



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



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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 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, 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 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.

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.

DENMARK: 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,¹⁵ 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 2011.¹⁶

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.¹⁷ 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 EU¹⁸ – 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.¹⁹

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.²⁰

15 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.

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

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

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

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

20 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: 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'.²¹ 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...²²

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...²³

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')²⁴ 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.

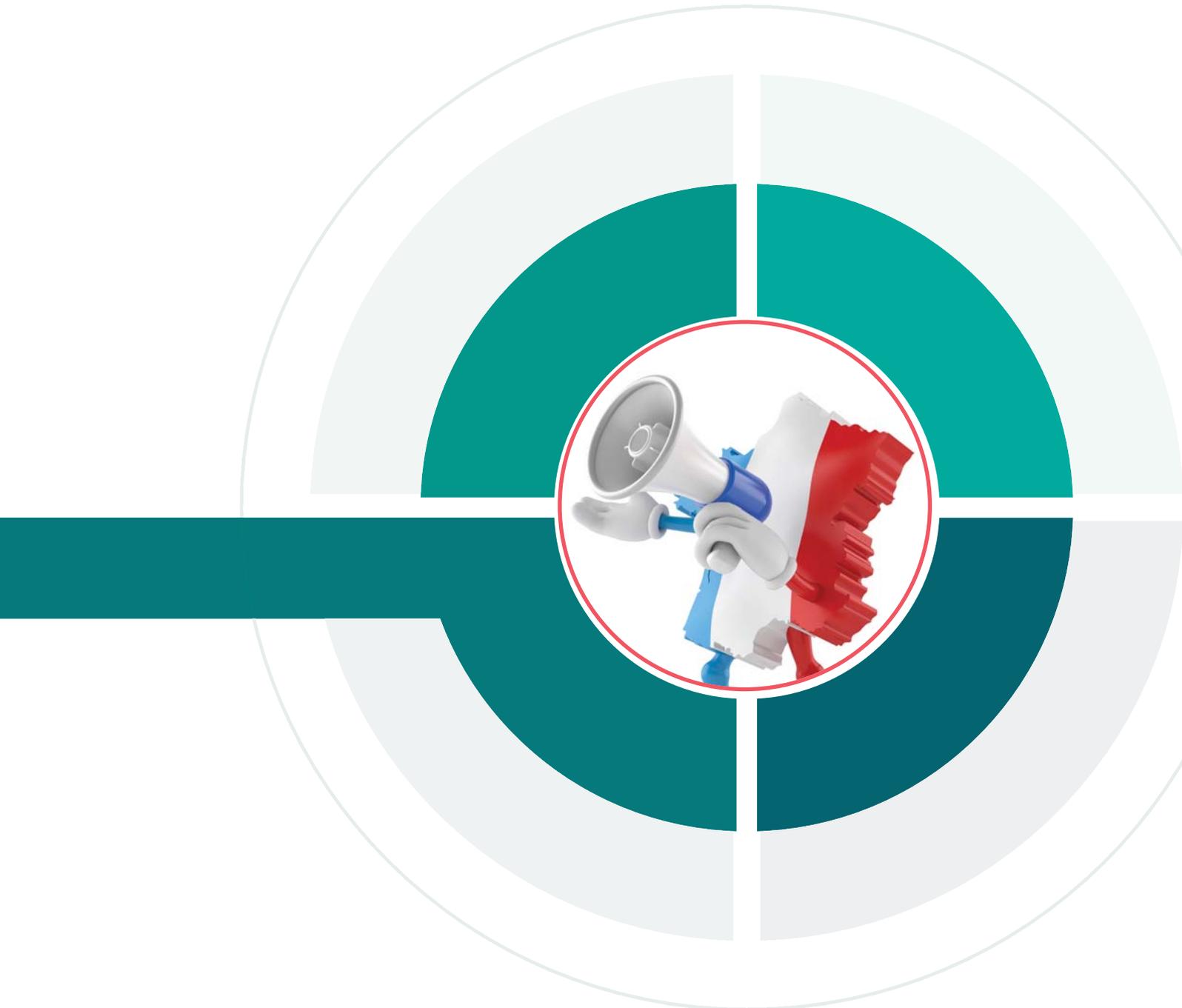
21 Jacques Rojot, 'French Industrial Relations: A Dual Paradox with Deep Historical Roots' (2014) 22 *International Journal of Organizational Analysis* 486, 500.

22 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.

23 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.

24 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,²⁵ 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.²⁶



25 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.

26 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: 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*'²⁷ This shows that alternative means of worker representation do not necessarily detract from the role and membership of trade unions.

27 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: 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.²⁸

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.

28 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.

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.²⁹ 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.

29 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.





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