourably with the EU average of 60%.⁵⁷ Again, however, this EU average figure should be adjusted to account for divergences in the levels of economic development, etc, across the Union. Taking the same 14 countries set out above (pre-2004 expansion minus UK), Ireland's rate of collective bargaining coverage is the second-lowest (ahead of Greece), and less than half the average of 73%.⁵⁸

As will be discussed further below, Ireland is categorised by Eurofound within the West group of industrial relations systems in Europe, alongside the UK, Cyprus and Malta.⁵⁹ Again omitting the UK because it is no longer a member of the EU nor the internal market, Ireland has the lowest rate of collective bargaining coverage in the West group. This means that even those states in the EU whose industrial relations systems are the closest to Ireland's out-perform Ireland in collective bargaining coverage: Cyprus has 50% coverage and Malta 42%.⁶⁰ Cyprus and Malta also out-perform Ireland in associational governance, with scores of 50.57 and 44.79 respectively (compared to Ireland's 36.83).⁶¹

It should be noted that the West group itself rates poorly for collective bargaining coverage compared to other industrial relations systems. The highest rates of coverage are found in the North⁶² and Centre-West⁶³ groups. States in the North group have an average rate of collective bargaining coverage of 87%, and for Centre-West the average is 77%. So even among the group of EU states which collectively are outliers in collective bargaining coverage, Ireland has the lowest rate of coverage.

Finally, it must be borne in mind that Ireland's collective bargaining coverage is highly imbalanced across different sectors of the economy. The starkest divide is between public and private sectors. Virtually all public sector workers are covered by the current Public Service Stability Agreement.⁶⁴ The public sector accounts for 15% of the Irish workforce;⁶⁵ on this basis, we can see that only 18% of private sector workers are covered by collective agreements.

55 Interestingly, all the worst performers on the Industrial Relations Index from among the pre-2004 expansion states faced problems with sovereign debt and budgetary deficits after the 2008 Financial Crash. For some parallel discussion on that point, see European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) ch 3.

56 Eurofound, *Measuring Varieties of Industrial Relations in Europe: A Quantitative Analysis* (Publications Office of the European Union 2018) 28. See also Eurofound, *Collective Bargaining in Europe in the 21st Century* (Publications Office of the European Union 2015) 15.

57 Eurofound, *Collective Bargaining in Europe in the 21st Century* (Publications Office of the European Union 2015) 21.

58 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 19 Feb 2020.

59 For more information on these headline figures, see also UNI Europe, *Collective Bargaining Systems in Europe: Some Stylised Facts* (2021) <<https://www.uni-europa.org/wp-content/uploads/2021/04/CB-Systems-in-Europe-EN.pdf>> accessed 4 May 2021.

60 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 19 Feb 2020.

61 Eurofound, *Measuring Varieties of Industrial Relations in Europe: A Quantitative Analysis* (Publications Office of the European Union 2018) 27.

62 Denmark, Finland and Sweden.

63 Austria, Belgium, Germany, Luxembourg, and the Netherlands.

64 For further information, see <<https://www.forsa.ie/other-benefits/pay-and-conditions/national-agreements/>> accessed 21 Feb 2021.

65 Richard Boyle, *Public Sector Trends 2018* (Institute of Public Administration 2018) 19.

Why is Ireland an outlier?

Ireland is clearly an outlier among comparable EU states in respect of collective bargaining coverage. The literature suggests three primary reasons for this: the impact of the 2008 Financial Crisis, Irish constitutional jurisprudence, and the voluntarist tradition of industrial relations. As will be seen, however, such evidence as is available remains inconclusive.

(a) Financial Crisis

There is some correlation between states that experienced budgetary and sovereign debt difficulties after the 2008 Financial Crisis, and those that now have low levels of collective bargaining coverage. The European Commission has observed:

In these reform programmes, the details of which were decided by the Member States, the industrial relations system itself, or at least some of its elements, received specific attention. Reforming collective bargaining was seen as part of the solution to address external imbalances and achieve a recovery. Such reforms were a core element of what have been termed 'internal devaluation strategies' and 'employment friendly reforms' aimed at restoring national competitiveness. Regaining cost competitiveness is considered an essential prerequisite for achieving a sustainable economic and jobs recovery.⁶⁶

In general among these states:

...the practical result was an unfavourable setting for social dialogue, leading to increasing conflict between the social partners and between trade unions and public authorities. This was illustrated by the complaints to the ILO and the Council of Europe as well as by the very critical assessment by the European Parliament of the respect of social rights under the EU/IMF programmes.⁶⁷

However true this assessment is of other bailout states, it is unclear to what extent this explains Ireland's low collective bargaining rate in particular. Certainly, tripartite mechanisms for governing industrial relations on a national economic level collapsed after the Financial Crisis, but many other aspects of industrial relations (particularly in the private sector) saw little substantive change as a result of the crisis and subsequent IMF-EU bailout.⁶⁸ There is some evidence that the decline in tripartism and the decentralisation of Irish industrial relations after the crisis contributed to lower rates of coverage.⁶⁹ Although this is contested by the Commission,⁷⁰ the ETUI has reported that the Troika overseeing the Irish bailout was keen to undermine such collective bargaining institutions as existed in Ireland before the Financial Crisis.⁷¹

However, Ireland was an outlier among bailout countries in that 'two successive social partner agreements on the public sector were reached'⁷² (although unilateral pay cuts in the public sector had also been imposed).⁷³ Moreover, collective bargaining coverage in Ireland had already been declining before the Financial Crisis: from a rate of 44% in 2000 to 40% in 2009.⁷⁴ Admittedly, the further fall to 33.5% by 2014 is still significant, but ultimately the European Commission attributes such decline to 'an underlying weakness of trade union and employer associations in co-ordinating their interests autonomously.'⁷⁵ As will

66 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 69.

67 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 70.

68 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 75.

69 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 79. Torsten Müller, Kurt Vandaele and Jeremy Waddington (eds), *Collective Bargaining in Europe: Towards an Endgame, Volume II* (ETUI 2019) ch 15.

70 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) ch 3.

71 Torsten Müller, Kurt Vandaele and Jeremy Waddington (eds), *Collective Bargaining in Europe: Towards an Endgame, Volume II* (ETUI 2019) 319-20.

72 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 83: these were the Croke Park and Haddington Road agreements. After the state exited the bailout programme, a further agreement was concluded (Lansdowne Road).

73 Torsten Müller, Kurt Vandaele and Jeremy Waddington (eds), *Collective Bargaining in Europe: Towards an Endgame, Volume II* (ETUI 2019) 316, 325.

74 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 19 Feb 2020.

75 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 85.

be explained below, the ETUI also correlates this decline in coverage with a parallel decline in trade union membership, although by comparison with the Commission, ETUI's report does attribute larger significance to the decline of national bargaining through the social partnership model.⁷⁶ There were significant changes to the legal status of collective agreements during the bailout period, but these were not actually a condition of the bailout, and it would be misleading to attribute Ireland's weak protection for collective bargaining to the Financial Crisis.⁷⁷ As Doherty puts it: 'The explanation... is relatively straightforward: Ireland's labour market (with its floor of minimum standards and its weak protection for collective bargaining) was already subject to extremely light regulation.'⁷⁸

(b) Constitutional jurisprudence

The most significant changes to such collective bargaining mechanisms as did exist pre-Financial Crisis came as a result of legal challenges to the constitutionality of those mechanisms. These should be seen in the context of pre-existing case law on the constitutional position of trade union activity and collective bargaining, although it is beyond the scope of this report to give an exhaustive account of this jurisprudence.⁷⁹ For present purposes, it serves to note that although there is a constitutional right to freedom of association,⁸⁰ there is no specific constitutional protection for collective bargaining, and the courts have repeatedly declined to recognise a constitutional obligation on employers to recognise or bargain with trade unions.⁸¹ The Supreme Court went so far as to suggest in *Ryanair v Labour Court* that employers may even enjoy a constitutional 'right to operate a non-unionised company'⁸² that prohibits both the state and trade unions from taking steps to compel them to negotiate with unions.⁸³ However, this comment was not part of the binding decision of the Court, and commentators have cast doubt on whether it correctly represents the law.⁸⁴

Notwithstanding the above constitutional position, there existed since 1946 a range of statutory provisions to promote and protect collective bargaining in Ireland. Briefly, Part III of the Industrial Relations Act 1946 allowed for any party to a collective agreement to apply to the Labour Court to have that agreement 'registered', which made it binding on all parties operating in that sector, both by incorporation into individual contracts of employment, and by criminal sanctions on employers who fail to abide by the collective agreement. Part IV provided for sectoral regulation through tripartite bodies called Joint Labour Committees (JLCs) under the auspices of the Labour Court. These could produce Employment Regulation Orders (EROs), which had similar status to the Registered Employment Agreements (REAs) provided for under Part III. The ten JLCs were responsible for setting wages and conditions in specific industries which were historically low-paid, labour-intensive, with low trade union density.⁸⁵ However, a series of court decisions over the past decade eroded this protection, determining that critical aspects of the Irish industrial relations framework were unconstitutional.⁸⁶

76 Torsten Müller, Kurt Vandaele and Jeremy Waddington (eds), *Collective Bargaining in Europe: Towards an Endgame, Volume II* (ETUI 2019) 328-29.

77 Michael Doherty, 'New Morning? Irish Labour Law Post-Austerity' (2016) 39(1) *Dublin University Law Journal* 51, 58-59.

78 Michael Doherty, 'New Morning? Irish Labour Law Post-Austerity' (2016) 39(1) *Dublin University Law Journal* 51, 59.

79 For further discussion, see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, Kelly: *The Irish Constitution* (5th edn, Bloomsbury 2018); Adam Elebert, 'Striking a Balance: Freedom of Association in Ireland and Germany' (2020) 38(6) *Irish Law Times* 80; Daryl D'Art, 'Freedom of Association and Statutory Union Recognition: A Constitutional Impossibility?' (2020) 63 *Irish Jurist* 82.

80 Bunreacht na hÉireann, Article 40.6.1.iii.

81 See, for example, *EI Co Ltd v Kennedy* [1968] IR 69, *Dublin Colleges Academic Staff Association v City of Dublin Vocational Education Committee* [1981] 7 JIC 3101 and *Abbott and Whelan v the Irish Transport and General Workers Union* (1982) 1 JISLL 56.

82 [2007] IESC 6, [58].

83 Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, Kelly: *The Irish Constitution* (5th edn, Bloomsbury 2018), [7.6.195].

84 Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, Kelly: *The Irish Constitution* (5th edn, Bloomsbury 2018), [7.6.195].

85 Kady O'Connell and Ronnie Neville, 'The Industrial Relations (Amendment) Act 2012 and the Future of JLCs and REAs Post-McGowan' (2015) 12(2) *Irish Employment Law Journal* 50; Michael Doherty, 'Battered and Fried? Regulation of Working Conditions and Wage-Setting after the *John Grace* Decision' (2012) 35(1) *Dublin University Law Journal* 97, 101-02.

86 For further discussion, see Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) *European Labour Law Journal*, available at <<https://journals.sagepub.com/doi/pdf/10.1177/20319525211000360>> accessed 27 April 2021.

In *John Grace Fried Chicken v Catering JLC*,⁸⁷ the High Court struck down as unconstitutional the system of JLCs and EROs, on the basis that it amounted to an impermissible delegation of legislative power to the Labour Court. Two years later, in *McGowan v Labour Court*,⁸⁸ the Supreme Court determined that the registered employment agreements (REA) scheme was also an unconstitutional delegation of legislative power.⁸⁹ The Supreme Court in *McGowan* characterised the delegation in Part III of the 1946 Act as 'unusual and possibly unique', in that it granted broad power to private actors (trade unions and employers) to create norms binding on third parties (employers who did not sign up to the original collective agreement), contravention of which could be a criminal offence.⁹⁰ This, according to the Court, amounted to legislation. The parent Act, the Court held, 'provides no limitation on, or guidance for, the exercise of the power by the regulation-making parties.'⁹¹ As such, the REA scheme (and every REA concluded thereunder) was struck down as unconstitutional.⁹²

After *McGowan*, the government introduced the Industrial Relations (Amendment) Act 2015. This reformed the system of REAs in response to *McGowan*, and carried over the reforms of the JLCs put into effect after *John Grace Fried Chicken*. The courts' decisions necessitated a significant weakening of the REA and JLC/ERO systems. In particular, section 6 of the 2015 Act specified that REAs were 'binding only on the parties to the agreement'.⁹³ The 2015 Act was again subject to constitutional challenge, in *Náisiúnta Leictreach Contraitheoir Éireann v Labour Court*.⁹⁴ The High Court held first, that the specific SEO for the electrical contracting industry was *ultra vires* the 2105 Act because of procedural flaws in its adoption; and second, that the 2015 Act was unconstitutional, again as an impermissible delegation of legislative power.

This decision has come in for criticism,⁹⁵ and at time of writing is under appeal to the Supreme Court. Even if the decision is overturned and the constitutionality of the legislation upheld, the 2015 Act simply does not provide particularly robust protection for collective bargaining. REAs remain binding only on the parties to them and there is no obligation on employers to recognise trade unions for the purposes of bargaining. Although SEOs can be used for 'bargaining by the back door',⁹⁶ they are formally administrative regulation, created after hearings in the Labour Court and subject to a report by the Labour Court to the Minister. This affords less autonomy to the social partners than true collective bargaining.⁹⁷ Indeed, it is interesting to observe how uneasily the tripartite SEO system sits within the broader context of Irish trade unionism, which has always been highly voluntarist in nature. This voluntarist tradition has been suggested as a further reason for the weakness of collective bargaining protection and the low rates of coverage in this jurisdiction.

87 [2011] IEHC 277.

88 [2013] IESC 21.

89 [2013] IESC 21, [19] ff.

90 [2013] IESC 21, [25].

91 [2013] IESC 21, [27].

92 Michael Doherty, 'New Morning? Irish Labour Law Post-Austerity' (2016) 39(1) Dublin University Law Journal 51 and 'Battered and Fried? Regulation of Working Conditions and Wage-Setting after the *John Grace* Decision' (2012) 35(1) Dublin University Law Journal 97. The employment agreements continued to have legal effect insofar as they had been incorporated into individual contracts of employment prior to *McGowan*: see Kady O'Connell and Ronnie Neville, 'The Industrial Relations (Amendment) Act 2012 and the Future of JLCs and REAs Post-*McGowan*' (2015) 12(2) Irish Employment Law Journal 50; and Cathy Maguire, 'The Enforceability of Collective Agreements' (2016) 13(4) Irish Employment Law Journal 92.

93 Cathy Maguire, 'The Enforceability of Collective Agreements' (2016) 13(4) Irish Employment Law Journal 92.

94 [2020] IEHC 303. At [41], the applicant is described as an organisation of small operators in the electrical contracting industry. It appears the name used for the purposes of litigation is supposed to be an Irish-language translation of 'National Electrical Contractors of Ireland', but correctly constructed that should be '*Conraitheoirí Leictreacha Náisiúnta na hÉireann*'. The case will be referred to hereafter as '*Electrical Contractors*'.

95 For example, Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) European Labour Law Journal, available at <<https://journals.sagepub.com/doi/pdf/10.1177/20319525211000360>> accessed 27 April 2021.

96 In *Electrical Contractors*, the SEO adopted the terms of a collective agreement that was reached between Connect trade union and employers' organisations, and presented to the Labour Court with the joint application for an SEO.

97 As defined in ILO Convention 154, article 2.

(c) Voluntarist tradition

Eurofound has summarised the traditional approach of Irish trade unionism as follows:

Under the traditional voluntarist model of Irish industrial relations, there was a view among employers and trade unions that there should be an absence of legal intervention in the industrial relations arena. In other words, the law should keep out of industrial relations. Part of the rationale behind voluntarism was the widespread perception that lawyers did not understand industrial relations. Rather, voluntary collective bargaining between employers and trade unions was the norm for regulating workplace issues across large sections of the economy. Employers and unions would deploy their respective power resources at the negotiating table to achieve the best outcome.⁹⁸

Critical to voluntarism is the absence of state interference in autonomous collective bargaining (on either side); recognition and agreement are secured by trade unions through resort to industrial action, not by legal obligation. It has been widely observed since the mid-2000s that Ireland's modern industrial relations framework is significantly less voluntarist than might have traditionally been the case – what even in 1999, Quinn called 'a unique form of regulated voluntarism'.⁹⁹ Nevertheless, it is clear that Irish industrial relations is much closer to the UK or USA than to 'corporatist' continental European systems. Under a voluntarist system, collective bargaining depends to a greater extent on industrial strength – that is, membership levels in trade unions and their willingness to take industrial action. In both these respects, there is evidence that Irish trade unionism is ill-suited to success in a voluntarist system.

First, membership levels of trade unions have been in consistent decline for decades: as recently as 2000 this figure was 38%, but currently stands at 24.4%.¹⁰⁰ Again, there are significant variations across economic sectors, and particularly as between the public and private sectors. The decline mirrors trends across the developed world, even in European states where collective bargaining coverage remains high.¹⁰¹ The average among pre-2004 EU states (minus the UK) is 33%, but there are a number of countries with lower trade union density than Ireland who nevertheless have very high levels of collective bargaining coverage (notably the Netherlands, France, and Germany).¹⁰² This indicates that voluntarist systems are more vulnerable to lower coverage when membership rates fall. The ETUI has confirmed that trade union density is more important to bargaining coverage in Ireland than most states, and that density has declined at about the same rate as coverage:

To conclude, union density is far more important in Ireland than in many other countries to sustain the coverage of collective bargaining. Given that union presence is increasingly concentrated in certain sectors of the economy, particularly in the public and the semi-state sector, construction and retail banking, while declining in other industries of the economy, this is likely to constitute a political challenge to the unions' capacity to extend the benefits of collective agreements to the largest possible share of the workforce.¹⁰³

Second, Ireland has relatively low levels of industrial action. The European Commission observed that during the Financial Crisis: 'Remarkably in Ireland, given the extent of the employment crisis... very little industrial action was recorded. [For example, t]here were only eight strikes in 2011, with 3,695 days lost – one of the lowest rates in the OECD.'¹⁰⁴ Even in 2011, 2,280 of the days accounted for by the Commission were in one sector of the economy (transport and storage).¹⁰⁵ Recent years have seen a significant increase in industrial action: approximately 33,000 days in 2015, 72,000 in 2016 and 50,000 in 2017. However, a substantial proportion of these are again concentrated in one sector of the economy in any given year. In both 2015 and 2016, 75% of all days lost to strikes were in the education sector; in 2017, the same proportion was again attributable to transportation.¹⁰⁶ Of course, both education and transport have disproportionately high numbers of public-sector employees, so again we see a distortion in the data linked to the wide divergence between public and private sectors referred to above. In 2018, the most recent year for which figures are available, industrial action fell back to earlier levels, with 4,050 days lost.¹⁰⁷

98 Tony Dobbins, 'Irish industrial relations system no longer voluntarist' (Eurofound, 21 April 2005) <<https://www.eurofound.europa.eu/publications/article/2005/irish-industrial-relations-system-no-longer-voluntarist>> accessed 22 Feb 2021.

99 Oisín Quinn, 'Existing Duties on Employers to Consult with Trade Unions' (1999) 4(6) *The Bar Review* 305.

100 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 22 Feb 2020.

101 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 18.

102 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 22 Feb 2020.

103 Torsten Müller, Kurt Vandaele and Jeremy Waddington (eds), *Collective Bargaining in Europe: Towards an Endgame, Volume II* (ETUI 2019) 321.

104 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 84.

105 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 22 Feb 2020.

106 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 22 Feb 2020.

107 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 22 Feb 2020.

The important thing to bear in mind is that although Ireland 'rank[s] close to the [EU] median' in terms of working days lost to industrial action,¹⁰⁸ higher levels of industrial action are necessary under a voluntarist system to maintain collective bargaining coverage, in the absence of state intervention. The same is true for union density. Therefore, although the data is mixed, it seems that Ireland's voluntarist tradition combined with lower than necessary levels of union density and industrial action contribute significantly to the low levels of collective bargaining coverage.

Of course, as noted above, it is no longer strictly true to say that Ireland's industrial relations system is voluntarist in the mould of Kahn-Freund's 'collective *laissez-faire*'.¹⁰⁹ There is already some state intervention in support of collective bargaining, although this has been eroded over the past decade by constitutional jurisprudence in particular. However, it is clear from the data set out above that Ireland has significantly weaker protection for collective bargaining rights than comparable European states. The following section of this report will examine three country comparators representing different models of collective bargaining, extracting principles that should be built into much-needed reform of the Irish approach.



108 European Commission, *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) 84.

109 This concept is elaborated throughout Kahn-Freund's work: see the extensive catalogue in Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 231-32.

Part III:

Comparative analysis

This part of the project consists of a comparative analysis of the industrial relations and collective bargaining systems of four EU member states: Denmark, France, Belgium and the Netherlands. The comparators were chosen in accordance with the methodology set out in the next section. Briefly, each comparator represents a group of states in Europe with similar collective bargaining structures, with two states (Belgium and the Netherlands) coming from the same group, for reasons that will be explained below. Lessons will be drawn from each comparator, with legal principles and techniques that should play a role in Irish reform of collective bargaining.

Methodology

Eurofound identifies five 'clusters' of collective bargaining systems in the EU:¹¹⁰

Group	States
North	Denmark, Finland, Sweden
Centre-West	Austria, Belgium, Germany, Luxembourg, the Netherlands
West	Cyprus, Ireland, Malta
Centre-East	Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia
South	Croatia, France, Greece, Italy, Portugal, Spain

For the reasons explained in Part II, it is not appropriate to compare Ireland to post-2004 expansion member states, which are predominantly in the Centre-East group. Although the other EU states in the West group do outperform Ireland on important metrics as set out in Part II, the contrasts are not so stark as to suggest there is much to learn from these states. The West group still performs badly overall on collective bargaining. Therefore, this report will draw comparators from the North, South and Centre-West groups, which are the three strongest clusters in respect of collective bargaining.

A number of metrics have been devised by which to compare the states within these groups to Ireland, for the purpose of identifying the most useful comparators. These are set out below. The relevant statistics are gathered from a variety of sources. Unless otherwise indicated, the sources are those set out below in respect of each metric. In each instance, the most recent statistics available are used, except for economic metrics, where pre-pandemic figures are used. Percentages have been rounded to the nearest percent.

¹¹⁰ Eurofound, *Collective Bargaining in Europe in the 21st Century* (Publications Office of the European Union 2015) iv. For a critique of this categorisation, see Richard Hyman, 'What Future for Industrial Relations in Europe?' (2018) 40 *Employee Relations* 569. For a recent report with slightly different categorisations (which do not bear on this report), see UNI Europa, *Collective Bargaining Systems in Europe: Some Stylised Facts* (2021) <<https://www.uni-europa.org/wp-content/uploads/2021/04/CB-Systems-in-Europe-EN.pdf>> accessed 4 May 2021.

Metric	Source
Population	ILO
Trade union density (TUD)	ILO
Collective bargaining coverage (CBO)	ILO
GNI ¹¹¹ per capita	Eurostat
Percentage of labour force employed in services	ILO
Percentage of GDP ¹¹² attributes to services	OECD
Ease of doing business	World Bank

North group

The following table sets out Ireland’s position as compared to the states in the North group:

State	Population	TUD	CBC	GNI	% emp in services	% GDP services	Ease of business
Ireland	4.98m	24%	34%	47.6	77%	60%	80
Denmark	5.81m	67%	84%	42.8	79%	75%	85
Finland	5.37m	65%	89%	35.6	74%	68%	80
Sweden	10.16m	67%	90%	38.8	80%	73%	82

Denmark will be used as a comparator from the North group. The reasons for its selection are that (a) it has the closest proportion of the workforce in services to Ireland; (b) it has the highest GNI *per capita* in the group and closest to Ireland; (c) it scores the highest on ease of doing business in the group and higher than Ireland. It is therefore a useful demonstration as to how collective bargaining is not necessarily in conflict with ease of doing business in a state. To the extent that ease of doing business is an important factor in Ireland’s economic model, there may be lessons to learn from Denmark as to how to enhance collective bargaining within a business-friendly environment.

The most obvious limitation of this comparison is that Denmark has significantly higher levels of trade union membership than Ireland. However, this is the case for all states in the North group, so cannot be used to rule out any comparator in this group. In any event, the section on Denmark will demonstrate that there is a close link between trade union density and collective bargaining coverage in that state.

111 Expressed in thousands of euro.

112 A deliberate choice has been made to use GNI *per capita* and GDP *per economic sector*. GNI is a more accurate measure by which to compare individuals’ economic circumstances in light of widely-reported distortions in Ireland’s headline GDP figures as a result of multinational corporate activity. Regrettably, GNI data disaggregated by economic sector is not generally available.

South group

The following table sets out Ireland's position as compared to the states in the South group:

State	Population	TUD	CBC	GNI	% emp in services	% GDP services	Ease of business
Ireland	4.98m	24%	34%	47.6	77%	60%	80
France	67.41m	8%	99%	34.7	76%	79%	77
Italy	60.37m	34%	80%	30.7	70%	74%	73
Portugal	10.17m	16%	72%	24.7	70%	75%	77
Spain	46.75m	14%	73%	29.0	76%	74%	78

Croatia and Greece have been omitted from consideration as comparators. For reasons set out above, it is inappropriate to compare Ireland to a post-2004 expansion state like Croatia. Greece performs even worse than Ireland on many of the metrics assessed in Part II; there is therefore little for Ireland to learn from a comparison to Greece.

France will be used as a comparator from the South group. It has been selected on the bases that (a) it has the highest rate of collective bargaining coverage with the lowest trade union density; (b) it has the highest GNI *per capita* in the group and the closest to Ireland; and (c) it has closely comparable figures for proportion of the labour force employed in services and ease of doing business. An obvious limitation of the comparison is that France has a much larger population than Ireland; however, it is considered that this is a less significant metric than the proportion of the labour force employed in services.

Centre-West group

The following table sets out Ireland's position as compared to the states in the Centre-West group:

State	Population	TUD	CBC	GNI	% emp in services	% GDP services	Ease of business
Ireland	4.98m	24%	34%	47.6	84%	60%	80
Austria	9.04m	27%	98%	40.5	71%	60%	79
Belgium	11.63m	54%	96%	38.1	78%	78%	75
Germany	83.9m	17%	56%	39.4	72%	70%	80
Luxembourg	0.63m	32%	55%	52.0	83%	88%	70
Netherlands	16.68m	17%	79%	41.0	74%	78%	76

Comparisons with Luxembourg are complicated by its small population and disproportionate economic reliance on services; furthermore, it has relatively low levels of collective bargaining coverage within this group (although still higher than Ireland). The same is true for Germany. As a result, there is less for Ireland to learn in respect of collective bargaining from Luxembourg and Germany.

Belgium and the Netherlands will be used as comparators from this group. As will be seen from the respective analyses, even within the Centre-West group there is a significant degree of diversity of economic structure and industrial relations.¹¹³ As a result, two comparators are being used to reflect this diversity. These states were selected for the following reasons: (a) to draw lessons from cases of both high and low trade union density; (b) Belgium has the closest breakdown of the labour force to Ireland (with the exception of Luxembourg, which has been excluded for the reasons above); and (c) it is widely-considered that key to Ireland's economic performance is the openness of its economy. The Netherlands ranks 3rd on the Global Index of Economic Openness, with Ireland 17th.¹¹⁴ Therefore, the Netherlands offers a useful demonstration of how collective bargaining protection is not necessarily a deterrent to foreign investment and trade. It should be noted that Belgium ranks 20th overall for openness, which is lower than Ireland, but ranks higher than Ireland in respect of market access and infrastructure and investment environment.¹¹⁵

Summary

Four states have been selected for the purposes of analysis of their respective collective bargaining frameworks: Denmark, France, Belgium and the Netherlands. Each of these will be considered in detail below, and core principles and legislative techniques underlying their systems will be extracted.¹¹⁶ A subsequent section will extract principles and techniques which may be of benefit to Ireland in pursuing reform of industrial relations to enhance collective bargaining coverage. A further section will then examine principles of EU law that are relevant to this report, including obligations of EU law to support collective bargaining. These should inform future Irish legislation on collective bargaining.



113 Jan Kees Looise, Nicole Torka and Stefan Zagelmeyer, 'Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 249.
 114 Stephen Brien, *Global Index of Economic Openness* (Legatum Institute 2019) 16.
 115 Stephen Brien, *Global Index of Economic Openness* (Legatum Institute 2019) 16.
 116 For further information, see Eurofound country profiles: <<https://www.eurofound.europa.eu/country/>>; and for a collection of national labour and industrial relations laws, see ILO country profiles: <<https://www.ilo.org/dyn/normlex/en/>> both accessed 2 March 2021.

Denmark

State	Population	TUD	CBC	GNI	% emp in services	% GDP services	Ease of business
Ireland	4.98m	24%	34%	47.6	77%	60%	80
Denmark	5.81m	67%	84%	42.8	79%	75%	85

Analysis

Legal framework for industrial relations

Denmark operates a famously voluntarist system of industrial relations – and indeed, of employment regulation in general.¹¹⁷ The Danish model dates back in substantially unchanged form to the ‘September Compromise’ of 1899, and has traditionally been characterised by large sectoral unions operating under the umbrella of the *Landsorganisationen i Danmark* (LO) confederation. The system finds its modern legal basis in the Act on respecting freedom of association in the labour market of 2006:¹¹⁸ as will be discussed below, the major reform contained in this Act was to prohibit the closed shop; otherwise the traditional system was retained.

Although there is a Labour Court, industrial relations disputes are largely adjudicated by out-of-court arbitration panels jointly controlled by the social partners. Even the Labour Court is made up of social partner representatives alongside state-appointed judges. Otherwise, tripartism is not a well-established feature of Danish industrial relations, with the social partners generally considering that state involvement in collective bargaining impinges on their autonomy.¹¹⁹ A notable exception is the 2016 agreement on the integration of refugees into the labour market; otherwise, government attempts to lead tripartite bargaining rounds have largely failed.¹²⁰

There is very little state regulation of the activities of trade unions and the collective bargaining process. The 2006 Act and its predecessors merely recognise the rights of the social partners to exist and negotiate. There are no laws mandating trade union recognition nor providing for the extension of collective agreements to non-unionised workers. There are, however, two ways in which the state lends indirect support to collective bargaining. First, there are occasions on which the state has legislated to extend the length of certain collective agreements which would otherwise come to an end.¹²¹ In practice, this is often a means of imposing wage restraint in pursuit of particular economic policies, or to ensure industrial peace in circumstances where it appears unlikely a new collective agreement will be concluded to replace the one coming to an end.¹²² Separately, the Danish government makes extensive use of public procurement to oblige private enterprises tendering for state contracts to sign up to collective agreements. Commentators have noted that ‘[i]n some respects, pay clauses in procurement can be seen as a substitute for legal extension mechanisms.’¹²³

117 For a discussion of the historical evolution of the Danish model, see Jens Lind and Herman Knudsen, ‘Denmark: The Long-lasting Class Compromise’ (2018) 40(4) *Employee Relations* 580.

118 The previous legislation was the Act on freedom of association of 1982. Again, this largely codified the September Compromise of 1899 and subsequent Basic Agreements between unions and employers. For more, see Ole Hasselbalch and Per Jacobson, *Labour Law and Industrial Relations in Denmark* (Kluwer 1999).

119 Soren Kaj Andersen, Sarah Kaine and Russell D Lansbury, ‘Decentralised Bargaining in Denmark and Australia: Voluntarism versus Legal Regulation’ (2017) 43(1) *Australian Bulletin of Labour* 45, 61-62.

120 Soren Kaj Andersen, Sarah Kaine and Russell D Lansbury, ‘Decentralised Bargaining in Denmark and Australia: Voluntarism versus Legal Regulation’ (2017) 43(1) *Australian Bulletin of Labour* 45, 61.

121 See the Act respecting the renewal and prolongation of collective agreements and contracts of 1985; and the discussion in Ole Hasselbalch and Per Jacobson, *Labour Law and Industrial Relations in Denmark* (Kluwer 1999) 28.

122 Ole Hasselbalch and Per Jacobson, *Labour Law and Industrial Relations in Denmark* (Kluwer 1999) 28.

123 Bjarke Refslund and Ole Henning Sørensen, ‘Islands in the Stream? The Challenges and Resilience of the Danish Industrial Relations Model in a Liberalising World’ (2016) 47(5) *Industrial Relations Journal* 530, 535.

Notwithstanding the generally abstentionist approach of the state in respect of collective bargaining, Danish workers enjoy near-universal collective bargaining coverage. The literature suggests the primary driver behind this is the fact that Denmark has among the highest rates of trade union membership in the world. Union membership has historically been subject to some state support which will be discussed below, which thereby indirectly supports collective bargaining. It should be observed that studies of Danish industrial relations support the view that in states with voluntarist systems, union density is the primary determinant of collective bargaining coverage.¹²⁴ Indeed, Refslund and Sørensen characterise high trade union density as the 'main explanatory variable' for the overall 'resilience' of the traditional Danish model of industrial relations in the modern economy.¹²⁵

Factors in high trade union membership

A combination of factors has led to Denmark's trade union density of 67%. Two of these have come from the state, two from the trade unions themselves. The first state contribution to trade union density is that trade union dues have traditionally been tax-deductible for workers. A significant body of research conducted since the reform of this provision in 2010 suggests a strong link between that reform (which limited the deduction) and changes in union membership patterns observed since the reform was introduced. The 2010 law limits the tax deduction to approximately €400 *per annum*, which has encouraged workers to switch to 'cheaper' unions.¹²⁶ 78% of workers who have changed unions in the past 10 years cite the cost of union dues as the primary reason for doing so.¹²⁷ As a result, various authors have concluded that the effective state subsidy for trade union membership in the form of the tax deduction on dues encouraged high membership rates before the 2010 restriction.¹²⁸ Even after the restriction was introduced, this has mostly caused workers to switch from legacy unions that charge higher dues to new entrants with lower dues. It should be noted that these new unions tend to keep costs down by merely providing individual advice services rather than engaging in collective bargaining; so it is feared the shift in membership patterns may, over time, undermine collective bargaining coverage.¹²⁹

The second, and more important,¹³⁰ contribution on the part of the state is the so-called 'Ghent system' of unemployment insurance. A comprehensive study of the Ghent system is beyond the scope of this report,¹³¹ but in brief summary, it envisages a network of private unemployment insurance funds (UIFs) either in supplement to or instead of public social welfare assistance for the unemployed. These funds are administered by trade unions. Workers pay into funds in order to enjoy the benefits of income replacement during periods of unemployment, rather than paying public social insurance contributions.¹³² In Denmark, UIFs operate in complement to the public system of social welfare for the unemployed, which is typically significantly lower than the benefits offered by UIFs and is subject to means-testing. Workers are legally entitled to join a UIF without becoming a member of the trade union that administers the fund, and cannot be penalised by the fund for doing so. However, the overwhelming majority of workers join the union associated with their fund.¹³³ Studies are divided as to why this is: there is some evidence that social

-
- 124 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444; Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469; Bjarke Refslund and Ole Henning Sørensen, 'Islands in the Stream? The Challenges and Resilience of the Danish Industrial Relations Model in a Liberalising World' (2016) 47(5) *Industrial Relations Journal* 530, 563.
- 125 Bjarke Refslund and Ole Henning Sørensen, 'Islands in the Stream? The Challenges and Resilience of the Danish Industrial Relations Model in a Liberalising World' (2016) 47(5) *Industrial Relations Journal* 530, 538.
- 126 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444, 454.
- 127 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444, 455.
- 128 Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469, 475.
- 129 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444; Jens Lind, 'The Restructuring of the Ghent Model in Denmark and Consequences for the Trade Unions' (2004) 10(4) *Transfer: European Review of Labour and Research* 621 and 'The End of the Ghent System as Trade Union Recruitment Machinery?' (2009) 40(6) *Industrial Relations Journal* 510.
- 130 Indeed, some commentators consider it the 'driving mechanism behind the high union density... in the three classic Ghent countries: Denmark, Sweden and Finland': see Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469, 469-70.
- 131 For more information, see Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469; Jens Lind, 'A Nordic Saga? The Ghent System and Trade Unions' (2007) 14(1) *International Journal of Employment Studies* 49.
- 132 See further the literature cited in respect of Belgium below, and Guy Mundlak, 'Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands' (2016) 17 *Theoretical Inquiries in Law* 163.
- 133 Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469.

pressure and support for the union's other activities drive membership, particularly where those unions are active in the workplace and engage in collective bargaining; others argue that the primary reason is that workers often do not appreciate the difference between the union and the fund, and (incorrectly) assume they must join the former to benefit from the latter.¹³⁴ Either way, UIFs clearly act as a 'recruiting channel' for trade unions.¹³⁵ This is referred to in the literature as 'the Ghent effect', although Høgedahl has noted that the impact of the Ghent system on trade union membership in Denmark varies across industries.¹³⁶

From the perspective of the trade unions, two factors have contributed to high membership rates. Historically, unions pursued closed-shop policies that limited employment in a given enterprise to members of a particular trade union. However, closed shops were prohibited in 2006, in response to the decision of the European Court of Human Rights in *Sørensen & Rasmussen v Denmark*,¹³⁷ which held such practices violated the right to freedom of association under Article 11 ECHR.¹³⁸ Ibsen *et al* argue that the closed shop was never a very significant factor in Danish industrial relations, covering at most 10% of the workforce,¹³⁹ mostly in small enterprises who were not affiliated to the main employers' confederation.¹⁴⁰ They further note that trade union membership did not suffer much of a decline after the closed shop was prohibited: there was a fall from 71% in 2005 to 67% today.¹⁴¹

A more significant contribution made by trade unions to high membership rates is 'union presence'. Ibsen *et al* define this as encompassing collective bargaining coverage and the presence of a shop steward in the workplace. They note that workers who have switched trade unions or left the trade union movement altogether are four times more likely to have a weak union presence in their workplace.¹⁴² Another study by Høgedahl shows that workers are more likely to join a union in the first place when that union is active in his or her workplace,¹⁴³ and Refslund and Sørensen conclude that 'workplace presence is a key determinant in explaining trade union density' in Denmark.¹⁴⁴ Trade union activity in the workplace is supported by both state intervention and the terms of collective agreements. Shop stewards enjoy legislative protection against dismissal that is more robust than other workers, and are typically given time off work to devote to trade union business. In many enterprises, the shop steward is a full-time remunerated position. So long as trade union officials are seen to (in the words of Ibsen *et al*) 'deliver the goods', that boosts trade union membership.¹⁴⁵

As a result of these factors, trade union membership is high, which in turn leads to high levels of collective bargaining coverage. Indeed, the literature demonstrates that in a voluntarist system like Denmark's, high trade union density is vital to achieve high collective bargaining coverage. 72% of Danish workers believe working conditions should be regulated by collective bargaining.¹⁴⁶ Even most employers support regulation by autonomous collective bargaining, rather than state intervention in the labour market.¹⁴⁷ Ibsen *et al* report that Danish employers dislike 'legislation dictated by politicians',¹⁴⁸ and therefore prefer collective bargaining as more flexible and (at the enterprise level) tailored to the needs of their business. The next section will set out the process by which that is achieved in Denmark.¹⁴⁹

134 Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469.

135 Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469; Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444. See also J Clasen and E Viebrock, 'Voluntary Unemployment Insurance and Trade Union Membership: Investigating the Connections in Denmark and Sweden', (2008) 37(3) *Journal of Social Policy* 433.

136 Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469, 481-82.

137 Applications no 52562/99 and 52620/99.

138 For discussion on this point, see Virginia Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member? Labour Rights Under the European Convention on Human Rights' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work* (Hart Publishing 2014) ch 15.

139 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444, 452-53.

140 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444, 452.

141 Statistics from the International Labour Organisation. See <<https://ilostat.ilo.org/data/>> accessed 8 March 2021.

142 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444, 457.

143 Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469.

144 Bjarke Refslund and Ole Henning Sørensen, 'Islands in the Stream? The Challenges and Resilience of the Danish Industrial Relations Model in a Liberalising World' (2016) 47(5) *Industrial Relations Journal* 530, 539.

145 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444, 457.

146 Bjarke Refslund and Ole Henning Sørensen, 'Islands in the Stream? The Challenges and Resilience of the Danish Industrial Relations Model in a Liberalising World' (2016) 47(5) *Industrial Relations Journal* 530, 539.

147 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444.

148 Flemming Ibsen, Laust Høgedahl and Steen Scheuer, 'Free Riders: The Rise of Alternative Unionism in Denmark' (2013) 44(5) *Industrial Relations Journal* 444, 452.

149 See also Steen Scheuer, 'Denmark: A Less Regulated Model', in Anthony Ferner and Richard Hyman (eds), *Changing Industrial Relations in Europe* (2nd edn, Blackwell 1998) 146.

Collective bargaining process

The industrial relations framework in Denmark is referred to as 'centralised decentralisation': sectoral bargaining is commonplace, but individual workplaces may be governed by enterprise-level agreements that are more favourable than the underlying sectoral agreement. For example, the vast majority of the private-sector workforce operate according to the 'minimum wage system' of bargaining, where sectoral agreements set a minimum rate of pay but the actual wage rates are determined by enterprise agreements. The public sector and the private transport sector follow the 'normal wage system' approach, whereby actual conditions are almost entirely determined by sectoral bargaining, with minimal flexibility at enterprise level. Of course, collective bargaining covers significantly more than pay: Eurofound notes that 'all aspects of working life are subject to collective bargaining [including] wage and working time, training, life-long learning, further training, paternity leave, education leave, options of free-time, leave during sickness, a child's first sick day, senior days, stress, and harassment...'¹⁵⁰

The Danish economy undergoes periodic rounds of collective bargaining, as collective agreements typically last between two and four years.¹⁵¹ In January of a bargaining year, negotiations begin on a national agreement for the public sector, and sectoral agreements in the private sector. Only once these are concluded does enterprise bargaining commence. In this respect, sectoral agreements 'set the pace' for wage increases and other conditions of enterprise agreements, which are typically more favourable to workers than the underlying sectoral agreement. Employers can deviate from sectoral agreements (that is, adopt terms less favourable than the sectoral agreement) only in respect of working time and training, and only with consent of trade unions at the enterprise level. There is a close working relationship between enterprise-level shop stewards, sectoral trade unions, and national confederations of unions,¹⁵² which allows for a combination of co-ordinated bargaining and flexibility for particular enterprises to encourage competition in the economy.

Other aspects of industrial relations

Since 1973, Danish legislation has required that companies with more than 35 employees reserve one-third of the seats on the board of directors (or at least two seats, provided that a majority of directors is still elected by shareholders) for representatives elected by workers by means of secret ballot.¹⁵³ Trade unions have no formal role in the selection of these representatives, who must be elected from among the employees of the company. Once elected, they are subject to the same rights and duties as other directors, and enjoy enhanced protection against dismissal from employment. They can, however, be recalled by a ballot of their fellow employees. There is no hard evidence of the contribution made by workers' representatives on boards of directors to the high levels of collective bargaining coverage, but the conclusion may tentatively be drawn that management which is accountable to a board featuring workers' representatives would be more likely to recognise trade unions for the purposes of collective bargaining, and to engage in bargaining in good faith. Research on the equivalent law in Sweden (which was adopted the same year as Denmark's), shows that the overwhelming majority of business managers hold a positive view of worker representatives on boards of directors,¹⁵⁴ and believe that their presence enhances co-operation in the workplace,¹⁵⁵ and improves efficiency.¹⁵⁶ The research suggests that worker representatives on boards facilitate more frequent contact with trade unions.¹⁵⁷

150 Eurofound country profile for Denmark: <<https://www.eurofound.europa.eu/country/denmark#collective-bargaining>> accessed 2 March 2021.

151 Ole Hasselbalch and Per Jacobson, *Labour Law and Industrial Relations in Denmark* (Kluwer 1999) 28.

152 Bjarke Refslund and Ole Henning Sørensen, 'Islands in the Stream? The Challenges and Resilience of the Danish Industrial Relations Model in a Liberalising World' (2016) 47(5) *Industrial Relations Journal* 530, 536.

153 Public Limited Companies Act 1973; discussed in Ole Hasselbalch and Per Jacobson, *Labour Law and Industrial Relations in Denmark* (Kluwer 1999) 224 ff.

154 Klas Levinson, 'Employee Representatives on Company Boards in Sweden' (2003) 32(3) *Industrial Relations Journal* 264, 265.

155 Klas Levinson, 'Employee Representatives on Company Boards in Sweden' (2003) 32(3) *Industrial Relations Journal* 264, 265-66.

156 Klas Levinson, 'Employee Representatives on Company Boards in Sweden' (2003) 32(3) *Industrial Relations Journal* 264, 267.

157 Klas Levinson, 'Employee Representatives on Company Boards in Sweden' (2003) 32(3) *Industrial Relations Journal* 264, 270 ff.

Lessons for Ireland

Notwithstanding the near-universal presence of trade union representatives and the need to engage in both sectoral and enterprise-level collective bargaining, Denmark scores higher than Ireland on the World Bank's measure of ease of doing business. In Denmark, sectoral agreements are capable of acting instead of statutory regulation of employment conditions in all areas except health and safety, where there is greater state involvement. The evidence shows that employers prefer this system to state regulation as better for business. It is possible to accommodate both sectoral and enterprise bargaining, with the former acting as a floor for the latter, but the evidence clearly shows that sectoral bargaining is key to high collective bargaining coverage.

Denmark squarely illustrates the conclusion of various commentators to the effect that a voluntary system of industrial relations can lead to high levels of collective bargaining coverage if, and only if, trade union density is also very high. Given its trade union membership rate of 67%, Denmark has no need of statutory extension of collective agreements to achieve 84% coverage.

Rather, the means by which Denmark enhances collective bargaining coverage is indirect – by supporting higher trade union density. Chief among these is the Ghent system, whereby trade unions administer employment insurance funds on behalf of their members. Workers are incentivised to join a UIF rather than rely on the less generous public social welfare system. In subscribing to a UIF, most workers will also become a member of the trade union responsible for the fund, either because they see the benefits of union activity or simply because they do not distinguish between the fund and the union.

Obviously, the introduction of a Ghent system would be a significant change in Irish industrial relations. There are, however, more subtle incentives in Denmark for union membership. Both UIF contributions and ordinary union dues are tax-deductible in Denmark. This effectively acts as a state subsidy for trade union membership. Recent reforms have limited the amount deductible to a level below that which most traditional unions need to sustain their collective bargaining activities,¹⁵⁸ which has led to workers defecting to 'cheaper' unions that only offer UIFs without engaging in collective bargaining. However, it is clearly open to Ireland to similarly subsidise union membership by making dues tax-deductible. Indeed, this used to be the case, in accordance with s472C of the Taxes (Consolidation) Act 1997, but tax relief was abolished in 2011.¹⁵⁹

There are also lessons available from Danish trade unions. Irish unions are similarly estopped from operating closed shops, not only because of the *Sørensen* judgment referred to above but also domestic constitutional jurisprudence.¹⁶⁰ However, the prohibition of the closed shop did not cause a significant decline in Danish trade union density. Rather, membership is largely driven by visible trade union activity in the workplace – in particular, an effective shop steward. There are measures by which the state can support shop steward activity as well. In Denmark, there is enhanced legislative protection against dismissal; collective agreements typically provide shop stewards with time off work for trade union activity, and in some large enterprises they provide for a full-time shop steward position. It would be possible for the Irish government to pursue similar ends by means of legislation.

On the subject of workplace representation, Danish legislation provides for worker representation on boards of directors of companies over a certain size. This is likely to make an indirect contribution to enhanced collective bargaining coverage by incentivising management to engage with trade unions. Board-level employee representation exists in 18 member states of the EU¹⁶¹ – another respect in which Ireland is an outlier. Consideration of board representation is beyond the scope of this report, but there is increasing scholarship on the subject.¹⁶²

Finally, the Danish government makes extensive use of public procurement to encourage private enterprises to sign up to collective agreements. There is evidence that this has reduced the extent to which privatisation and outsourcing of public services has contributed to a decline in collective bargaining coverage in Denmark, as has occurred in other European countries since the 1970s.¹⁶³

158 Laust Høgedahl, 'The Ghent Effect for Whom? Mapping the Variations of the Ghent Effect across Different Trade Unions in Denmark' (2014) 46(5) *Industrial Relations Journal* 469.

159 For more information, see Fórsa, 'Restoring Fair Play' (2018).

160 *Educational Company of Ireland Ltd v Fitzpatrick (no 2)* [1961] IR 345.

161 Michael Gold, 'Book Review' (2016) 47(2) *Industrial Relations Journal* 201.

162 See, for example, Jeremy Waddington and Aline Conchon, *Board level Employee Representation in Europe: Priorities, Power and Articulation* (Routledge 2016).

163 Bjarke Refslund and Ole Henning Sørensen, 'Islands in the Stream? The Challenges and Resilience of the Danish Industrial Relations Model in a Liberalising World' (2016) 47(5) *Industrial Relations Journal* 530, 535.

France

State	Population	TUD	CBC	GNI	% emp in services	% GDP services	Ease of business
Ireland	4.98m	24%	34%	47.6	77%	60%	80
France	67.41m	8%	99%	34.7	76%	79%	77

Analysis

Legal framework for industrial relations

The modern French system of industrial relations has its roots in the wave of social unrest that swept the country in May 1968, in which trade unions were quite active.¹⁶⁴ These led to the *Accords de Grenelle*, in which employers first recognised the legitimacy of enterprise-level bargaining. Although historically, French industrial relations were mostly conducted at the sectoral and regional levels, the recent trend has been increasing decentralisation – a series of legal reforms since 1982 have enhanced the role of the social partners in bargaining at enterprise level.¹⁶⁵ By stark contrast with Denmark, industrial relations in France have always been characterised by high levels of state involvement.¹⁶⁶ The five largest confederations of trade unions are recognised as ‘representative’ by the state, and given enhanced powers to conclude collective agreements and participate in the administration of various social programmes.¹⁶⁷

The landscape for organised labour has always been marked by pluralism at best and factionalism at worst: most confederations organise on a cross-sectoral basis, competing with one another for membership and prestige.¹⁶⁸ Membership is often chosen on the basis of political and religious sympathies rather than the standard of services provided by the union.¹⁶⁹ With such low levels of membership, trade unions tend to be dominated by political radicals and militants – particularly within the largest confederation, the *Confédération général de travail* (CGT), which was historically affiliated with the French Communist Party.¹⁷⁰

‘Representativeness’ of trade unions is key to French industrial relations. Unions must meet representative thresholds in order to have collective agreements extended (on which more below). Union confederations jealously guard their membership data, and many commentators suspect exaggeration for the purposes of securing and maintaining representative status.¹⁷¹ As a result, recent legal reforms have elevated the role of workplace elections in gauging the support of trade unions, rather than membership figures. There are additional statutory criteria imposed in order for a union to be considered representative, including independence from the employer, experience in the conduct of industrial relations, and ‘respect for republican values’ (which replaced a previous requirement that the union have adopted a patriotic stance during the Second World War, and not collaborated with the Nazi occupation).¹⁷²

164 Julien Mouret, ‘Collective Relations in France: A Multi-Layered System in Mutation’ in Roger Blanpain, Shinya Ouchi and Takashi Araki (eds), *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives* (Kluwer 2007) ch 3; Nick Parsons, *French Industrial Relations in the New World Economy* (Routledge 2005).

165 The first of these were the Lois Aroux of 1982, discussed in Antoine Lyon-Caen and Luigi Mariucci, ‘State, Legislative Intervention, and Collective Bargaining: A Comparison of Three National Cases, The Structures of Collective Bargaining’ (1985) 1 *International Journal of Comparative Labour Law and Industrial Relations* 87, 93 ff. For more historical discussion, see Michael Forde, ‘Trade Union Pluralism and Labour Law in France’ (1984) 33 *The International and Comparative Law Quarterly* 134.

166 Nick Parsons, *French Industrial Relations in the New World Economy* (Routledge 2005) ch 2.

167 Eurofound country profile for France: <<https://www.eurofound.europa.eu/country/france>> accessed 15 March 2021.

168 Nick Parsons, *French Industrial Relations in the New World Economy* (Routledge 2005) 33, 117.

169 Michael Forde, ‘Trade Union Pluralism and Labour Law in France’ (1984) 33 *The International and Comparative Law Quarterly* 134; Jacques Rojot, ‘French Industrial Relations: A Dual Paradox with Deep Historical Roots’ (2014) 22 *International Journal of Organizational Analysis* 486, 489.

170 Jacques Rojot, ‘French Industrial Relations: A Dual Paradox with Deep Historical Roots’ (2014) 22 *International Journal of Organizational Analysis* 486, 489.

171 Michael Forde, ‘Trade Union Pluralism and Labour Law in France’ (1984) 33 *The International and Comparative Law Quarterly* 134, 142.

172 *Code du Travail*, article L-2121-1.

Labour disputes are adjudicated by *Conseils des prud'hommes*, local labour tribunals consisting of a panel of four lay judges: two representatives each from trade unions and employers. Tripartism is entrenched in the field of legislative social policy: Law 2007-130 'makes it obligatory to consult national-level representatives of trade unions and employers' organisations beforehand when proposing reforms in the field of industrial relations, employment and vocational training.¹⁷³ However, attempts to reach tripartite collective agreements on substantive employment issues in the aftermath of the Financial Crash were deemed to have 'ended in political failure' by 2014.¹⁷⁴

Union density and collective bargaining coverage

France is the prime exemplar of a state with near-universal collective bargaining coverage but low trade union density. Indeed, France has one of the lowest rates of trade union density in the Western world.¹⁷⁵ The reasons for this gaping disparity can be broken down into extension mechanisms and alternative bases for union power.

There are robust provisions for extension of collective agreements in France. At the sectoral level, the Minister for Labour has the power to extend agreements reached between employers and at least one representative trade union *erga omnes*.¹⁷⁶ This is considered in French law to be an administrative function, in contrast to Irish jurisprudence which has conceived of extension as a legislative act.¹⁷⁷ The 2008 reforms in France instituted a new system for determining representativeness: the union or unions who signed the agreement must have sponsored candidates who between them obtained at least 30% of the votes cast in elections for workplace representatives in companies throughout that sector. An agreement can be invalidated if contested by one or more union(s) whose candidates obtained more than 50%. Statistics on workplace elections are kept for this purpose by the Ministry. Since 2017, the Minister is also obliged to have regard to the public interest in determining whether to extend a collective agreement. In practice, virtually all sectoral agreements are extended.¹⁷⁸ Similarly, at the enterprise level, agreements reached between the employer and one or more representative trade union(s) are routinely extended to the entire workforce.

Clearly, the effect of these extension mechanisms has been to maintain high collective bargaining coverage despite falling membership rates. However, there is ample evidence that the liberal use of extension has in fact *contributed* to the decline in membership rates. Commentators are unanimous in the view that extension mechanisms in France have allowed non-unionised workers to 'free ride' on the collective bargaining efforts of trade unions.¹⁷⁹ There is little incentive to join a trade union when workers obtain all the benefits of collective bargaining anyway, and (as will be discussed below) there are alternative channels of worker voice within companies.

Rather than membership, trade unions in France rely on alternative bases for their substantial institutional power.¹⁸⁰ First, unions benefit from significant state support quite apart from the extension of collective agreements;¹⁸¹ Rojot has observed that they are 'woven into the social fabric of the country'.¹⁸² Representative trade unions are granted extensive privileges in the nominating of candidates for workplace elections, consultation from both employers and the state on various issues identified by law, and (as mentioned above) involvement in the administration of national and regional social welfare schemes (referred to as *paritarisme*).¹⁸³ In particular, the five largest confederations are deemed to be

173 Eurofound country profile for France: <<https://www.eurofound.europa.eu/country/france>> accessed 15 March 2021.

174 Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617, 624.

175 Susan Milner and Andrew Mathers, 'Membership, Influence and Voice: A Discussion of Trade Union Renewal in the French Context' (2013) 44 *Industrial Relations Journal* 122.

176 Miguel Ángel García Calavia and Michael Rigby, 'The Extension of Collective Agreements in France, Portugal and Spain' (2020) 26(4) *Transfer: European Review of Labour and Research* 399.

177 For further discussion, see Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) *European Labour Law Journal*, available at <<https://journals.sagepub.com/doi/pdf/10.1177/20319525211000360>> accessed 27 April 2021.

178 Miguel Ángel García Calavia and Michael Rigby, 'The Extension of Collective Agreements in France, Portugal and Spain' (2020) 26(4) *Transfer: European Review of Labour and Research* 399, 403.

179 Susan Milner and Andrew Mathers, 'Membership, Influence and Voice: A Discussion of Trade Union Renewal in the French Context' (2013) 44 *Industrial Relations Journal* 122, 123.

180 Susan Milner and Andrew Mathers, 'Membership, Influence and Voice: A Discussion of Trade Union Renewal in the French Context' (2013) 44 *Industrial Relations Journal* 122 speak of 'the inadequacy of density alone as a measure of union vitality'.

181 Susan Milner, *Comparative Employment Relations: France, Germany and Britain* (Palgrave 2015) 38 ff.

182 Jacques Rojot, 'French Industrial Relations: A Dual Paradox with Deep Historical Roots' (2014) 22 *International Journal of Organizational Analysis* 486, 489.

183 Eurofound country profile for France: <<https://www.eurofound.europa.eu/country/france>> accessed 15 March 2021.

representative, even as their membership rates diminish. In protecting the status of trade unions, the state has a long tradition of respecting not only representativeness in terms of membership, but also in ideological diversity: what Forde refers to as 'spiritual representativeness'.¹⁸⁴ Not all of this state support is directly relevant for the purposes of this report, but the institutional status of trade unions lends them a level of influence far in excess of actual membership among the workforce.

Second, trade unions make extensive recourse to industrial action in pursuit of collective bargaining.¹⁸⁵ France lost the highest number of days to work stoppages¹⁸⁶ in Europe in 2016 (the latest year for which ILO figures are available),¹⁸⁷ and across the period 2009-2013 lost the second-highest number of days per worker after Cyprus.¹⁸⁸ Moreover, as stated above, French unions tend to be dominated by militants – which is reflected in the character of industrial action. Rojot draws attention to the high level of violence that often accompanies French industrial disputes, including occupation of and damage to employer premises, and even 'boss-napping' (temporary imprisonment of managers by striking workers).¹⁸⁹ Reaney and Cullinane sum up French industrial relations as 'organised anarchy'.¹⁹⁰ Collective agreements cannot contain peace clauses, as the right to strike is guaranteed by the French Constitution.¹⁹¹ French strikes tend to enjoy broad support among workers (even those not members of the unions involved) and the general public.¹⁹²

Collective bargaining process

The conduct of collective bargaining in France is heavily determined by statute.¹⁹³ Historically, sectoral bargaining was always the most important aspect of industrial relations, for three reasons: trade unions enjoyed institutional power granted by the state; individual workplaces were generally hostile to organised labour;¹⁹⁴ and sectoral agreements were extended *erga omnes* ('towards all', meaning to cover employers who did not sign the original agreement and their employees) and took precedence over enterprise-level agreements to the contrary. The latter of these has been removed by a series of legislative reforms, of which the most important have been the *Loi Fillon* of 2004, Law 2008-789 on working time, Law 2015-994 on social dialogue, the *Loi el Khomri* of 2016, and a package of decrees passed by President Macron in 2017.¹⁹⁵ The net effect of these reforms is that now enterprise agreements take precedence over sectoral agreements, even where they are less favourable to workers. The system of representativeness continues to operate at enterprise level. Only representative trade unions have the authority to conclude collective agreements, although they can waive this right in favour of other elected representatives (see below) where there is no meaningful trade union presence in a particular workplace. Operating in parallel to the decentralisation of collective bargaining from sectoral to enterprise level have been repeated attempts to rationalise the number of sectors for the purposes of bargaining. From a high of 700, these have been steadily reduced to around 100 sectors now.¹⁹⁶

184 Michael Forde, 'Trade Union Pluralism and Labour Law in France' (1984) 33 *The International and Comparative Law Quarterly* 134, 142.

185 Susan Milner, *Comparative Employment Relations: France, Germany and Britain* (Palgrave 2015) 138 ff.

186 Defined as encompassing both strikes and lockouts.

187 See <<https://ilostat.ilo.org/data/>> accessed 15 March 2021.

188 Samuel Osborne, 'The European countries that strike the most' (*The Independent*, 3 June 2016) <<https://www.independent.co.uk/news/world/europe/european-countries-strike-most-french-strikes-industrial-action-map-a7063926.html>> accessed 15 March 2021. It should be observed that data for Cyprus was distorted by one open-ended strike in the construction industry at this time.

189 Nick Parsons, 'Legitimizing Illegal Protest: The Permissive Ideational Environment and "Bossnappings" in France' (2013) 51 *British Journal of Industrial Relations* 288; Jacques Rojot, 'French Industrial Relations: A Dual Paradox with Deep Historical Roots' (2014) 22 *International Journal of Organizational Analysis* 486; Ruth Reaney and Niall Cullinane, 'Workplace Unionism under Decentralised Bargaining in France: A Case Study of the CGT in the Car Industry' (2017) 48 *Industrial Relations Journal* 403.

190 Ruth Reaney and Niall Cullinane, 'Workplace Unionism under Decentralised Bargaining in France: A Case Study of the CGT in the Car Industry' (2017) 48 *Industrial Relations Journal* 403, 406.

191 Eurofound country profile for France: <<https://www.eurofound.europa.eu/country/france>> accessed 15 March 2021.

192 Jacques Rojot, 'French Industrial Relations: A Dual Paradox with Deep Historical Roots' (2014) 22 *International Journal of Organizational Analysis* 486.

193 *Code du travail*, livre II.

194 Michael Forde, 'Trade Union Pluralism and Labour Law in France' (1984) 33 *The International and Comparative Law Quarterly* 134, 135.

195 Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617.

196 Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617, 628.

The shift in focus of bargaining levels has been called a 'revolution' in French industrial relations and provoked bitter industrial action by trade unions. It has been criticised by most commentators as weakening labour law standards.¹⁹⁷ It has now become commonplace that employers take advantage of the weakness of trade unions at the enterprise level due to low membership rates to derogate from higher sectoral standards.¹⁹⁸ Even though collective bargaining coverage remains high as enterprise-level agreements are extended throughout the workplace, these are 'hollowed out', and often come closer to unilateral employer imposition of terms than to real collective bargaining, as minority unions routinely make concessions.¹⁹⁹ However, employers are divided as to their preference for enterprise or sectoral bargaining: the reforms were originally driven by employer concerns about the competitiveness of the French economy,²⁰⁰ but some employers have since expressed disquiet that they now risk being undercut by competitors who adopt less favourable collective agreements.²⁰¹

The *Lois Aroux* of 1982 impose an obligation on employers to enter into collective bargaining on an annual basis, at both sectoral and enterprise levels. However, there are a number of flaws with this system, chief among which is the lack of any definitive way of knowing when that obligation is fulfilled.²⁰² There is no obligation to reach an agreement; however, this is compensated for by the provision for collective agreements to continue in force until they are replaced by another agreement (unlike, as we saw, in Denmark, where agreements typically lapse after two to four years). As a result, failure to reach a new agreement does not necessarily reduce collective bargaining coverage.

Other aspects of industrial relations

As mentioned above, French workers enjoy a variety of forms of workplace representation quite apart from traditional trade unionism. This system is described by commentators as 'complex and paradoxical', having been built up layer upon layer over decades 'follow[ing] different and sometimes conflicting logics.'²⁰³ It was the subject of substantial reform in 2017, but the origins of the current system bear examination.

First, since 1936,²⁰⁴ workplaces with more than 10 employees must have an elected *délégué du personnel* (DP). DPs have no powers to bargain collectively on behalf of workers, but there are extensive duties on employers to provide information and consult, and DPs can represent individual workers in grievance proceedings. In principle, DPs have no formal links to trade unions. However, representative trade unions enjoy a statutory monopoly on the presentation of candidates for elections (it is the results of these elections that are used to calculate representativeness, as discussed above),²⁰⁵ and the procedures for elections must be agreed between employers and unions, including the composition of the electoral colleges for different categories of staff.

Second, workplaces with more than 50 employees must have a *comité d'entreprise* (CE), which is like the works councils seen in many European states, albeit with less power than, for example, their German counterparts.²⁰⁶ Again, CEs have no collective bargaining powers, and are chaired by the employer. Employee delegates to the CE are elected on a similar basis to DPs, again with substantial trade union involvement even though CEs are formally distinct from unions. A CE is entitled to its own budget of 0.2% of company revenues, which it can spend on social and welfare activities for employees.

197 Nick Parsons, *French Industrial Relations in the New World Economy* (Routledge 2005) 129.

198 Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617, 625.

199 Richard Hyman, 'What Future for Industrial Relations in Europe?' (2018) 40 *Employee Relations* 569, 571. See also Susan Milner, *Comparative Employment Relations: France, Germany and Britain* (Palgrave 2015) 100 ff.

200 Ruth Reaney and Niall Cullinane, 'Workplace Unionism under Decentralised Bargaining in France: A Case Study of the CGT in the Car Industry' (2017) 48 *Industrial Relations Journal* 403, 404.

201 Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617, 630.

202 Antoine Lyon-Caen and Luigi Mariucci, 'State, Legislative Intervention, and Collective Bargaining: A Comparison of Three National Cases, The Structures of Collective Bargaining' (1985) 1 *International Journal of Comparative Labour Law and Industrial Relations* 87; Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617.

203 Rebecca Gumbrell-McCormick and Richard Hyman, 'Embedded Collectivism? Workplace Representation in France and Germany' (2006) 37 *Industrial Relations Journal* 473, 481.

204 With an interregnum during WWII.

205 Strictly speaking, representative unions have this monopoly over presentation of candidates in the first round of elections – if union-backed candidates garner insufficient support, the field is thrown open to non-unionised candidates for a second round.

206 Rebecca Gumbrell-McCormick and Richard Hyman, 'Embedded Collectivism? Workplace Representation in France and Germany' (2006) 37 *Industrial Relations Journal* 473, 481.

Since the 2017 reforms, the above have been incorporated into the more general concept of *Comité social et économique* (CSE), although CSEs operate differently in companies of fewer and more than 50 employees. CSEs also incorporate various other representative mechanisms that had previously existed in respect of health and safety.

Third, representative trade unions are entitled to appoint a *délégué syndical* (DS) from among their members who are employees of that company, whose role is that of a traditional shop steward.²⁰⁷ Since there may be more than one representative trade union operating in a company, each may appoint their own DS. Only a DS can negotiate with the employer for the purposes of collective bargaining; if an employer agrees a collective agreement with one or more DS(s) who represents 30% of the workplace according to the last election for the CSE, that agreement may be extended to the entire workforce, unless one or more DS(s) who represent a majority of the workforce objects. In this way, collective agreements are routinely concluded and extended despite some trade unions operating in the workplace refusing to agree (usually the CGT, which has historically been reluctant to engage in collective bargaining at enterprise level).²⁰⁸

A DS or member of a CSE enjoys very robust protection against dismissal or other penalisation. In particular, they can only be dismissed with the approval of the state labour inspectorate.²⁰⁹ Furthermore, they are entitled to *credit d'heures*: time off from work, paid by the employer as working time, to engage in trade union or CSE activity.²¹⁰ Depending on the size of the company, this varies from 10-20 hours per month. However, it should be noted that despite the elaborate system of employee representation in France, representatives perceive less impact of their activities over management decisions than might be expected.²¹¹

The important thing to observe for present purposes is the relationship between the above forms of worker representation, trade unions, and collective bargaining. First, the presence of these mechanisms for representation reduces the incentive for workers to join trade unions. Second, the unions' power is maintained by their legal monopoly over the nomination of candidates for representative positions, and the legal entitlement to a DS. Third, collective bargaining takes place in highly regulated, formal channels, under the control of trade unions - with very little connection to the actual level of membership of those unions in that workplace. Only where there is no DS can the workers conduct collective negotiations with the employer through the directly elected DP, and have the collective agreement approved by a referendum of the workers.²¹² In a highly fractured trade union landscape, minority unions that are willing to reach collective agreements can see those agreements extended in the absence of a solid bloc among the workers opposing them.

207 *Code du travail*, articles L2143-1 to L2143-23.

208 Ruth Reaney and Niall Cullinane, 'Workplace Unionism under Decentralised Bargaining in France: A Case Study of the CGT in the Car Industry' (2017) 48 *Industrial Relations Journal* 403.

209 Julien Mouret, 'Collective Relations in France: A Multi-Layered System in Mutation' in Roger Blanpain, Shinya Ouchi and Takashi Araki (eds), *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives* (Kluwer 2007) ch 3, 56.

210 Julien Mouret, 'Collective Relations in France: A Multi-Layered System in Mutation' in Roger Blanpain, Shinya Ouchi and Takashi Araki (eds), *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives* (Kluwer 2007) ch 3, 55.

211 Susan Milner, *Comparative Employment Relations: France, Germany and Britain* (Palgrave 2015) 121-22.

212 Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617, 629.

Lessons for Ireland

It is readily apparent that in circumstances of low trade union density, the state must do a lot of the heavy lifting in driving the collective bargaining agenda, supporting bargaining actors, and extending agreements to non-unionised workers and workplaces, in order to keep coverage high. Of course, Irish trade union membership is nowhere near as low as in France, but it should nonetheless be borne in mind that the lower the membership rates, the more intervention of the state is required to promote collective bargaining.

However, the French experience also illustrates that state support for trade unions and collective bargaining can be a double-edged sword. Rojot has observed in respect of France: 'The autonomy of the social partners is a fiction. It is always proclaimed by government but [is] violated at the first opportunity.'²¹³ Similarly, Milner and Mathers point out:

France has been characterised as a case of 'virtual unionism' because the influence of organised labour rests not on conventional measures of strength but on its relationship with the state as representative of workers and as a legitimating institution for state policies... [T]he logic of influence [is] driving unions ever further into membership collapse and dependence on the state...²¹⁴

They go on to argue:

...the solution to union decline lies in detaching the confederations from an institutionalised bargaining system that removes them from employees and places them in a situation of dependence in relation to employers and the state. As well as advocating non-compatibility of union and other representative functions to alleviate task overload... professionalisation of union services, funded by membership fees, would ensure independence...²¹⁵

Where the state gives so much support to trade unions that their institutional role is secure irrespective of membership rates and workers benefit from collective bargaining without membership of the unions, there is less incentive to join, and membership can decline. Therefore, state support for unions and bargaining must be paired with measures to incentivise membership to maintain density.

There is further insight to be gained from the French experience of decentralisation. Although sheer coverage has not declined as the focus of bargaining has shifted from sectoral to enterprise-level due to the institutional position of trade unions, the *quality* of bargaining has suffered. *Prima facie* minimum standards are still set at the sectoral level, which workers are entitled to under an extension provision so long as there is no enterprise agreement in place. However, if the employer wants to derogate from these standards, it is relatively easy to do so, by concluding an enterprise agreement with unions who suffer from a very weak position at the enterprise level due to low membership rates.

On the other hand, the embedded nature of trade unions and the bargaining process in French labour law (what one commentator has called 'neo-corporatism')²¹⁶ necessitates a strong union bureaucracy. The DS is a particularly important position, and is carefully selected by the relevant union, but all employee representatives are involved in detailed management of workplace affairs, and need to be intimately familiar with the complicated processes set out above. Union officials and other representatives therefore enjoy robust protection in the form of state supervision over their dismissal, and paid time off work to engage in union business. Unions enjoy similar bureaucratic control over other representative channels in the workplace. The monopoly on presentation of election candidates in particular lends them influence and voice in the workplace out of proportion to their membership rates. State support for trade unions therefore also needs to be accompanied by enhanced training for union officials if they are to play an effective role in workplace administration.

213 Jacques Rojot, 'French Industrial Relations: A Dual Paradox with Deep Historical Roots' (2014) 22 *International Journal of Organizational Analysis* 486, 500.

214 Susan Milner and Andrew Mathers, 'Membership, Influence and Voice: A Discussion of Trade Union Renewal in the French Context' (2013) 44 *Industrial Relations Journal* 122, 123.

215 Susan Milner and Andrew Mathers, 'Membership, Influence and Voice: A Discussion of Trade Union Renewal in the French Context' (2013) 44 *Industrial Relations Journal* 122, 126.

216 Udo Rehfeldt, 'Industrial Relations in France: From the Underdevelopment of Collective Bargaining to the Failure of Neocorporatist Concertation' (2018) 40 *Employee Relations* 617.

Finally, it should be observed that French unions are significantly more radical than Irish unions in the field of industrial action. In circumstances of low membership, their relevance is maintained not only by legal support but also recourse to tactics which are rarely seen in other countries. Property damage and 'boss-napping' might be illegal, but there is evidence that trade unionists typically receive minor sentences if they are sanctioned at all,²¹⁷ and even violent industrial action tends to garner broad public support. As such, unions are able to mobilise far greater numbers than their membership would indicate.²¹⁸



- 217 Nick Parsons, 'Legitimizing Illegal Protest: The Permissive Ideational Environment and "Bossnappings" in France' (2013) 51 *British Journal of Industrial Relations* 288; Jacques Rojot, 'French Industrial Relations: A Dual Paradox with Deep Historical Roots' (2014) 22 *International Journal of Organizational Analysis* 486; Ruth Reaney and Niall Cullinane, 'Workplace Unionism under Decentralised Bargaining in France: A Case Study of the CGT in the Car Industry' (2017) 48 *Industrial Relations Journal* 403.
- 218 Susan Milner and Andrew Mathers, 'Membership, Influence and Voice: A Discussion of Trade Union Renewal in the French Context' (2013) 44 *Industrial Relations Journal* 122.

Belgium

State	Population	TUD	CBC	GNI	% emp in services	% GDP services	Ease of business
Ireland	4.98m	24%	34%	47.6	84%	60%	80
Belgium	11.63m	54%	96%	38.1	78%	78%	75

Analysis

Legal framework for industrial relations

Belgian industrial relations are rooted in the Law of 5 December 1968 (as amended, most significantly in 2009) and the national-level Collective Agreement no 5 of 1971. As will be explored further below, sectoral bargaining has always been the most important level of collective bargaining in Belgium. However, this operates within a framework determined by national bargaining on wages: the National Labour Council concludes agreements every 2 years, which are extended *erga omnes* if the parties are 90% representative (representativeness will be discussed further below). The National Labour Council operates initially as a bipartite forum, subject to state intervention if bipartite negotiations break down. These agreements set not only a floor for subsequent sectoral and enterprise-level bargaining on wages (indexed to inflation), but also a *maximum* wage increase permitted under lower-level collective agreements (referred to as the 'wage norm').²¹⁹ This system aims to control inflation and retain competitiveness through wage restraint; the level of wage increases is benchmarked against labour costs in neighbouring countries like France, Germany and the Netherlands.²²⁰

It should also be borne in mind that there is an increasing trend towards regionalism in Belgium, which is evident in many areas of law and policy, including industrial relations. The three regional tripartite bodies (particularly in Flanders and Wallonia) are becoming more powerful over time, at the expense of national bargaining.²²¹

Representativeness is crucial to the role of trade unions in Belgium. Since the reforms of 2009, trade union federations are deemed representative if they have 125,000 members, and organise on a cross-sectoral basis, in a majority of sectors. Obviously, this is a high threshold to meet; only three union federations enjoy representative status. Only representative unions can conclude collective agreements and sit on bi- and tripartite bodies. In a further indication of increasing regional tendencies in Belgium, unions tend to divide their internal structure between Flemish and Walloon.²²² The Belgian approach to representativeness has been criticised as focusing too heavily on membership numbers to the neglect of, for example, membership approval of union leadership policies and negotiating position.²²³ Wauters draws attention to the fact that national bargaining occasionally fails because union leaders cannot secure the support of rank-and-file members for agreements.²²⁴ Nevertheless, the same three union federations have always held representative status, and there is little evidence of changes in membership patterns since the 1990s.²²⁵

219 Eurofound country profile for Belgium: <<https://www.eurofound.europa.eu/country/belgium>> accessed 1 April 2021. For more information on this process of wage indexing, see Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010) 352 ff.

220 Filip Dorssemont, 'Wage-Setting in Belgium: Collective Autonomy under the Shadow of the Law' (2019) 12 *Italian Labour Law e-Journal* 11.

221 Michael Rusinek and Ilan Tojerow, 'The Regional Dimension of Collective Wage Bargaining: The Case of Belgium' (2014) 48 *Regional Studies* 301.

222 Roger Blanpain, 'Recent Trends in Collective Bargaining in Belgium' (1984) 123(3) *International Labour Review* 319.

223 Bram Wauters and others, 'Perfect Match or Missing Link? An Analysis of the Representativeness of Trade Union Representatives in Belgium' (2014) 45 *Industrial Relations Journal* 424.

224 Bram Wauters and others, 'Perfect Match or Missing Link? An Analysis of the Representativeness of Trade Union Representatives in Belgium' (2014) 45 *Industrial Relations Journal* 424, 427.

225 Kurt Vandaele, 'Newcomers as Potential Drivers of Union Revitalization: Survey Evidence from Belgium' (2020) 75 *Relations Industrielles* 351, 356.

Factors in bargaining coverage

Belgian workers enjoy near-universal collective bargaining coverage. There are three significant factors driving high coverage rates: union density, sectoral bargaining and extension mechanisms.

First, Belgium has among the highest rates of trade union density in the world. In part, this depends on its 'de facto Ghent' system of social welfare administration.²²⁶ We examined the Ghent system in respect of Denmark; despite the system originating in the eponymous Belgian city, Belgium today does not operate a formal Ghent system as a matter of law. Rather, there is mandatory public insurance against unemployment. However, workers can opt for this to be paid through trade union administration, and the state will reimburse unions for associated administrative costs. 86% of workers choose to have their unemployment benefits paid through trade unions in this way,²²⁷ because of a perception that the state unemployment administration is too slow and bureaucratic²²⁸. There is 'overwhelming evidence' that this system contributes to high levels of union membership.²²⁹ Up to one-third of union members are in fact unemployed, having joined or remained in the union for the unemployment benefits.²³⁰ Indeed, Vandaele observes that trade unions in Belgium have played a 'historical role of defending the unemployed.'²³¹

Unions are similarly 'institutionally embedded' in other aspects of social policy-making and administration.²³² Despite this close relationship with the state, and a large proportion of 'passive' members,²³³ they retain 'considerable mobilisation capacity' when it comes to industrial action.²³⁴ Research by van den Berg *et al* shows that Belgium has more strikes than other countries in the Centre-West bloc.²³⁵ Collective agreements, especially at sectoral level, typically include peace clauses prohibiting industrial action during the lifetime of the agreement. However, these clauses are not generally enforceable and as such trade unions are not liable to pay compensation to employers if they take industrial action.²³⁶ Instead, employers generally make payment of some benefit that is reserved to union members under the agreement (see below) conditional on observance of the peace clause.²³⁷

Trade union density has historically been maintained without recourse to the closed shop.²³⁸ Negative freedom of association is protected by the Act of May 1921 (and in any event Belgium would be bound by the ECtHR decision in *Sørensen & Rasmussen v Denmark* referred to above).²³⁹ Importantly however, Blanpain notes that collective agreements often provide for bonus pay or retirement and redundancy benefits exclusively for trade union members (notwithstanding that the agreements themselves are extended to cover non-union members, as discussed below).²⁴⁰ In this way, trade unions can still secure incentives to join. Similarly, employers often pay up to 75% of workers' union dues as a bonus, to compensate for the fact that dues-paying unionised workers bear the cost of union activities despite non-members also benefitting from collective agreements.²⁴¹

-
- 226 Kurt Vandaele, 'A Report from the Homeland of the Ghent System: The Relationship between Unemployment and Trade Union Membership in Belgium' (2006) 12(4) *Transfer: European Review of Labour and Research* 647, 648. For more discussion, see Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 274.
- 227 Kurt Vandaele, 'A Report from the Homeland of the Ghent System: The Relationship between Unemployment and Trade Union Membership in Belgium' (2006) 12(4) *Transfer: European Review of Labour and Research* 647, 648 ff.
- 228 Kurt Vandaele, 'A Report from the Homeland of the Ghent System: The Relationship between Unemployment and Trade Union Membership in Belgium' (2006) 12(4) *Transfer: European Review of Labour and Research* 647, 653.
- 229 Kurt Vandaele, 'A Report from the Homeland of the Ghent System: The Relationship between Unemployment and Trade Union Membership in Belgium' (2006) 12(4) *Transfer: European Review of Labour and Research* 647, 647; Bram Wauters and others, 'Perfect Match or Missing Link? An Analysis of the Representativeness of Trade Union Representatives in Belgium' (2014) 45 *Industrial Relations Journal* 424, 430.
- 230 Kurt Vandaele, 'Newcomers as Potential Drivers of Union Revitalization: Survey Evidence from Belgium' (2020) 75 *Relations Industrielles* 351, 356.
- 231 Kurt Vandaele, 'A Report from the Homeland of the Ghent System: The Relationship between Unemployment and Trade Union Membership in Belgium' (2006) 12(4) *Transfer: European Review of Labour and Research* 647, 654.
- 232 Kurt Vandaele, 'Newcomers as Potential Drivers of Union Revitalization: Survey Evidence from Belgium' (2020) 75 *Relations Industrielles* 351, 356; Bram Wauters and others, 'Perfect Match or Missing Link? An Analysis of the Representativeness of Trade Union Representatives in Belgium' (2014) 45 *Industrial Relations Journal* 424, 430.
- 233 Kurt Vandaele, 'Newcomers as Potential Drivers of Union Revitalization: Survey Evidence from Belgium' (2020) 75 *Relations Industrielles* 351, 352.
- 234 Kurt Vandaele, 'Newcomers as Potential Drivers of Union Revitalization: Survey Evidence from Belgium' (2020) 75 *Relations Industrielles* 351, 356.
- 235 Annette van den Berg, Arjen van Witteloostuijn and Olivier van der Brempt, 'Employee Workplace Representation in Belgium: Effects on Firm Performance' (2017) 38 *International Journal of Manpower* 130, 132.
- 236 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 369.
- 237 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 369.
- 238 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 263.
- 239 Applications no 52562/99 and 52620/99.
- 240 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 263.
- 241 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 263; Kurt Vandaele, 'A Report from the Homeland of the Ghent System: The Relationship between Unemployment and Trade Union Membership in Belgium' (2006) 12(4) *Transfer: European Review of Labour and Research* 647, 652.

Second, as mentioned above, the most significant collective bargaining takes place at sectoral level.²⁴² Only the wage norm (defining lower and upper limits) is determined nationally; actual wages are set by sectoral agreements for 75% of workers.²⁴³ Sectoral agreements determine most other conditions of employment as well, including the institutional role of unions at enterprise level (on which more below). However, the social partners may agree minimum terms at a sectoral level, allowing individual employers to conclude more favourable enterprise agreements. Enterprise agreements that are less favourable than the relevant sectoral agreement are invalid (likewise if the sectoral agreement establishes maximum conditions as well as minimum).²⁴⁴ Sectoral bargaining is conducted through bipartite Joint Committees, established by the state of its own initiative or at the request of the social partners.²⁴⁵ These are 'the core of the wage-setting system,'²⁴⁶ although Rusinek and Tojerow note that the relative importance of sectoral and enterprise-level bargaining can vary by industry.²⁴⁷ There has been a very recent tendency towards decentralisation of industrial relations in Belgium, encouraged by the EU through its Semester oversight.²⁴⁸ This has been strongly criticised by Dorssement as facilitating social dumping and undermining the autonomy of the social partners;²⁴⁹ however, it may be too early to draw definitive conclusions on the extent and effect of decentralisation.

Third, Belgium relies heavily on extension mechanisms to enhance bargaining coverage. Like other jurisdictions in this study, there are two kinds of extensions: first, both enterprise and sectoral agreements apply automatically by law to all employees of signatory employers, including non-unionised workers (with the exception of those provisions identified above that may reserve certain benefits to union members).²⁵⁰ Second, the state may, upon request from the social partners, extend sectoral agreements *erga omnes* by means of Royal Decree.²⁵¹ As outlined above, these sectoral agreements must be concluded by representative trade unions within the structure of Joint Committees, and meet various formal requirements. In practice, the government accedes to virtually all requests to extend, although there is discretion to refuse to extend provided the Minister for Labour gives specified reasons to the social partners.²⁵²

Under the Belgian model, collective agreements often provide for a sectoral unemployment or retirement fund. Benefits from these funds are reserved for trade union members, as outlined above. However, once an agreement is extended, non-signatory employers are also obliged to pay into the relevant fund. This effectively operates as a tax on employers, but a tax over which employers who engage in sectoral bargaining have influence. There is evidence this incentivises employers to join employer associations and engage in collective bargaining.²⁵³ Even multinational employers who do not engage in collective bargaining in their home state routinely join employer associations and conduct sectoral bargaining in Belgium, often becoming very active in collective bargaining to shape national labour relations.²⁵⁴

The use of extension varies by sector. The state does not normally extend agreements in sectors with high levels of unionisation, because 'the unions are strong enough to have the agreement enforced by their members.'²⁵⁵

242 For an overview, see Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 349 ff.

243 Michael Rusinek and Ilan Tojerow, 'The Regional Dimension of Collective Wage Bargaining: The Case of Belgium' (2014) 48 *Regional Studies* 301, 304.

244 Patrick Humblet and Marc Rigaux, *Introduction to Belgian Labour Law* (Intersentia 2016), 237.

245 Patrick Humblet and Marc Rigaux, *Introduction to Belgian Labour Law* (Intersentia 2016), 196 ff.

246 Michael Rusinek and Ilan Tojerow, 'The Regional Dimension of Collective Wage Bargaining: The Case of Belgium' (2014) 48 *Regional Studies* 301, 304.

247 Michael Rusinek and Ilan Tojerow, 'The Regional Dimension of Collective Wage Bargaining: The Case of Belgium' (2014) 48 *Regional Studies* 301, 304. See also François Rycx, 'Industry Wage Differentials and the Bargaining Regime in a Corporatist Country' (2003) 24 *International Journal of Manpower* 347.

248 Filip Dorssement, 'Wage-Setting in Belgium: Collective Autonomy under the Shadow of the Law' (2019) 12 *Italian Labour Law e-Journal* 11, 17.

249 Filip Dorssement, 'Wage-Setting in Belgium: Collective Autonomy under the Shadow of the Law' (2019) 12 *Italian Labour Law e-Journal* 11, 17.

250 Law of 5 December 1968, article 19.

251 Filip Dorssement, 'Wage-Setting in Belgium: Collective Autonomy under the Shadow of the Law' (2019) 12 *Italian Labour Law e-Journal* 11, Michael Rusinek and Ilan Tojerow, 'The Regional Dimension of Collective Wage Bargaining: The Case of Belgium' (2014) 48 *Regional Studies* 301, 303-4.

252 It is not immediately clear from the relevant legislation what reasons are sufficient: see the Law of 5 December 1968, articles 28 and 29. Patrick Humblet and Marc Rigaux, *Introduction to Belgian Labour Law* (Intersentia 2016), 243 say: 'The Crown can also refuse to declare a collective labour agreement generally binding if formal and validity requirements have not been fulfilled, but never for economic or political reasons.' Confusingly, Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 374-75 says: 'The Executive is not obliged to comply with the request; if he [sic] is of the opinion that he should not recommend to the Crown to make the agreement generally binding, he must make the reasons for his decision known ... [but t]here is nothing the social partners can do if the Secretary [for Employment and Labour] does not extend the agreement, does not inform the body, and forgets about the case.'

253 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 374.

254 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 374.

255 Patrick Humblet and Marc Rigaux, *Introduction to Belgian Labour Law* (Intersentia 2016), 243.

Other aspects of industrial relations

There are works councils in Belgium, in enterprises above 100 employees. Works councils consist of half nominees of the employer, half elected employees, with the employer as chair. Elections for works councils are held every four years.²⁵⁶ Works councils are not widely considered to be a significant aspect of Belgian industrial relations. There are also dedicated health and safety committees in most workplaces, but again these are not considered particularly important.²⁵⁷ van den Berg *et al* observe that 'Belgian works councils are clearly dominated by trade unions.'²⁵⁸ Representative trade unions hold a statutory monopoly on the presentation of candidates for elections to works councils, with the result that most members of works councils are also the trade union representatives in that workplace.²⁵⁹ In the event that there is no works council, trade union representatives have the right to take over some of the council's functions.²⁶⁰ Despite these shortcomings, turnout for works council elections tend to have turnouts over 70%.²⁶¹

Of greater significance are enterprise-level trade union delegations.²⁶² In accordance with the national Collective Agreement no 5 of 1971, representative trade unions have the right to a union delegation in the enterprise, subject to rules set out in the relevant sectoral agreement for that industry.²⁶³ These rules include the threshold of membership at which the trade union acquires the right to a delegation, the number of delegates,²⁶⁵ whether the delegates are nominated by unions or elected by staff, etc. Only trade union delegations can negotiate enterprise-level collective agreements. As we saw above, these enterprise agreements are extended to all workers, but in other respects (eg grievances and discipline) trade union delegations only act on behalf of unionised workers.²⁶⁶ In this respect they differ from members of works councils, who act on behalf of all workers. It should be noted that delegations can consist of delegates from several trade unions. In such circumstances, a 'chief delegate' is typically chosen by the delegates as a spokesperson for the delegation as a whole, on the basis of membership of 'the strongest union in the enterprise.'²⁶⁷

256 Roger Blanpain, 'Recent Trends in Collective Bargaining in Belgium' (1984) 123(3) *International Labour Review* 319.

257 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 331 ff.

258 Annette van den Berg, Arjen van Witteloostuijn and Olivier van der Brempt, 'Employee Workplace Representation in Belgium: Effects on Firm Performance' (2017) 38 *International Journal of Manpower* 130, 131.

259 Annette van den Berg, Arjen van Witteloostuijn and Olivier van der Brempt, 'Employee Workplace Representation in Belgium: Effects on Firm Performance' (2017) 38 *International Journal of Manpower* 130, 133.

260 Patrick Humblet and Marc Rigaux, *Introduction to Belgian Labour Law* (Intersentia 2016), 222.

261 Bram Wauters and others, 'Perfect Match or Missing Link? An Analysis of the Representativeness of Trade Union Representatives in Belgium' (2014) 45 *Industrial Relations Journal* 424, 429.

262 For general information, see Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 282 ff.

263 Patrick Humblet and Marc Rigaux, *Introduction to Belgian Labour Law* (Intersentia 2016), 221 ff.

264 The default provided in Collective Agreement no 5 is 10% of the workforce of that enterprise: see Patrick Humblet and Marc Rigaux, *Introduction to Belgian Labour Law* (Intersentia 2016), 223.

265 It should be noted that there is a separate framework in place for white-collar workers. The Collective Agreement of 9 July 1997 provides for a scale of specified numbers of delegates depending on the number of white-collar workers in an enterprise - from 2 delegates for enterprises with 25-75 workers, up to 10 delegates for more than 2,000 workers. See further Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 287.

266 Eurofound country profile for Belgium: <<https://www.eurofound.europa.eu/country/belgium>> accessed 1 April 2021.

267 Roger Blanpain, *Labour Law in Belgium* (Kluwer Law 2010), 285.

Lessons for Ireland

Like Denmark but in contrast to France, Belgium shows how to reach high levels of collective bargaining coverage with high levels of trade union density. However, Belgium makes much greater use than the North group countries of state intervention and legal mechanisms to enhance coverage.

First, there is widespread national and sectoral bargaining. National bargaining takes place under a statutory bipartite body, the National Labour Council. All agreements reached in this forum apply throughout the economy, although in practice these tend to be focused exclusively on wages rather than other working conditions. Representative trade unions are entitled to a seat at this body. High thresholds for representativeness incentivise unions to organise to maintain their position, and require organising on a cross-sectoral basis. More generally, making institutional rights of trade unions conditional on membership and organisational requirements promotes stability in industrial relations.

If the social partners are unable to reach a national agreement, the state reserves the right to step in. Whether imposed by the state or agreed by the social partners, the wage norm is key to industrial relations in Belgium. It posits a minimum index for wages, to protect workers' real wages from erosion by inflation and provide a floor for bargaining. On the other hand, it also sets a maximum level beyond which the social partners cannot agree wage increases in collective bargaining at sectoral and enterprise levels. This maximum is benchmarked against Belgium's closest trading partners (France, Germany and the Netherlands). Through the wage norm, the state seeks to protect Belgian competitiveness while also empowering the social partners to regulate the economy through collective bargaining.

There is clear evidence from Belgium that sectoral bargaining leads to greater coverage. The vast majority of workers have wages and conditions set by sectoral agreements (within the wage norm enshrined in the national agreement). There are ways of incentivising employers to join representative organisations that engage in sectoral bargaining: for example, if all employers have to contribute to a sectoral fund providing unemployment, illness or retirement benefits that is administered by the social partners, employers will want to engage in bargaining to influence the terms of that fund. This can have the effect of incentivising multinational companies to bargain collectively in the host state, even where they refuse to elsewhere. In Belgium this approach is accomplished by establishing such funds by collective agreement then extending the agreement to all employers, but there is no reason why the fund could not be established by statute with administration still delegated to social partners.

Extension mechanisms are routinely used in Belgium. Upon request from a representative union or employer association, the state extends sectoral collective agreements to non-signatory employers within that sector. However, this is used selectively – sectors with high levels of unionisation tend not to require extension. Enterprise-level agreements are automatically extended to all employees irrespective of union membership. In France, similar techniques have created a massive free-rider problem: workers obtain all the benefits of trade union membership without having to join, so membership levels are incredibly low. Belgium, on the other hand, retains one of the highest levels of trade union density in the world.

Various techniques allow it to strike this balance. First, some benefits of collective bargaining accrue only to trade union members. These tend to be bonuses and benefits in case of unemployment, illness or retirement rather than core wages. Many employers offer bonuses specifically to cover some of the cost of union dues. Such benefits can also be used as incentives to keep industrial peace. Second, Belgian law offers workers the choice to have public social welfare benefits paid through their trade union. This is particularly convenient if the worker would already be in receipt of benefits from a private fund established through a collective agreement, as just mentioned. Workers in Belgium believe, at least, that administration of these benefits is much more efficient in trade unions as compared to the public system. As a result, the overwhelming majority of recipients of unemployment benefits opt to receive these benefits through their union, creating what the literature calls a '*de facto* Ghent effect'.

Although Belgium makes use of other industrial relations machinery like works councils, these tend to be dominated by trade unions, which have a monopoly on the nomination of candidates. As a result, the same people who act as union reps are often elected to works councils. There is a '*subtle works council-trade union interplay*'²⁶⁸ This shows that alternative means of worker representation do not necessarily detract from the role and membership of trade unions.

268 Annette van den Berg, Arjen van Witteloostuijn and Olivier van der Brempt, 'Employee Workplace Representation in Belgium: Effects on Firm Performance' (2017) 38 *International Journal of Manpower* 130, 141.

The Netherlands

State	Population	TUD	CBC	GNI	% emp in services	% GDP services	Ease of business
Ireland	4.98m	24%	34%	47.6	84%	60%	80
Netherlands	16.68m	17%	79%	41.0	74%	78%	76

Analysis

Legal framework for industrial relations

Some commentators have voiced disquiet about the categorisation of the Dutch industrial relations system within the European ‘clusters’ relied on for this paper. They argue that the nature of the Netherlands as a relatively small and highly open economy requires it to adapt its industrial relations to trends within its trading partners, and as such it exhibits traits that are not easily categorised.²⁶⁹ Referred to as ‘democratic corporatism’ or the ‘poldermodel’, Dutch industrial relations are a product of this adaptability and compromise.²⁷⁰ Industrial relations in the Netherlands are characterised by a high degree of consensus and co-operation.²⁷¹ The literature overwhelmingly supports the view that the vast majority of employers are willing to engage in collective bargaining, believing it to be in their interest; that trade unions enjoy widespread public support in their bargaining efforts (Jacobs reports 80% of workers approve of trade unions, even if this does not translate into membership);²⁷² and that the state is supportive of the autonomy of the social partners in regulating economic affairs.²⁷³ The industrial relations system has been broadly stable for many decades: the most important legal instruments being the Act on Collective Agreements of 1927, the Act on Extension of Collective Agreements of 1937, and the Act on Works Councils of 1950 (as amended in 1971 and 1979, on which more below).

Tripartism is rare, as is national-level bargaining. There are two national industrial relations bodies, the Social and Economic Council and the Foundation of Labour: the former a tripartite body where the state consults with the social partners on matters of social and economic policy; the latter a bipartite body for national collective bargaining.²⁷⁴ Membership of these bodies is determined in accordance with a 1980 decree which sets out fairly vague criteria for representativeness, nevertheless with the result that there has been stability in respect of the three large federations of unions that are entitled to sit at the national bodies.²⁷⁵ The most important national agreement in historical context remains the Wassenaar Agreement of 1982: this set the foundation for the modern Dutch approach to collective bargaining. Since the

269 Jan Kees Looise, Nicole Torcka and Stefan Zagelmeyer, ‘Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View’ (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 249, 255-59.

270 Jan Kees Looise, Nicole Torcka and Stefan Zagelmeyer, ‘Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View’ (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 249, 256, 259. For an overview of the industrial relations system of the Netherlands, see Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 226-27.

271 Antoine Bevort, ‘Negotiated versus Adversarial Patterns of Social Democracy: A Comparison between the Netherlands and France’ (2016) 22 *Transfer: European Review of Labour and Research* 63.

272 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 230.

273 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, ‘To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany’ (2020) 58 *British Journal of Industrial Relations* 532; Antoine Bevort, ‘Negotiated versus Adversarial Patterns of Social Democracy: A Comparison between the Netherlands and France’ (2016) 22 *Transfer: European Review of Labour and Research* 63; Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 179.; Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 38, 256-57, 269.

274 Eurofound country profile for the Netherlands: <<https://www.eurofound.europa.eu/country/netherlands>> accessed 9 April 2021. Antoine Bevort, ‘Negotiated versus Adversarial Patterns of Social Democracy: A Comparison between the Netherlands and France’ (2016) 22 *Transfer: European Review of Labour and Research* 63 estimates this as somewhat lower, at just over half. However, it is unclear whether the reported figures indicate number of businesses, or the proportion of the workforce employed by those businesses.

275 Eurofound country profile for the Netherlands: <<https://www.eurofound.europa.eu/country/netherlands>> accessed 9 April 2021.

Wassenaar Agreement, trade unions have generally pursued a bargaining policy that accepts wage moderation in exchange for reductions in working time, flexible working arrangements, and job creation. There are few other national agreements,²⁷⁶ with instead the Foundation of Labour generally confining itself to issuing recommendations to the social partners as to the content of sectoral agreements.²⁷⁷

The most important bargaining has always taken place at the sectoral level.²⁷⁸ Employers strongly support sectoral bargaining as a means to protect their businesses from undercutting by competitors and to promote economic stability.²⁷⁹ Employers tend to join both sectoral and national associations, with an estimated 80% of employers affiliated to their relevant sectoral association.²⁸⁰ Trade unions organise on a sectoral basis but also join national federations – representatives of the relevant sectoral union will occupy the seat at the bargaining table assigned to each federation.²⁸¹ Unlike as we saw above in respect of Belgium, sectoral bargaining does not take place within formal established structures.²⁸² Rather, the social partners themselves decide the procedures for bargaining and appoint an independent chairperson. As such there is little state regulation of the process of collective bargaining at the sectoral level.

Huiskamp and Riemsdijk have observed the existence of an implementation gap between the content of sectoral agreements and the working reality of some employees in smaller enterprises.²⁸³ This tends to arise where there is no trade union presence on the ground in those enterprises (which is often the case due to the low trade union density in the Netherlands, on which more below) and no works council in place due to the size of the enterprise (again, see further below). As a result, the high collective bargaining coverage rates may disguise a more decentralised reality in practice.²⁸⁴ However, more recent research by Bevort indicates this is much less of a problem in the Netherlands than it is in France, another subject of this report.²⁸⁵ Partly this is because trade union density is higher in the Netherlands than France, but more importantly because most employers are genuinely committed to collective bargaining in the Netherlands as compared to a much more confrontational industrial relations environment in France.²⁸⁶

Notwithstanding the risk of hidden divergence identified above, enterprise-level bargaining is relatively unimportant in the Netherlands.²⁸⁷ Some very large employers engage in enterprise bargaining where unionisation rates in that workplace are very high. There is a great multiplicity of enterprise agreements among very small employers, but in practice these cover very few workers.²⁸⁸ For the most part, enterprise bargaining only takes place within flexibility granted by sectoral agreements.²⁸⁹ Jacobs identifies a trend towards more framework agreements being adopted at sectoral level that leave some details to be negotiated at enterprise level, either by trade unions or works councils.²⁹⁰ It is generally unlawful for enterprise agreements to derogate from sectoral agreements – and indeed Dutch employers have successfully lobbied in recent years to *restrict* the conditions under which employers may derogate by means of enterprise agreements.²⁹¹

-
- 276 National agreements can sometimes amount to 'shotgun weddings', produced only under pressure from the state that legislation will be forthcoming if agreement is not reached: see Rien Huiskamp and Maarten van Riemsdijk, 'Competitive Consensus: Bargaining on Employment and Competitiveness in the Netherlands' (2001) 7 *Transfer: European Review of Labour and Research* 682, 683-85.
- 277 Eurofound country profile for the Netherlands: <<https://www.eurofound.europa.eu/country/netherlands>> accessed 9 April 2021.
- 278 Jelle Visser, 'Two Cheers for Corporatism, One for the Market: Industrial Relations, Wage Moderation and Job Growth in the Netherlands' (1998) 36 *British Journal of Industrial Relations* 269, 276; Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 573.
- 279 They are helped in this by extension mechanisms, on which more below.
- 280 Eurofound country profile for the Netherlands: <<https://www.eurofound.europa.eu/country/netherlands>> accessed 9 April 2021.
- 281 Guy Mundlak, 'Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands' (2016) 17 *Theoretical Inquiries in Law* 163, 176.
- 282 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 252.
- 283 Rien Huiskamp and Maarten van Riemsdijk, 'Competitive Consensus: Bargaining on Employment and Competitiveness in the Netherlands' (2001) 7 *Transfer: European Review of Labour and Research* 682, 691 ff.
- 284 Rien Huiskamp and Maarten van Riemsdijk, 'Competitive Consensus: Bargaining on Employment and Competitiveness in the Netherlands' (2001) 7 *Transfer: European Review of Labour and Research* 682, 693.
- 285 Antoine Bevort, 'Negotiated versus Adversarial Patterns of Social Democracy: A Comparison between the Netherlands and France' (2016) 22 *Transfer: European Review of Labour and Research* 63, 73.
- 286 Antoine Bevort, 'Negotiated versus Adversarial Patterns of Social Democracy: A Comparison between the Netherlands and France' (2016) 22 *Transfer: European Review of Labour and Research* 63, 64-65.
- 287 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 537.
- 288 Rien Huiskamp and Maarten van Riemsdijk, 'Competitive Consensus: Bargaining on Employment and Competitiveness in the Netherlands' (2001) 7 *Transfer: European Review of Labour and Research* 682, 686.
- 289 Jan Kees Looise, Nicole Torca and Stefan Zagelmeyer, 'Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 249, 259.
- 290 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 247.
- 291 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 542.

Factors in collective bargaining coverage

The Netherlands, like France, has very high collective bargaining coverage despite very low trade union density. Indeed, coverage in the Netherlands has increased by 7% since 1990, while most of Europe has seen steady declines in that timeframe.²⁹² A number of factors in driving this coverage rate are visible in the literature, but first it is worth considering what the Netherlands does not rely on for bargaining coverage.

First, obviously, coverage is not driven by trade union membership and activity. Although not quite as low as France, trade union density in the Netherlands stands around 17%, lower even than Ireland. Following a period of great turbulence in the 1980s, there has been a steady fall since the 1990s, mirroring the trend in many other countries across Europe.²⁹³ Most commentators agree that a significant factor in the low membership rate is the same problem observed in France of non-unionised workers ‘free-riding’ on the benefits of collective bargaining because of extension of agreements (on which more below).²⁹⁴ Mundlak also argues that trade unions have been content to rely on state support for their bargaining position, and feel no pressure to organise workers on the ground.²⁹⁵ Trade unions do offer some incentives to workers to join, but these are limited: for example, discounted dues for new members (particularly young workers, who are disproportionately unorganised);²⁹⁶ withholding support for a works council in an enterprise unless 50% of workers are union members;²⁹⁷ and individual services like legal advice and support with retraining and job-searching.²⁹⁸ The extent to which these are successful vary widely by workplace.²⁹⁹ Mundlak argues that a significant gap in unions’ organising strategy lies in the absence of a Ghent-style system of social insurance like we saw above in Denmark and (in practice) Belgium.³⁰⁰ Again unlike Belgium, although it is legal for collective agreements to reserve some benefits for trade union members, this is generally not availed of in the Netherlands. The closed shop is never used in the Netherlands,³⁰¹ as it would run counter to the consensual culture of industrial relations.³⁰²

The low rate of trade union density does cause problems in the Netherlands. Foremost among these are concerns about legitimacy: although unions generally enjoy broad public support,³⁰³ some commentators express doubts that they can really be considered legitimate social partners and representative of the workforce with such low membership.³⁰⁴ Of more practical concern is the financial impact of dwindling membership. Dutch unions are notoriously under-resourced,³⁰⁵ relying on funding from employers under the terms of collective agreements in order to promote the benefits of those agreements and provide information to their own members.³⁰⁶ As Jacobs observes, this ‘cannot be good for their independence.’³⁰⁷

-
- 292 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, ‘To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany’ (2020) 58 *British Journal of Industrial Relations* 532, 532.
- 293 Jelle Visser, ‘Two Cheers for Corporatism, One for the Market: Industrial Relations, Wage Moderation and Job Growth in the Netherlands’ (1998) 36 *British Journal of Industrial Relations* 269, 287.
- 294 Jelle Visser, ‘Two Cheers for Corporatism, One for the Market: Industrial Relations, Wage Moderation and Job Growth in the Netherlands’ (1998) 36 *British Journal of Industrial Relations* 269, 287; Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 168; Jacobs 230.
- 295 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 180.
- 296 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 189.
- 297 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 187.
- 298 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 188.
- 299 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 188.
- 300 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 179.
- 301 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 233.
- 302 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 233.
- 303 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 230.
- 304 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 165, 181.
- 305 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 230.
- 306 Guy Mundlak, ‘Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands’ (2016) 17 *Theoretical Inquiries in Law* 163, 181; Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 230.

In stark contrast to France, unions in the Netherlands do not attempt to compensate for low membership with a militant approach to industrial action. Indeed, industrial unrest is relatively uncommon in the Netherlands, and only ever a last resort if a bargaining round has broken down.³⁰⁸ Most collective agreements contain peace clauses for the lifetime of the agreement. Unions typically adopt a moderate, consensual approach to industrial relations that reflects the inclinations of most workers, whether or not they are members of unions,³⁰⁹ and are therefore reluctant to strike. Mundlak notes that 'strikes are considered to be foreign to the culture of social partnership.'³¹⁰ However, this lack of militancy has clearly not had a negative effect on bargaining coverage.

Finally, it should be observed that there is no provision for mandatory recognition of trade unions for the purposes of bargaining in the Netherlands.³¹¹ Despite this, the overwhelming majority of employers do engage in collective bargaining. In part this is because they are incentivised to recognise unions despite not being obliged to do so: for example, only trade unions who are signatories to a collective agreement are bound by peace clauses, so employers want to include all unions with a presence at their workplace in the bargaining process.

In the absence of high union density, militant unions and mandatory recognition, the Netherlands relies on a number of other techniques to guarantee high levels of collective bargaining coverage. First, as noted before, sectoral bargaining is predominant. There is clear evidence in all the states we have looked at in this report that sectoral bargaining is correlated with high coverage rates. For reasons that will be returned to in a moment, the overwhelming majority of employers are members of sectoral associations and thereby participate in sectoral collective bargaining. Second, both sectoral and enterprise agreements are automatically extended to non-unionised workers within signatory enterprises. This is particularly important to compensate for the very low union density but, as we have seen above, contributes to that low density by creating free-rider problems.

Third, sectoral agreements are often extended to non-signatory employers.³¹² In accordance with the Act on Extension of Collective Agreements of 1937, the Minister for Labour can extend an agreement only upon request from the social partners. In practice, the request must come from both sides – the social partners are each given a veto over extension. The extension may only be granted if the Minister is satisfied the parties represent a 'substantial majority' of the workforce, which in practice is taken to be 55% of workers in the sector.³¹³ Since trade union membership is so low, it is the number of workers employed by the members of the employers' association that really matters for this calculation. The social partners are responsible for providing evidence of coverage rates. The Minister also has discretion to refuse a request to extend for reasons of social and economic policy.³¹⁴ The law also makes provision for exemptions from the terms of a collective agreement in cases of business hardship³¹⁵ but, as noted above, employers have actually lobbied to restrict these exceptions in recent years.

About half of sectoral agreements are extended.³¹⁶ However, commentators argue that extension is only indirectly responsible for high coverage rates. Paster *et al* point out that only 7% of workers benefit directly from extension,³¹⁷ in the sense that they work for employers who were not parties to the agreement. Rather, extension functions as a means of incentivising employers to subscribe to representative associations and engage in collective bargaining in the first place. If employers know they will be subject to the terms of a collective agreement whether they engage in bargaining or not, they have an incentive to engage in bargaining so as to influence the terms of the agreement to which they will be subject.³¹⁸

307 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 233.

308 Eurofound country profile for the Netherlands: <<https://www.eurofound.europa.eu/country/netherlands>> accessed 9 April 2021.

309 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 38.

310 Guy Mundlak, 'Organizing Workers in Hybrid Systems: Comparing Trade Union Strategies in Four Countries - Austria, Germany, Israel and the Netherlands' (2016) 17 *Theoretical Inquiries in Law* 163, 193.

311 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 256-67.

312 Unless otherwise indicated, what follows is taken from Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 266 ff.

313 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 539 notes that the minister may extend an agreement that is less representative if to do so is in the 'general interest'.

314 Jelle Visser, 'Two Cheers for Corporatism, One for the Market: Industrial Relations, Wage Moderation and Job Growth in the Netherlands' (1998) 36 *British Journal of Industrial Relations* 269, 277; Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 539.

315 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 268.

316 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 533.

317 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 538-9.

318 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532.

There are additional incentives for employers to engage in bargaining. Research in the Netherlands strongly supports the view that employers believe widespread collective bargaining is in their interests as individual businesses and in respect of the economy overall. Even employers who are not members of employers' associations for the purposes of sectoral bargaining overwhelmingly support both collective bargaining in principle and the extension of collective agreements to non-party employers like themselves.³¹⁹ The literature suggests a number of reasons for this attitude. First, employers want industrial peace and stability within the labour market. They pursue a co-operative relationship with unions, even in industries with very low trade union density,³²⁰ to uphold the Dutch tradition of consensual, moderate industrial relations.

Second, employers in the Netherlands take a different perspective on wage competition as compared to some other countries in Europe.³²¹ Most employers believe collective agreements prevent 'excessive competition' in the economy that actually harms growth;³²² they believe in competition on the basis of productivity and innovation rather than wages. Looise *et al* note that the evidence from the Netherlands is that trade union activity and collective bargaining have no negative effects on workplace productivity, innovation and competitiveness – rather, that worker participation enhances innovation by promoting 'intellectual capital'.³²³ There is equally no evidence from studies of the Netherlands that collective bargaining necessarily increases labour costs.³²⁴

Third, Dutch employers believe that regulation of the economy by collective bargaining is preferable to state regulatory intervention, because it is more flexible, responsive to business concerns, and tailored to workplace realities.³²⁵ As a result, business interests have even lobbied against past proposals by right-wing governments to restrict collective bargaining.³²⁶ One interesting aspect in which collective bargaining promotes flexibility is so-called 'cafeteria' agreements: rather than one-size-fits-all packages of benefits, some collective agreements allow individual workers to trade off designated benefits against each other.³²⁷ For example, agreements might entitle workers to a set number of days off or a wage increase or reduced working time, etc. Different categories of workers within a given industry will be interested in different combinations of benefits – for example, the evidence shows that higher-level staff are more inclined to trade holidays they do not want to use anyway for extra pay.³²⁸ 70% of Dutch workers support the inclusion of such interchangeable benefits within collective agreements (although in practice only about 20% of workers take advantage of the ability to trade in standard benefits for other options).³²⁹

Many of these are ingrained cultural intuitions on the part of Dutch managers.³³⁰ They are likewise in line with public sentiment, which as noted above strongly approves of trade unions and collective bargaining, notwithstanding low actual membership rates. However, the state does play a role in promoting this attitude among the business community. We saw above how the state's use of extension mechanisms incentivise employers to engage in collective bargaining to shape the rules of the sector in which they operate. Also very important is the strategic use of public procurement, like we saw in Denmark. The Netherlands spends 44% of its national budget on procurement, which amounts to 20% of GDP and is the highest proportion in the OECD.³³¹ Since 2013, the Dutch government has required businesses awarded

319 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 540.

320 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 257 gives the example of the hospitality industry, which has only 7% trade union density but is still covered by a sectoral agreement.

321 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 550.

322 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 269.

323 Jan Kees Looise, Nicole Torca and Stefan Zagelmeyer, 'Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 249, 262-65.

324 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 542.

325 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 540.

326 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 541-42.

327 Lei Delsen, Jos Benders and Jeroen Smits, 'Choices Within Collective Labour Agreements à La Carte in the Netherlands' (2006) 44 *British Journal of Industrial Relations* 51.

328 Lei Delsen, Jos Benders and Jeroen Smits, 'Choices Within Collective Labour Agreements à La Carte in the Netherlands' (2006) 44 *British Journal of Industrial Relations* 51, 63-64, 68-69.

329 Lei Delsen, Jos Benders and Jeroen Smits, 'Choices Within Collective Labour Agreements à La Carte in the Netherlands' (2006) 44 *British Journal of Industrial Relations* 51, 54 ff.

330 Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 38.

331 Amy Ludlow, 'Social Procurement: Policy and Practice Future Directions in EU Labour Law: Academic Contributions' (2016) 7 *European Labour Law Journal* 479, 482.

state contracts to demonstrate compliance with core ILO standards, including the conventions on freedom of association and collective bargaining.³³² These are made binding as terms of all state contracts (rather than made conditions of the initial tender).³³³ 'Social return' conditions in those contracts specify the percentage of the tender fee that is to be spent on wages, which reduces scope for the awardees to squeeze wages in order to increase profit margin.³³⁴ Ludlow argues that 'the Netherlands [is] a front-runner in the use of public procurement to further social policy objectives' within the EU.³³⁵

Other aspects of industrial relations

We saw above one aspect of how trade unions interact with works councils in order to shore up their own membership, by withholding support for the works council where fewer than 50% of workers are unionised. Notwithstanding this, Dutch law provides for mandatory works councils in enterprises with over 50 employees.³³⁶ For workplaces between ten and 50 employees, there must be dedicated staff representatives who enjoy some of the same rights as works council members.³³⁷ Until 1979, the effectiveness of works councils was neutered by the fact that the employer chaired the council and could nominate up to half the members; since then, representatives are entirely elected from among staff.³³⁸ Elections are held for works councils every three years; any employee who has worked in the business for one year can run for election.³³⁹ Any trade union with members in that workplace is entitled to nominate candidates from among the staff. Union-backed candidates generally win works councils elections: 65% of works councils members are trade union members, notwithstanding that only 17% of workers at large are unionised.³⁴⁰ The prominence of union members on works councils compensates for the fact that formal union presence in the form of shop stewards at the workplace is 'relatively rare'.³⁴¹ Looise *et al* emphasise the importance of co-operation between trade unions and works councils,³⁴² particularly since trade unions are often most active at sectoral levels and thus disconnected from workers on the ground.³⁴³

Works councils enjoy tiered sets of rights – information about some issues, mandatory consultation on others, and a veto over a narrower class of decisions relating to working time, the management of occupational pension funds, and similar issues.³⁴⁴ Although works councils do not enjoy formal collective bargaining powers, they will often negotiate agreements with management in respect of those issues over which they have the most robust co-determination powers.³⁴⁵ It has been observed that multinational employers demonstrate a preference for dealing internally with works councils than trade unions.³⁴⁶ Employers must pay the running costs of works councils, including the expenses of hiring external expert consultants to advise the works council members on a variety of issues provided those expenses have been notified to the employer in advance.³⁴⁷ Representatives are entitled to paid time off for works council business,³⁴⁸ with specific minimum hours that representatives must devote to council activities *per annum*.³⁴⁹

- 332 Amy Ludlow, 'Social Procurement: Policy and Practice Future Directions in EU Labour Law: Academic Contributions' (2016) 7 *European Labour Law Journal* 479, 486.
- 333 Amy Ludlow, 'Social Procurement: Policy and Practice Future Directions in EU Labour Law: Academic Contributions' (2016) 7 *European Labour Law Journal* 479, 486.
- 334 Amy Ludlow, 'Social Procurement: Policy and Practice Future Directions in EU Labour Law: Academic Contributions' (2016) 7 *European Labour Law Journal* 479, 487.
- 335 Amy Ludlow, 'Social Procurement: Policy and Practice Future Directions in EU Labour Law: Academic Contributions' (2016) 7 *European Labour Law Journal* 479, 488.
- 336 For an overview of the laws on works councils, see Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 297 ff; Ferdinand BJ Grapperhaus and Leonard G Verburg, *Employment Law and Works Councils of the Netherlands* (Kluwer Law 2009).
- 337 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 299. See also Eurofound country profile for the Netherlands: <<https://www.eurofound.europa.eu/country/netherlands>> accessed 9 April 2021.
- 338 Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 31.
- 339 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 303.
- 340 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 303.
- 341 Eurofound country profile for the Netherlands: <<https://www.eurofound.europa.eu/country/netherlands>> accessed 9 April 2021.
- 342 Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 50.
- 343 Jan Kees Looise, Nicole Torca and Stefan Zagelmeyer, 'Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 249, 274-75.
- 344 Ferdinand BJ Grapperhaus and Leonard G Verburg, *Employment Law and Works Councils of the Netherlands* (Kluwer Law 2009) ch 11, 59 ff; Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 32.
- 345 Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 32.
- 346 Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 34.
- 347 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 304.
- 348 Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 32.
- 349 Ferdinand BJ Grapperhaus and Leonard G Verburg, *Employment Law and Works Councils of the Netherlands* (Kluwer Law 2009) 47.

Finally, there is provision for worker representation on corporate boards in the Netherlands. There are two tiers of board (management and supervisory),³⁵⁰ with workers entitled to elect a specified number of members of the supervisory board depending on the size of the enterprise and its market value.³⁵¹

Lessons for Ireland

As noted earlier in the report, the Netherlands is one of the most competitive, open and globalised economies in the world. It scores very highly in ease of doing business. Yet none of this is inconsistent with widespread and entrenched collective bargaining – indeed, the overwhelming majority of Dutch employers believe collective bargaining strengthens their businesses and the economy. Even employers who themselves do not engage in collective bargaining through sectoral representative associations recognise the value in collective bargaining, with agreements extended throughout the sector, for promoting fair competition in the economy. Dutch collective bargaining supports innovation, flexibility and productivity. This is particularly the case where agreements themselves are flexible: either because they leave some detail to be worked out through enterprise-level bargaining, or because they include packets of benefits individual workers can select between. Further to this end, trade unions have chosen to pursue reduced working time, job security and the creation of new jobs, at the expense of accepting wage moderation.

Sectoral bargaining and extensions are essential to high coverage rates, but not because many workers directly benefit from agreements being extended to their employers. Rather, extension operates alongside other incentives to encourage employers to join sectoral associations and engage in the bargaining process. Extension remains at the discretion of the state, and can thus be used to implement public policy goals while still respecting the autonomy of the social partners. It should be noted that employers in the Netherlands were not always so supportive of extension mechanisms – Paster *et al* report that extension was viewed with suspicion by employers until it was in operation, and evidence became available that it had positive effects on business by preventing undercutting on the basis of poor labour standards.³⁵²

As a result of these incentives and extension mechanisms, the Netherlands has no need for mandatory recognition of trade unions. On the other hand, however, there is clear evidence once again that extension operates as a double-edged sword for trade unions: it increases the effectiveness of collective bargaining, but generates the risk that non-members can free-ride on bargaining efforts, reducing the incentive to join a union at all.

Thus Dutch trade unions can operate relatively successfully without high membership rates nor mandatory recognition. However, some observers have raised concerns that dwindling membership imperils their legitimacy and risks increasing disconnect from the interests and views of workers on the ground. Of more immediate concern is the financial consequences of low membership rates, which leave unions dependent on financial support from employers and their representatives. Some attempts have been made to recruit new members, but clearly more efforts are needed. To make up for a light presence in many enterprises, trade unions engage with elections for works councils and co-operate to promote workers' interests; this shows how other forms of representation at enterprise level can complement and strengthen, rather than undermine, trade union activity.

Finally, the Netherlands makes significant use of public procurement to promote collective bargaining, building support for bargaining into state contracts. This adds to the evidence already recounted in respect of Denmark of the potential for public procurement to promote collective bargaining rights.

350 Antoine Jacobs, *Labour Law in the Netherlands* (2nd edn, Kluwer Law 2015) 294.

351 For more information, see: Antoine Bevoort, 'Negotiated versus Adversarial Patterns of Social Democracy: A Comparison between the Netherlands and France' (2016) 22 *Transfer: European Review of Labour and Research* 63, 76; Ferdinand BJ Grapperhaus and Leonard G Verburg, *Employment Law and Works Councils of the Netherlands* (Kluwer Law 2009) 41; Jan Kees Looise and Michiel Drucker, 'Employee Participation in Multinational Enterprises: The Effects of Globalisation on Dutch Works Councils' (2002) 24 *Employee Relations* 29, 38.

352 Thomas Paster, Dennie Oude Nijhuis and Maximilian Kiecker, 'To Extend or Not to Extend: Explaining the Divergent Use of Statutory Bargaining Extensions in the Netherlands and Germany' (2020) 58 *British Journal of Industrial Relations* 532, 538.

Part IV: Collective Bargaining in EU law

This Part of the report will examine the position of collective bargaining in a number of areas of EU law. It does not purport to be a comprehensive assessment of EU labour law, much less of the complex interactions between EU law and national labour law.³⁵³ Scholars have noted that it is not just EU labour law that is relevant for the discussion of labour law in the EU; a raft of EU legal measures is of relevance to labour law, sometimes in unexpected ways.³⁵⁴ Therefore, this Part will examine a number of ways in which EU law supports collective bargaining rights within the member states, specifically:

1. Fundamental rights and the Treaties
2. Economic norms:
 - a. Internal market rules
 - b. Competition law
3. Participation directives

It will then examine the recent proposal from the European Commission for a directive on an adequate minimum wage that is designed to enhance collective bargaining rights and coverage.

A brief observation should be made from the outset. It is atypical of scholarship on labour law to speak of EU law supporting and protecting collective bargaining. Far more often, particularly in the past decade or so, academic commentary has been critical of the EU in respect of the effect of Union law and policy on the rights of trade unions (and of workers more broadly).³⁵⁵ In particular, the economic governance policies of the Troika during the Financial Crisis, and of the European Commission in the European Semester programme that succeeded formal bailout programme supervision, has come in for trenchant criticism for their effect on national labour laws and standards (even in member states that were not subject to bailouts).³⁵⁶ Furthermore, high-profile decisions of the Court of Justice of the EU suggested it was an inhospitable environment for organised labour, prioritising market integration and freedoms for businesses over worker protection and collective action.³⁵⁷

This Part will strike a more optimistic note, for two reasons. First, even within the EU legal measures and decisions criticised by defenders of organised labour, there are many aspects in which Union law has always supported collective bargaining in a way that would be beneficial to Ireland in particular. It is important to recognise that Ireland is starting from a low base in terms of collective bargaining rights – we are an outlier in the EU, as set out in Part II. Therefore, the risks potentially posed by some areas of EU law to well-developed systems of collective bargaining do not threaten Ireland's, and still leave much room for

353 For such a broad survey, see: Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016); Monika Schlachter (ed), *EU Labour Law: A Commentary* (Kluwer 2015); Roger Blanpain, *European Labour Law* (14th edn, Kluwer 2014); ACL Davies, *EU Labour Law* (Elgar 2012); and Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012).

354 Phil Syrpis, 'The EU's Role in Labour Law : An Overview of the Rationales for EU Involvement in the Field' in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016) ch 2, 21; Jeremias Prassl, 'The Interaction of EU Law and National Law: Between Myth and Reality' ch 3 in the same volume, 44.

355 See, for example: Nikolett Hos, 'The Principle of Proportionality in Viking and Laval: An Appropriate Standard of Judicial Review?' (2010) 1 *European Labour Law Journal* 236; Marco Rocca, 'Enemy at the (Flood) Gates: EU Exceptionalism in Recent Tensions with the International Protection of Social Rights' (2016) 7 *European Labour Law Journal* 52.

356 Alan Bogg and KD Ewing, 'The Continuing Evolution of European Labour Law and the Changing Context for Trade Union Organizing Global Barriers to Union Organizing' (2016) 38 *Comparative Labor Law & Policy Journal* 211.

357 Most notoriously, the 'Laval Quartet' (also referred to by Pieter Pecinovsky, 'Evolutions in the Social Case Law of the Court of Justice: The Follow-up Cases of the Laval Quartet: ESA and RegioPost European Developments' (2016) 7 *European Labour Law Journal* 294 as 'the Court's Four Horsemen'): C-438/05 *Viking Line*, C-341/05 *Laval*, C-346/06 *Rüffert* and C-319/06 *Commission v Luxembourg*. These will be discussed in detail later.

improvement before the criticisms that are levelled against EU law become relevant. The survival of those systems referred to in Part III demonstrates how much scope EU law leaves for collective bargaining to flourish, relative to Ireland's current position. A comparison may be drawn with the *Viking Line* decision: although condemned by labour activists and commentators in Finland and other Nordic member states, the same case was strongly welcomed by trade unionists in Eastern states, who benefitted from the CJEU's recognition of the right to strike. Thus Ireland may benefit from the positive aspects of EU law notwithstanding criticisms from member states with much higher collective bargaining standards than we have.

Second, there has been a noticeable change of direction from EU policymakers and the Court since about 2015. As Europe looks to emerge from the second economic catastrophe this century, the Covid-19 pandemic, there are clear signs that the EU has learned at least some lessons from its handling of the first. The agenda of the Commission, and (it seems) the jurisprudence of the Court, are more worker-friendly than immediately before and during the Financial Crisis. A number of proposals to enhance collective bargaining rights have been put forward in recent months; these will be examined towards the end of this Part.

It bears repeating this is not a comprehensive study of EU labour and economic law. It will, however, suggest a basis in EU law for enhanced protection of collective bargaining in Ireland. There are reasons to believe this would be particularly useful in overcoming the reasons set out in Part II as to why bargaining coverage is so low in Ireland. Chief among these lies in Article 29.4.6, which provides:

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State... that are necessitated by the obligations of membership of the European Union... or prevents laws enacted by, acts done or measures adopted by [the EU] from having the force of law in the State.

This has been interpreted very expansively by the Irish courts. In *Crotty v An Taoiseach*³⁵⁸, Barrington J held:

The Constitution could not be invoked to invalidate any measure which the State was directed by the institutions of the [EU] to take arising out of the exercise of their powers nor to invalidate any regulation or any decision of the European Court...³⁵⁹

Murphy J went even further in *Lawlor v Minister for Agriculture*³⁶⁰, saying:

It seems to me that the word 'necessitated' in this context must extend to include acts or measures which are consequent upon membership of the [EU] and in general fulfilment of the obligations of such membership and even where there may be a choice [or] degree of discretion vested in the State as to the particular manner in which it would meet the general spirit of its obligations of membership.³⁶¹

The matter becomes more complicated where EU law leaves discretion to the member states in the manner of implementation of their obligations.³⁶² Most of the case law focuses on the question of whether, in such circumstances, the Oireachtas needs to implement the relevant EU law by means of primary legislation rather than a minister doing so by statutory instrument. That question does not arise for the purposes of this report, since it is to be assumed the Oireachtas would legislate to support collective bargaining in the ways envisaged in Part III.

It was argued in Part II that existing case law in this area should not be understood to mean that mandatory recognition of trade unions for the purposes of collective bargaining, a right to collectively bargain, sectoral bargaining mechanisms, and the extension of collective agreements are all necessarily unconstitutional. Nevertheless, if there are concerns about constitutionality of measures like those discussed in Part III, it has just been shown these lose their force if the measure is based on EU law. As such, it is worth considering how EU law both accommodates and indeed promotes collective bargaining. This will now be done in respect of the three areas of EU law set out above, plus the recent proposals from the European Commission.

358 [1987] IR 713.

359 [1987] IR 713, 727-28.

360 [1990] 1 IR 356.

361 [1990] 1 IR 356, 377.

362 For discussion, see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) 601 ff.

1. Fundamental rights and the Treaties

The first thing to note in this section is that many of the instruments of international law discussed in Part I are expressly incorporated into, or relied on in the interpretation of, EU law. For example, Article 52(3) of the Charter of Fundamental Rights of the European Union³⁶³ proclaims:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53 goes on to declare:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

As such, the ECHR operates as a 'floor' for the rights protected in EU law, both through the Charter and the 'general principles of EU law' enforced by the Court of Justice of the EU (CJEU) for decades. This includes the elaboration of Article 11 on freedom of association in the jurisprudence of the European Court of Human Rights. Although the European Social Charter is not explicitly mentioned, as an 'international agreement to which... all the Member States are party', it too falls within the scope of Article 53.³⁶⁴

The position of the ECHR and ESC is further supported by Article 351 of the Treaty on the Functioning of the EU (TFEU), which sets out:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.³⁶⁵

Ireland acceded to the ECHR in 1951 and to the ESC in 1961, long before accession to the EU in 1973. As such, the Treaties cannot simply override Ireland's obligations in respect of these instruments.³⁶⁶ At the very least, Ireland is obliged to reconcile the respective requirements of EU and international law as best it can, including by co-operation with other member states and the Union legislative process.

Of course, Article 351 TFEU applies with equal force to any ILO conventions entered into by Ireland pre-accession. Conventions 87 on freedom of association and 98 on collective bargaining were both ratified in 1955. Furthermore, they enjoy the protection of Article 53 Charter, being 'international agreement[s] to which... all the Member States are party' as fundamental conventions of the ILO. Finally, Article 151 TFEU refers directly to the ESC when setting out the social policy competences of the Union. Thus we can see that the obligations on Ireland set out in Part I of this report are further buttressed by EU law.

363 Hereafter 'the Charter'.

364 Interestingly, Colm O'Connell, 'The European Social Charter and EU Labour Law' in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016) does not mention this.

365 For discussion see Marco Rocca, 'Enemy at the (Flood) Gates: EU Exceptionalism in Recent Tensions with the International Protection of Social Rights' (2016) 7 *European Labour Law Journal* 52.

366 Marco Rocca, 'Enemy at the (Flood) Gates: EU Exceptionalism in Recent Tensions with the International Protection of Social Rights' (2016) 7 *European Labour Law Journal* 52 does take a more pessimistic view of the effect of this Article, considering that 'appropriate steps' may include withdrawing from the other international obligations where the obligations cannot be reconciled. However, it is clear from this section that the obligations should be interpreted in conformity with one another as much as possible.

Building on the ECHR, the ESC, and other international human rights norms, the Charter itself sets out the following rights of relevance to this issue:

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.³⁶⁷

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.³⁶⁸

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.³⁶⁹

It should be stressed again that these must provide protection at least equivalent to the ECHR (and, by virtue of the ECtHR's integrated approach to interpretation discussed in Part I, the ESC and relevant ILO conventions).

As a result of the foregoing, any restriction on business freedoms under EU law (whether that is the internal market freedoms or the free-standing 'freedom to conduct a business in accordance with Community law and national laws and practices' recognised in Article 16 Charter) is capable of being justified in pursuit of the obligations of Articles 12, 27 and 28 Charter. Likewise, EU competition, state aid and public procurement laws must be interpreted by both the CJEU and national courts in compliance with these rights in the Charter.³⁷⁰

As the Commission has stated in respect of the Charter, 'The Union's action must be above reproach when it comes to fundamental rights. The Charter must serve as a compass for the Union's policies and their implementation by the Member States.'³⁷¹ This is recognised within the EU legislative process itself: the Commission is obliged to promote social dialogue between business and labour, consult with the social partners in the preparation of proposed legislation, and the EU may use Council decisions to give agreements of the social partners at EU level effect as EU law.³⁷² In this regard, the CJEU has recognised the contribution collective bargaining makes to 'the principle of democracy on which the Union is founded'.³⁷³

Of more recent provenance in the EU pantheon of fundamental rights is the European Pillar of Social Rights, adopted by the Union institutions in 2017.³⁷⁴ Pillar 8 sets out:

The social partners... shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action... Support for increased capacity of social partners to promote social dialogue shall be encouraged.

The adoption of the Pillar of Social Rights is among the indicators of a recent shift in the EU's approach to collective bargaining mentioned above. It must be observed that the Pillar is not itself legally binding, but rather a collection of political priorities for the Union and for member states. The Commission has adopted an Action Plan to implement the Pillar across the various fields of EU law, which promises 'an initiative to support social dialogue at EU and national level in 2022';³⁷⁵ in the meantime, 'The Commission encourages... Member States to encourage and create the conditions for improving the functioning and effectiveness of collective bargaining and social dialogue'.³⁷⁶

367 Article 12(1).

368 Article 27.

369 Article 28. For more information on Article 28 Charter, see Filip Dorsemont and Marco Rocca, 'Article 28 - Right of Collective Bargaining and Action' in Filip Dorsemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) ch 22.

370 C-271/08 *Commission v Germany*; see also Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 716.

371 European Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' COM(2010) 573, 4.

372 See Articles 152, 154 and 155 TFEU.

373 See Alan Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) *European Labour Law Journal*, available at <<https://journals.sagepub.com/doi/pdf/10.1177/20319525211000360>> accessed 27 April 2021; and Stijn Smismans, 'The European Social Dialogue: Between Constitutional and Labour Law' (2007) 32(3) *European Law Review* 341, 342, 346 ff, citing T-135/96 *UEAPME*, in particular [89].

374 Available at <https://ec.europa.eu/info/sites/info/files/social-summit-european-pillar-social-rights-booklet_en.pdf> accessed 15 April 2021.

375 European Commission, 'The European Pillar of Social Rights Action Plan' (2021), <https://ec.europa.eu/info/files/european-pillar-social-rights-action-plan_en> (accessed 26 April 2021) 36.

376 European Commission, 'The European Pillar of Social Rights Action Plan' (2021), <https://ec.europa.eu/info/files/european-pillar-social-rights-action-plan_en> (accessed 26 April 2021) 36-37.

2. Economic norms

It is beyond the scope of this report to consider the full range of economic governance measures that exist in the EU legal sphere. In particular, it is not proposed to examine the European Semester and associated requirements of fiscal governance under, for example, the Fiscal Compact and Stability and Growth Pact. Nor will the potential relevance of state aid and public procurement law be considered.³⁷⁷ The examination of internal market rules and competition will be limited to demonstrating that these areas of law are broadly supportive of many of the collective bargaining mechanisms discussed in this report, even to the extent of preferring these to other kinds of economic regulation at national level.

(a) Internal market rules

The various measures of EU law which contribute to the functioning of the internal market have come in for repeated criticism as compromising the rights of social partners to bargain collectively and otherwise support high labour standards. While some of this is certainly warranted, it is clear that there is ample scope within the internal market rules for Ireland to improve collective bargaining rights.

It is well-established in the case law that the internal market rules do not prohibit collective bargaining in general, nor do they prohibit devices like extension mechanisms to increase collective bargaining. Indeed, the approaches to collective bargaining recommended in Part III of this report can contribute to strengthening the internal market, and most importantly represent better means of complying with internal market rules than the voluntarist system currently established in Ireland. In *Laval*, the CJEU held:

Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory... either by law, regulation or administrative provision, or by collective agreements or arbitration awards which have been declared universally applicable [or,] in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to base themselves on those which are generally applicable to all similar undertakings in the industry concerned or those which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory... [R]ecourse to the latter possibility requires, first, that the Member State must so decide...³⁷⁸

The clear implication of this passage is that EU law not only allows for national labour standards to be set by means of collective bargaining alongside or instead of legislation, but that member states are encouraged to intervene in collective bargaining processes to declare agreements either 'of universal application' or 'generally applicable to all similar undertakings in the industry concerned'. Specifically in *Laval*, the Court held that it was not permissible for national trade unions to enforce collective agreements against undertakings operating from other member states unless those agreements had been extended by the state. Since that case was decided, the Union institutions and the member states have been obliged to respect the right to collectively bargain, by virtue of the Charter coming into force. They are supported in this endeavour by the Pillar and its Action Plan, even though these are not themselves legally binding. As a result, member states are now obliged to balance two obligations: not to allow industrial action in pursuit of collect agreements unless those agreements have been made mandatory by the state on one hand, and promote collective bargaining on the other. That leaves a relatively narrow window of compliance, which seems to be only satisfied by the use of extension mechanisms.

³⁷⁷ However, regard should be had to the experiences of Denmark and the Netherlands in particular in using public procurement to enhance collective bargaining: see Part III.

³⁷⁸ C-341/05 *Laval*, [57]-[66].

This position has support in the literature. Blanpain argues that member states have two options in the aftermath of *Laval*: either rely exclusively on legislation to protect minimum labour standards (confining collective bargaining to adopting standards higher than this minimum, which cannot be enforced against undertakings from other member states), or extend collective agreements to function as a national or sectoral minimum (which can be enforced against undertakings from other member states).³⁷⁹ Malmberg and Sigeman conclude from *Laval* that while industrial action in order to protect the conditions of trade union members at a given enterprise will always prevail over the internal market freedoms of businesses, trade unions cannot protect the interests of their members from being undercut by employers who refuse to bargain unless agreements are extended.³⁸⁰ They argue the clear consequence of *Laval* is that any national industry open to competition from undertakings in other member states needs a mandatory sectoral agreement featuring binding minimum wages; industrial action to enforce any other form of collective bargaining process will be in violation of the Treaties.³⁸¹ Therefore, given the need to interpret EU law in light of the fundamental right to bargain collectively, it is hard to see how the state could adequately protect this right *without* an extension mechanism.³⁸²

At first glance it appears the decision in *Alemo-Herron* casts doubt on this position.³⁸³ Here, the CJEU held it was incompatible with Article 16 of the Charter to bind an employer to pay wages determined by a collective bargaining process in which it did not take part. Although in that case compliance with the collective agreement was specified in the individual contracts of employment, it seems likely similar reasoning would apply to collective agreements imposed on the employer by means of extension. However, it is clear from the judgment that the violation arose because the employer was *prohibited* from taking part in the bargaining process.³⁸⁴ If anything, the Court expressed a preference for agreements to be extended by law rather than, as had occurred in that case, be incorporated into private contracts which would bind future undertakings who acquired the business in question.³⁸⁵ As such, extension of collective agreements is perfectly compatible with EU internal market law provided the employer has the opportunity to participate in the bargaining process. Even if an individual employer chooses not to participate, the agreement can be extended to that undertaking.

This is confirmed by the more recent decision of the CJEU in *Elektrobundowa*³⁸⁶, which was factually similar to *Laval* but decided after the entry into force of the Charter. Here, the Court held the employer of posted workers was obliged to pay minimum wage rates set down in a collective agreement, because that agreement had been declared binding on all actors within the sector by the host state. This was the case even where the contracts of employment had been concluded under the laws of the home state and therefore not within the context of that collective agreement.

(b) Competition law

In a recent Irish case, *Náisiúnta Leictreach Conraitheoir Éireann v Labour Court*,³⁸⁷ the High Court expressed misgivings about the consequences of the effective extension of sectoral collective agreements on competition within that industry.³⁸⁸ However, the Court neglected to make any reference to the *Albany* decision,³⁸⁹ in which the CJEU held:

379 Roger Blanpain, 'The Treaty Needs to Be Amended' (2013) 4 European Labour Law Journal 28, 31.

380 Jonas Malmberg and Tore Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 Common Market Law Review 1115, 1133.

381 Jonas Malmberg and Tore Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 Common Market Law Review 1115, 1142.

382 Rebecca Zahn, 'Trade Unions and the Challenges of EU Enlargement: The Kind of Laws the Unions Ought to Want Future Directions in EU Labour Law: Academic Contributions' (2016) 7 European Labour Law Journal 387, 401.

383 C-426/11 *Alemo-Herron*.

384 C-426/11 *Alemo-Herron*, [33]-[34], see also [12].

385 C-426/11 *Alemo-Herron*, [10]-[11].

386 C-396/13 *Elektrobundowa*.

387 [2020] IEHC 303.

388 [2020] IEHC 303, [132].

389 C-67/96 *Albany*.

It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [Article 101 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment. [Therefore] agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Article 101 TFEU].³⁹⁰

This is supported by the later decision in *FNV*³⁹¹, wherein the Court held that persons who may be considered ‘falsely self-employed’ because their independence is ‘notional’ are also entitled to bargain collectively, notwithstanding that they are classified as self-employed under national law.³⁹² In recent months, the Commission has launched a consultation process to amend competition rules so as to expand collective bargaining rights to even genuinely self-employed operators,³⁹³ promising legislative reform in this area by the end of 2021.³⁹⁴ As such, there is clear authority in EU competition law to promote collective bargaining. Recent scholarship has suggested how this could be enhanced in practice, including by taking a ‘functional’ approach to classifying workers who are entitled to bargain collectively, based on the extent to which they are in a position to diversify economic risk.³⁹⁵ Such an approach would have the effect of increasing collective bargaining coverage to sectors of the economy where collective bargaining is currently prohibited or rare.

In this regard, Doherty and Franca praise the Competition (Amendment) Act 2017 as ‘an innovative attempt to extend collective bargaining rights to vulnerable workers’,³⁹⁶ while arguing it should go further in not requiring there be ‘no or minimal economic effect on the market in which the class of self-employed worker concerned operates’.³⁹⁷ It is far from clear that such a condition is required by the relevant EU competition rules. To the extent that collective bargaining ‘inherently’ has such an effect,³⁹⁸ it should be observed that academic scholarship, and governments and employers in various member states, take the view that far from inhibiting competition, collective bargaining (particularly at the sectoral level) enhances it. This report leaves it up to economists to make those arguments in detail, but there is ample support for this position in labour law literature.³⁹⁹

390 C-67/96 Albany, [59]-[60].

391 C-413/13 *FNV*.

392 C-413/13 *FNV*, [31] ff.

393 See <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237> accessed 15 April 2021.

394 European Commission, ‘The European Pillar of Social Rights Action Plan’ (2021), <https://ec.europa.eu/info/files/european-pillar-social-rights-action-plan_en> (accessed 26 April 2021) 42.

395 Dagmar Schiek and Andrea Gideon, ‘Outsmarting the Gig-Economy through Collective Bargaining – EU Competition Law as a Barrier to Smart Cities?’ (2018) 32 *International Review of Law* 275, 285-87.

396 Michael Doherty and Valentina Franca, ‘Solving the “Gig-Saw”? Collective Rights and Platform Work’ (2020) 49 *Industrial Law Journal* 352, 361; see also Michael Doherty, ‘Trade Unions and the “Gig Economy”’ in Frank Hendrickx and Valerie de Stefano (eds), *Game Changers in Labour Law: Shaping the Future of Work* (Kluwer 2018) 106.

397 Michael Doherty and Valentina Franca, ‘Solving the “Gig-Saw”? Collective Rights and Platform Work’ (2020) 49 *Industrial Law Journal* 352, 362-63.

398 C-67/96 Albany, [59].

399 Jonas Malmberg and Tore Sigeman, ‘Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’ (2008) 45 *Common Market Law Review* 1115, 1136-37; Rebecca Zahn, ‘Trade Unions and the Challenges of EU Enlargement: The Kind of Laws the Unions Ought to Want Future Directions in EU Labour Law: Academic Contributions’ (2016) 7 *European Labour Law Journal* 387. See also ACL Davies, *EU Labour Law* (Elgar 2012) 13-14.

3. Participation directives

Article 153(1) TFEU gives the EU competence to legislate in the following areas:

- (a) improvement in particular of the working environment to protect workers' health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

Of these, the Union has made most extensive use of (e). There are a number of directives which impose obligations on employers to consult with representatives of workers, most notably the Acquired Rights Directive,⁴⁰⁰ the Collective Redundancies Directive,⁴⁰¹ the European Company Directive,⁴⁰² the European Works Councils Directive,⁴⁰³ and the Information and Consultation Directive.⁴⁰⁴ None of these, in themselves, require member states to put in place specific measures to promote collective bargaining. They are all compatible with the 'dual-track' approach to worker representation present in all the member states examined in this report, of trade unions, works councils and other forms of representation working in tandem to promote workers' interests.⁴⁰⁵ Rather, they find their foundation in the EU legal order in Article 27 Charter, which provides for rights to information and consultation, rather than Article 28, which provides for the right to bargain collectively.⁴⁰⁶

Nevertheless, there are a number of important links between these participation directives and collective bargaining. First, as we have seen in Part III, enterprise-level representation structures can be designed in such a way as to enhance the presence of trade unions, rather than undermine them. For example, we saw how some states give a monopoly to unions in presenting candidates for election to these bodies. This in turn indirectly contributes to collective bargaining coverage by making it more likely employers will negotiate with unions.

400 Council Directive 2001/23/EC.

401 Council Directive 98/59/EC.

402 Council Directive 2001/86/EC.

403 Directive 2009/38/EC.

404 Directive 2002/14/EC.

405 Wanjiru Njoya, 'The EU Framework of Information and Consultation: Implications for Trades Unions and Industrial Democracy' in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016) ch 15.

406 Wanjiru Njoya, 'The EU Framework of Information and Consultation: Implications for Trades Unions and Industrial Democracy' in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016) ch 15, 365.

Second, these directives can be equally justified by reference to point (f) in Article 153(1) TFEU, the ‘representation and collective defence’ of workers, and ‘co-determination’. As Davies has observed, ‘collective defence’ is not a recognised term of art within industrial relations, and ‘freedom of association’ is excluded from Union competence under Article 153(5).⁴⁰⁷ This has led some commentators to conclude that the EU is similarly precluded from legislating to promote collective bargaining. However, this is not necessarily the case. Just because the phrase ‘collective defence’ rather than ‘collective bargaining’ appears in the English language version of the Treaty does not mean that Article 153(1)(f) does not encompass collective bargaining. It is beyond the scope of this report to conduct a comprehensive survey of the 24 equally-authentic language versions of the TFEU for similarity between the phrase used in Article 153(1)(f) and recognised terms of art within the respective industrial relations frameworks of the 27 member states. Moreover, the CJEU takes a teleological approach to interpretation, allowing it to transcend discrepancies of language as between different equally-authentic legal texts.⁴⁰⁸ Dorssemont and Rocca argue the contrary:

The issue of collective bargaining has not been excluded from EU competences. It has not been listed in Article 153(5) TFEU. As far as cross-sectoral and sectoral European social dialogue is concerned, a constitutional and embryonic framework has been put in place, ever since the Maastricht Treaty [but no] *specific* legislative framework has been put in place for transnational company agreements. Neither has the European legislator ever tried to harmonise the various systems of collective bargaining at the level of the Member States. Such an exercise might indeed run counter to the obligation of the European Union to respect the ‘diversity of the national systems’ (Article 152 TFEU).⁴⁰⁹

Dorssemont and Rocca note that the EU might nonetheless face political difficulty legislating in the field of industrial relations. In this regard they refer to the fate of the Monti II proposal to protect the right to strike in the aftermath of *Laval*, which was dropped by the Commission after backlash from some national parliaments and member state governments.⁴¹⁰ Nevertheless, they argue that the participation directives discussed here ‘tend to enhance the coverage of collective agreements in respect of employers who are neither signatory to these agreements nor affiliated to a signatory organisation’.⁴¹¹ As such, the directives referred to above should be interpreted as promoting collective bargaining as well as consultation, and an approach may be taken to their implementation which involves trade unions.

407 ACL Davies, ‘Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?’ in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005) ch 6.

408 For discussion, see C-72/95 *Kraaijeveld*. It is also possible the CJEU would rely on Article 28 Charter to interpret Article 153(1)(f) TFEU broadly, albeit with the caveat that Article 51(2) Charter provides: ‘The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

409 Filip Dorssemont and Marco Rocca, ‘Article 28 – Right of Collective Bargaining and Action’ in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) ch 22, 471-72.

410 For more information, see The Adoptive Parents, ‘The Life of a Death Foretold: The Proposal for a Monti II Regulation’ in Mark Freedland and Jeremias Adams-Prassl (eds), *EU Law in the Member States: Viking, Laval and Beyond* (Bloomsbury 2016) ch 5.

411 Filip Dorssemont and Marco Rocca, ‘Article 28 – Right of Collective Bargaining and Action’ in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) ch 22, 472. The authors also note the same of the revised Posted Workers Directive, discussed in the context of C-341/05 *Laval* above.

Proposed directive on adequate minimum wage

The foregoing discussion lays the groundwork for this section, the discussion of the proposed Directive on an adequate minimum wage (AMWD).⁴¹² It is important to stress this is as yet merely a proposal from the Commission, but one which has been broadly welcomed by the labour movement, the academy, and the European Parliament.⁴¹³

The bulk of the directive is devoted to requiring member states to set adequacy standards and procedures for calculating their national minimum wage. However, the Commission notes a strong correlation between high collective bargaining coverage and high wages:

The countries with high collective bargaining coverage tend to display a lower share of low-wage workers, higher minimum wages relative to the median wage, lower wage inequality and higher wages than the others. In the Member States where minimum wage protection is exclusively provided by collective agreements, its adequacy and the share of workers protected are directly determined by the features and functioning of the collective bargaining system. In Member States with statutory minimum wages, collective bargaining has also a strong effect on minimum wage adequacy. By affecting general wage developments, collective bargaining ensures wages above the minimum level set by law and induces improvements in the latter. It also pushes increases in productivity.⁴¹⁴

Therefore, Article 4 of the proposed directive would require:

1. With the aim to increase the collective bargaining coverage Member States shall take, in consultation with the social partners, at least the following measures:
 - (a) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage setting at sector or cross-industry level;
 - (b) encourage constructive, meaningful and informed negotiations on wages among social partners;
2. Member States where collective bargaining coverage is less than 70% of [workers] shall in addition provide for a framework of enabling conditions for collective bargaining, either by law after consultation of the social partners or by agreement with them, and shall establish an action plan to promote collective bargaining. The action plan shall be made public and shall be notified to the European Commission.

The proposal draws directly on the obligations under EU law set out in earlier sections, in particular Art 28 Charter. It also refers to Pillar 8, recognising the political obligation it places on the Union institutions and the member states. Despite initial concern as to EU competence to legislate in this area, the Council's legal service has recently issued an opinion supporting the Commission's choice of legal basis.⁴¹⁵ Like other directives in the field of social policy, it will be possible for member states to implement the AMWD by means of collective bargaining: 'Member States may entrust the social partners with the implementation of this Directive, where the social partners jointly request to do so.'⁴¹⁶ This could well have the effect of allowing states to 'kill two birds with one stone', by ensuring whatever collective agreement is reached by the social partners covers at least 70% of workers (by extension if necessary) to fulfil the requirement of Article 4.

412 COM(2020) 682; for the full draft text, see: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN>> accessed 16 April 2021.

413 <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/658208/IPOL_ATA\(2020\)658208_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/658208/IPOL_ATA(2020)658208_EN.pdf)> accessed 14 April 2021.

414 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN>> (accessed 16 April 2021) 3.

415 <<https://agenceurope.eu/en/bulletin/article/12675/13>> ; <<https://www.etuc.org/en/document/opinion-council-legal-service-directive-adequate-minimum-wages-eu-better-late-never>> accessed 16 April 2021.

416 Article 13 AMWD.

Although the European labour movement is broadly supportive of the proposed AMWD, there has been criticism from trade unions in some member states that it will increase state and EU intervention in their well-established collective bargaining frameworks.⁴¹⁷ This concern has been shared by some member state governments, in a letter addressed to the Commission calling for the withdrawal of the proposal and its replacement with a recommendation.⁴¹⁸ However, it is clear from Part II that this concern, whether or not it is valid on the part of trade unions and governments in Denmark or Sweden, would be entirely misplaced on the part of Ireland and Irish unions. Coverage here is so low and industrial relations frameworks so weak relative to our closest comparators that the AMWD proposal could only strengthen our collective bargaining practices.



417 See, for example: <<https://euobserver.com/opinion/150145>> accessed 16 April 2021.

418 <<https://www.rte.ie/news/2021/0207/1195632-minimum-wage/>> accessed 16 April 2021.

Summary of EU law

A final point should be stressed: the existence of the AMWD proposal should not be considered grounds for Ireland to defer action on collective bargaining to see how things pan out at EU level. The Commission anticipates a two-year legislative process, with a further two-year implementation period. It is entirely possible the AMWD will be substantially revised during that process. The experience of the Monti II proposal indicates that any EU intervention in national industrial relations will face significant political hurdles to implementation.⁴¹⁹

As indicated above, not only is there is no impediment under EU law for Ireland to take pre-emptive action in respect of promoting collective bargaining, but indeed there is a legal obligation to do so, with certain techniques better suited to protecting the integrity of the internal market and respecting EU competition law than others. To the extent that there are impediments under national constitutional law to effective state intervention in the sphere of collective bargaining (although for the reasons adverted to in Part II, these impediments may be exaggerated), existing EU law grants ample scope to adopt domestic legislation that expands collective bargaining rights and / or develops complementary channels of worker representation and co-determination. In light of the experiences of the states considered in Part III, there should be strong institutional links between such mechanisms and trade unions. As Njoya argues, this would have the effect of helping trade unions establish a foothold at the enterprise level in industries with low rates of trade union density or no history of organisation,⁴²⁰ whether these are low-paid service industry or highly-paid white collar workplaces (both important parts of the Irish economy).



419 See The Adoptive Parents, 'The Life of a Death Foretold: The Proposal for a Monti II Regulation' in Mark Freedland and Jeremias Adams-Prassl (eds), *EU Law in the Member States: Viking, Laval and Beyond* (Bloomsbury 2016) ch 5.

420 Wanjiru Njoya, 'The EU Framework of Information and Consultation: Implications for Trades Unions and Industrial Democracy' in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016) ch 15, 382.

Conclusion

The states reviewed in this report are economically, politically and institutionally diverse in all but one respect – workers in each of them enjoy much higher rates of collective bargaining coverage than here in Ireland. Nevertheless, some commonalities may be observed in how their governments support collective bargaining, from which Ireland should learn.

In all of the states considered, sectoral bargaining has been key to both high coverage rates and the *quality* of the bargaining process. There are a number of incentives deployed to encourage employers to bargain at the sectoral level. The most critical of these is to extend at least some obligations of the collective agreement to non-signatory employers. Employers are thus encouraged to engage in bargaining to shape the terms of the obligations. The state can either make extension automatic upon certain conditions being met (such as the ‘representativeness’ of the parties), or use extension selectively to pursue economic and social priorities. The state can also make use of public procurement as a sort of ‘*de facto* extension’ mechanism to require compliance with collective agreements. Denmark and the Netherlands are European leaders in the deployment of such ‘social clauses’ in the public procurement process.

Extension can have consequences for trade union density. In France and the Netherlands, extension has generated a large number of ‘free-riders’ who obtain the benefits of collective bargaining without needing to join a union. The effect of this free-rider problem for unions can be a significant loss of financial resources and independence from both the state and employers. To counterbalance this, other countries use various measures to incentivise union membership. These include making union dues tax-deductible for workers (or in the case of Ireland, restoring to the position pre-2011), reserving some benefits of collective agreements to union members, and the Ghent system of decentralised distribution of social welfare and unemployment benefits through unions.

In the absence of support for membership and collective bargaining, the evidence is that unions need to resort to radical industrial action to remain relevant and drive the bargaining agenda, like in France. Other states have seen off this prospect by encouraging bargaining, and employers have seen the obvious rewards for industrial peace and economic stability that accompany widespread bargaining. This has engendered a culture shift among employers, who appreciate collective bargaining as a means to boost productivity and demand in the economy and prevent their businesses being undercut by unfair competition on wages rather than product quality and innovation. They also prefer their businesses to be regulated by a collective bargaining process in which they have a direct say, and that can be flexibly tailored to the needs of their businesses, rather than by state intervention.

Another way for unions to increase membership along with collective bargaining coverage is to improve their on-the-ground presence. The state can support this by mandating paid time off work and enhanced protections against dismissal or other forms of detriment for union representatives, and by promoting other forms of worker representation that unions can engage with. The states studied in this report have a mixture of works councils and members of boards of directors that represent workers alongside unions. Ireland, by contrast, largely still subscribes to the ‘single-channel’ model of representation inherited from the UK tradition of industrial relations.⁴²¹ There are clear benefits to both workers and businesses associated with formal institutions of co-determination at the enterprise level, and these can be of great benefit to unions as well, depending on the system design. For example, France gives unions the exclusive right to nominate candidates for election to their equivalent of works councils. These and other institutional rights of unions can be reserved for those that pass a threshold of ‘representativeness’. Such an approach encourages consolidation among unions and vigorous recruitment to keep membership rates sufficiently high. This has advantages for the efficiency of the collective bargaining process and the ultimate stability of agreements.

421 Wanjiru Njoya, ‘The EU Framework of Information and Consultation: Implications for Trades Unions and Industrial Democracy’ in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016) ch 15, 380 ff.

Finally, EU law both imposes obligations to promote collective bargaining and offers opportunities by which to do so, through the implementation of EU legal instruments. Fears about the incompatibility of collective bargaining with the internal market and competition law of the EU are misplaced with respect to Ireland at least. There is also a clear recent shift in political and legal direction at EU level in support of collective bargaining, which Ireland can build on domestically.

Collective bargaining coverage may be at a historic low in Ireland, but that is not an inevitability. It is not even a regrettable consequence of our service-driven, globally-connected and competitive economy. Other countries in Europe have found ways to increase bargaining coverage, through state support for trade unions and the bargaining process that creates a cultural norm of bargaining throughout the economy. It is vital to the success and stability of the Irish economy, and the protection of workers' rights, that such a cultural shift occur here. This report has set out both the benefits of collective bargaining and the ways in which it can be promoted here. It is also important not to lose sight of the fact that workers have a fundamental human right, enshrined in international and European law, to bargain collectively. This creates obligations on the state to promote and protect collective bargaining.





CORK

Father Matthew Quay,
Cork, T12 EWV0

Phone:
021-425-5210
Email:
forsacork@forsa.ie

DUBLIN

Nerney's Court,
Dublin, D01 R2C5

Phone:
01-817-1500
Email:
info@forsa.ie

GALWAY

Unit 23-24, Sean
Mulvoy Business Park,
Sean Mulvoy Road,
Galway, H91 HT27

Phone:
091-778-031
Email:
forsagalway@forsa.ie

LIMERICK

Roxborough Road,
Limerick, V94 YY31

Phone:
061-319-177
Email:
forsalimerick@forsa.ie

SLIGO

Ice House, Fish Quay,
Sligo, F91 HHX4

Phone:
071-914-2400
Email:
forsasligo@forsa.ie

WOODFORD

Unit 2.2 Ground Floor,
Woodford Business
Park, Santry, D17
E524

Phone:
01-817-1500
Email:
admin@ialpa.net