Organisation for Mediation and Arbitration (O.ME.D.)
Law Schools of Athens (NKUA) and Thessaloniki (AUTH) Universities

RECENT TRENDS OF COLLECTIVE BARGAINING IN BALKAN & SOUTHEASTERN EUROPEAN STATES

International Conference on the occasion
of the 30th Anniversary of the functioning of O.ME.D.

Editor: **Prof. Costas Papadimitriou**

ΕΚΔΟΣΕΙΣ ΣΑΚΚΟΥΛΑ
ΑΘΗΝΑ-ΘΕΣΣΑΛΟΝΙΚΗ

Recent trends of collective Bargaining in Balkan and South-Eastern European states

ORGANISATION FOR MEDIATION AND ARBITRATION (O.ME.D.) - LAW SCHOOLS OF ATHENS (NKUA) AND THESSALONIKI (AUTH) UNIVERSITIES

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Editor: Prof. Costas Papadimitriou

- Raluca Dimitriu
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- Senad Jašarević
- Ioannis Koukiadis
- Costas Papadimitriou
- Aleksandar Ristovski
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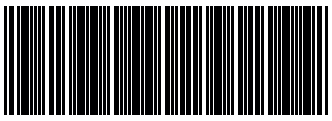
SAKKOULAS PUBLICATIONS S.A.
ATHENS - THESSALONIKI

Athens
23, Ippokratous Str. - 106 79 Athens
Tel.: (+30 210) 33.87.500, Fax: (+30 210) 33.90.075

Thessaloniki
1, Fragon Str. - 546 26 Thessaloniki
Tel.: (+30 2310) 535.381, Fax: (+30 2310) 546.812
42, Ethnikis Aminis Str. - 546 21 Thessaloniki
Tel.: (+30 2310) 244.228, 9, Fax: (+30 2310) 244.230
http://www.sakkoulas.gr • email: info@sakkoulas.gr



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Introduction of the president of O.ME.D.

Prof. Costas PAPADIMITRIOU

Good morning.

On behalf of the Mediation and Arbitration Organization (O.ME.D), we welcome you.

As you know O.ME.D. has the duty to intervene between employers and employees in an attempt to settle collective disputes. Three respective procedures of dispute settlement have been established: conciliation, mediation and arbitration.

We should also emphasize that OMED is one of the few Organizations in Greece, which is not public in the classical sense of the term, but it is directly managed by the social partners, i.e. by the representatives of employers and employees. It is also an Organization that, due to its sensitive nature, is administered through the principle of "unanimity". In particular the "unanimity" of the 11 members of its Board of Directors applies for the selection of the Mediators and Arbitrators. In this sense, the element of consensus and compromise is fundamental for the Organization.

Which is the reason that we decided to hold today's event? The reason has definitely been the completion of 30 years from the initiation of O.ME.D. operation. In particular, the Mediation and Arbitration Organization has been fully operational since 1992. There are a lot to be said about the history of the Organization. I have the privilege to be a member of the Body of the Mediators from the beginning, Professor Koukiadis also from the first years as its President. There are a lot of positive points regarding its operation; however, some serious weaknesses also exist. But one thing might not be denied: OMED has determined to a significant extent the labor relations in our country. And I think that this will also continue in the future, as it is now evident if someone considers its new responsibilities.

Let's come to the present. I would like to explain our decision to organize a conference concerning the Balkans.

I remember, about 15-16 years ago, in 2005, a similar event was held here concerning collective bargaining in the Balkans. We are organizing a similar event today. Because we believe that the neighboring residents of the Balkans have a lot to discuss, many common points, as well as some differences that offer the opportunity for a fruitful dialogue. Therefore, it is worth to develop a regional cooperation and understanding at the level of the Balkans.

And why did we choose to organize this event at Thessaloniki? Because we love Thessaloniki of course. Additionally, Thessaloniki is one of the hubs of the Balkans. Geographically, it is also closer than Athens to the region of Balkans. Thus, beyond the classic hospitality of the city, which is taken for granted, there is also a wider reason for holding this event here in Thessaloniki.

I should also thank from my side all those who assisted with the organization of this event, which is also broadcasted online and distributed in a wider environment. Taking into account all the difficulties due to the pandemic, many persons helped for this event. The Aristotle University of Thessaloniki also helped to a great extent; Professor Angelos Stergiou was our liaison for this co-organization. We thank him very much and all members of the staff of the Aristotle University. Special thanks to the Dean, Prof. Glavinis, who provided us with this room for today's event. We must also thank the national reporters, who travelled during this difficult period from their countries, allocating their valuable time both for travelling and for preparing their reports. Their contribution is particularly positive. I would also like to thank the presidents of today's sessions, and all of you who participate, so that we can hopefully conclude this event successfully.

So good luck in today's conference.

Thank you very much.

Recent trends of collective bargaining in Greece

Costas PAPADIMITRIOU*

Historical trends

The structure of the Greek economy is marked by very few large enterprises and many micro- and small firms. The wider part of the Greek economy concerns services, a relatively smaller part concerns industry and a disproportionately smaller part concerns agriculture; there is a problem of long-term structural unemployment, with relatively high numbers of unemployed, for a prolonged period, as well as high youth unemployment.

There is a long tradition of trade union participation. The first legislation concerning trade unions dates back to the beginning of the 20th century[1].

Unionization rates are actually high in the public sector (60 %) but very low in the private sector (18 %). The recent financial crisis and the raise of the unemployment affected negatively the unionization rate.

The Greek trade union movement is in favor of the trade union unity without ignoring the difference of various social approaches. There are only two confederations, one for employees (G.S.E.E.) and one for civil servants (A.D.E.D.Y). Even if freedom of association allows the creation of several trade union organizations at the same level, the workers, even of different tendencies, prefer to join the same trade union organization. Accordingly, the law provides, in order to promote this unity, that the board of directors of all trade union organizations must be composed of representatives of all tendencies so that all parties can express their ideas. In this way the workers prefer to remain members of the unitary organization which is designated to negotiate and conclude the single collective agreement (in the country, branch, professional or company level).

* Professor of labour law at the Law School of Athens, President of OMED.

1. A. Karakatsanis - S. Gardikas, Individual labour law (in Greek), 1995, p 39ff.

Employees' participation in the company, through representatives elected by all employees, even if it is provided by law, does not play any important role, since employees prefer to be represented by trade unions, rather the work councils.

1. THE COLLECTIVE AGREEMENTS

1.1.The rules

Collective autonomy is a fundamental principle of Greek law recognized at a constitutional level. However, reasons related to the protection of the general interest may lead to certain restrictions of this fundamental freedom. Greek courts have been called upon several times to evaluate the constitutionality of such restrictive measures. It must be said, however, that the Greek courts are rather hesitant to review legislative activity involving limitations on collective autonomy[2].

Greece has a tradition of legislative regulation of the regime of collective agreements. The legislator provides in detail for the persons whose employment relationships are likely to be regulated by collective agreements, the content and duration, the signatory parties, the force and scope of application of collective agreements as well as the levels of bargaining.

1.2. The application of collective agreements

The application of collective agreements concerns dependent employment relationships. However, for the first time, the law of 1990 takes into account the reality of economically dependent workers. It thus specifies that collective agreements can also regulate the relations of persons who, although not bound by a dependent employment relationship, provide their work under conditions of economic dependence and they need protection equivalent to that of employees.

However, this innovative standard for Greek labor law has had no practical application. After more than 25 years of the implementation of this provision, no collective agreement has extended its scope of application to economically dependent workers.

This principle is recently confirmed in 2021, as a new law (Law 4808/2021) provides that platform workers, irrespective from the nature of

2. G. Leventis, Collective labour law (in Greek), 2007, p. 30 ff.

their contact, may create trade unions, negotiate in order to conclude collective agreements and exercise the right to strike. This new form of employment is, in this way, taken into account by labour law.

1.3. The principle of favour

The "most favourable arrangement" clause (or favourability principle) has been introduced since 1990, stipulating that, in case of conflict between collective bargaining agreements of different levels, the agreement or clauses providing for most favourable conditions for the employees would apply.

This principle was affected during the period of crisis, in the sense that the company agreement prevailed over the branch level agreement, even if it contained less favourable labour conditions than the latter.

The principle of favour has been restored in 2018.Therefore, from 2018 onwards company agreements may provide only more favourable conditions than the branch agreements, otherwise the less favourable terms don't apply. However, a new exception is provided: local branch and local professional agreements, prevail over the national ones and may provide for less favourable conditions. Thus, a new factor of eventual instability is introduced.

1.4. The level of collective bargaining

The Greek bargaining system combines all levels of collective agreements. Bargaining takes place at national, branch, occupational and company levels. There are thus different categories of collective agreements corresponding to the respective levels.

The Greek system of industrial relations in the pre-crisis period was centered on the concept of multi-level bargaining, this being complemented by the operation of extension mechanisms and the favourability principle.

This system was differentiated after 2012 due to important legislative changes.

At branch and occupational level, the changes in the legal framework, in conjunction with the deepening of the crisis, resulted in the near collapse of collective bargaining.

1.4.1. Bargaining at national level

The contractual parties to EGSEE have traditionally included the five employers' associations and the Greek General Confederation of Labour (GSEE). The function of EGSSE was traditionally to ensure a minimum wage safety net at national level, including unskilled workers, who were not covered by sectoral or other collective agreements. The minimum wage and minimum working conditions stipulated under the EGSSE were applicable to all workers under a private law employment contract throughout the country, regardless of whether they were members of a trade union[3].

Even if the determination of the national minimum wage by statutory legislation has completely changed the framework for collective bargaining, the negotiation of minimum salary might continue to take place at the level of General National Collective Employment Agreement for the improvement of the legislatively provided minimum wage. However, one cannot say that this negotiation was in the same framework as in the past. First of all, since the enactment of the legislative minimum wage, no national general collective employment agreement includes clauses on wage issues, although that would be possible. Secondly, the parties simply repeat, in the new collective national agreement the existing clauses without adding new ones. Therefore, although the parties maintain good relations at this level, they practically fail to enrich the collective bargaining.

1.4.2. Role of branch (sector) bargaining

Regional branch or professional collective agreements may set wage levels and provide other terms and conditions designed to address the specificities of the branch or the profession.

The most obvious development of the last decade has been the drop in the overall volume of bargaining at the branch level, as the parties found it difficult to reach agreement in the absence of appropriate legal-institutional incentives, as the ones prevailed prior to 2011/2012.

In particular, prior to 2011/2012 an average of 100 branch agreements and 40 occupational (professional) level agreements were concluded per year; whilst, during the period 2012-2021 an average of less than 19 branch agreements and less than 6 occupational level agreements per year were concluded. More specifically, only 15 national branch agree-

3. Article 8 par. 2 of Law 1876/1990.

ments were concluded in 2018, 10 in 2019, 7 in 2020 and 12 in 2021, as well as 6 national professional agreements in 2018, 5 in 2019, 1 in 2020 and 5 in 2021.

1.4.3. Role of company bargaining

Company agreements can be concluded, irrespective from the size of the company, whereas before the crisis legislation provided that said agreements could only be concluded to companies employing more than 50 employees.

Decentralization of collective bargaining was encouraged through various pieces of legislation introduced from 2010 onwards.

The above decentralization was also linked with the abolition of the favourability principle and the provision of additional scope for company-level derogations via legislation, during the crisis. The decrease of branch and occupational bargaining was accompanied by an increase in company-level agreements. In contrast to the pre-crisis landscape of bargaining, company-level agreements were the predominant form of collective bargaining. The highest rate of company-level agreement was reported in 2012 (976 agreements) being in direct contrast to 170 company level agreements concluded in 2011.

The restatement of the principle of favour in 2018 modifies once more the landscape. The number of company agreements is decreasing since then. Only 193 were concluded in 2019, 159 in 2020 and 179 in 2021.

1.5. The collective bargaining issues

Collective agreements constitute an important source of labour law. Pursuant to law, they may regulate almost all matters which concern employers and employees.

Apparently, agreement on wages is the most important issue of collective agreements. Until 2013, the determination of minimum wages at the national level fell within the exclusive competence of collective agreements[4]. From this year onwards, the national minimum wage can only be set by the legislator, even if the social partners still have the power to provide for a higher wage level for their members.

4. G. Leventis, Collective labour law (in Greek), 2007, p. 416.

Working time arrangements, leaves, health and safety of employees constitute frequent bargaining issues.

As the introduction of new technologies plays an increasingly important role in Greek companies, the issues of protection of employment, working conditions, training and teleworking often constitute a bargaining issue.

Covid issues have not been included in recent collective bargaining even if they directly affect the functioning of the employment relationship; the role of state institutions still remains the main factor.

1.6. The legal effects of collective agreements

The branch and professional collective agreements normally govern labor relations of the members of signatory trade unions. However, the Minister of Labor had the power to extend the scope of a collective agreement and make it binding upon all the workers of a given economic sector or occupation. The extension principle serves to establish equal working conditions for unionized and non-unionized workers in companies that either were or were not members of employers' organizations, thus avoiding gaps in coverage. This option has simply been repealed by Law 4046/2012.

However, this power was once more reactivated in 2018, and the Minister of Labour and Social Security can decide to extend a collective agreement if it is already binding for employers employing at least 51 per cent of the sector's or profession's workers. However, as the coverage ratio is difficult to be verified, very few collective agreements have been extended.

Given that the unionization rate is currently at the lowest level in the history of collective relations in Greece and few extensions are declared, the application of branch collective agreements is undoubtedly limited, which diminish their importance.

1.7. The coverage of collective agreements

As the participation of employees in trade unions is declining, the balance of power between employers and employees is seriously altered. The number of collective agreements has recently been decreased.

In practice, during the pre-crisis period, the system of collective bargaining was relatively stable in terms of its structure, coverage and operation. During the period 1990-2011, the structure of collective agreements included, on top, the national general collective agreement, followed by

around 100 branch agreements, 90 occupational level agreements and 150 company-level agreements on average[5].

However, during the period 2012-2021, less than 19 branch agreements per year, and less than 6 occupational level agreements were concluded. On the other hand, during the same period the explosion of the number of company collective agreement (975 in 2012) was followed by its essential decrease (179 in 2021).

There are various reasons justifying this decrease in the number of concluded collective employment agreements. Firstly, this is attributed to the decline of the participation of employees in trade unions. Secondly, the limitation of the possibility of unilateral recourse to arbitration, in the event of failure of bargaining, results in the decrease of the number of the collective agreements and of arbitration awards. In particular, changes in the arbitration system, i.e. removing the unilateral right of recourse to arbitration, led to a sharp decline in arbitration decisions[6].

Collective bargaining plays actually an important role only in larger companies, banks, and companies of the public sector.

2. THE SETTLEMENT OF COLLECTIVE LABOUR DISPUTES

The establishment of collective labour dispute settlement procedures has, for decades, been an important component of Greek industrial relations[7].

The «Mediation and Arbitration Organization» (OMED) has the task to establish mechanisms of settlement of collective labour disputes.

2.1. The Mediation and Arbitration Organization

The Greek legislature founded in 1990the "Mediation and Arbitration Organization" (OMED) whose task was the establishment of the mechanisms of settlement of collective labor disputes[8]. This Organization does not have the nature of an administrative service, not even of an autonomous

5. K. Papadimitriou-Chr. Ioannou, The collective bargaining and its consequences during 2012-2104 (in Greek), in EDEKA, Collective bargaining today, 2015, p. 103 ff.
6. ILO, Evaluating the effects of the structural labour market reforms on collective bargaining in Greece, 2016, p. 49.
7. K. Papadimitriou, The settlement of collective labour disputes (in Greek), 1992, passim.
8. K. Papadimitriou, Collective labour relationships and settlement of labour disputes v. A΄ The settlement of labour disputes, (in Greek) 1992, 155 ff.

administrative body, but rather it acquired the legal form of an autonomous private body regulated by private law (Article 17§ 1 of Law 1876/90).

The legislature's purpose was obviously to exempt at this point the mechanism for settlement of collective labour disputes from state interference. Two elements relating to OMED must therefore be emphasized, as especially strengthening its effectiveness: First, its Board of Directors has no connection with the state apparatus. On the contrary, employers' and workers' organizations, equally participating, have the primary responsibility for running the Organization. Secondly, the choice of mediators - arbitrators is done in a way that ensures their objectivity and their ability to perform their highly sensitive work[9].

2.1.1.The Bodies of mediators and arbitrators

In the framework of the Mediation and Arbitration Organization (OMED), two independent Bodies are formed: one of mediators and one of arbitrators. Although the members of these Bodies are public officials, they do not have the status of civil servant (Article 17§ 8 of Law 1876/90). Regarding their qualifications, they must have university degree in law or economics and relevant experience in the field of industrial relations. They must also perform their duties objectively and they have to observe the Code of Conduct of the Body of Mediators and Arbitrators.

The mediators and arbitrators are linked to OMED by virtue of contracts for the provision of services. The legislature, in order to facilitate the negotiating parties, formulated a permanent body of experienced and trained people who would be able to execute their duties independently from external interventions. In particular, the credibility of the mediators-arbitrators is not based on the possession of some high hierarchical ranks or some other qualities, but such credibility is safeguarded through their participation in a specialized and independent Body.[10]

The selection of the persons intended to be members of the Mediators/Arbitrators Body is made by the Board of Directors of the Mediation and Arbitration Organization following a public notice (Article 17§ 11 of Law 1876/90). Indeed, in order to ensure the selection of persons of general acceptance, it is stipulated that, in particular for the recruitment or re-

9. K. Papadimitriou, Collective labour law (in Greek), 2019, p. 207 ff.

10. A. Gladstone, Voluntary arbitration of interest disputes. A practical guide, ILO, 1984, 18 ff.

newal of the term of office of mediators or arbitrators, an unanimous decision of all members of the Board of Directors of OMED is required.

Furthermore, the term of office of the members of arbitrators and mediators is three years and may be renewed (Article 17§ 11 of Law 1876/90). It is evident that the three-year term of office of mediators - arbitrators aims to periodically evaluate the satisfactory manner of carrying out their mission as well as their spirit of independence towards employers, employees and the governmental policy.

Additionally, as stated in the law, mediators - arbitrators enjoy full independence in the performance of their duties (17§ 8 of Law 1876/90). The explicit reference made by the legislator to this independence is undoubtedly directed at both the Board of Directors of the Organization and the public authorities, so that the mediators - arbitrators actonly according to their conscience and not on the basis of the government policy.

OMED is not, however, staffed by full time mediators and arbitrators since the legislation does not exclude the possibility of parallel occupation of members of these Bodies in another profession. This freedom could be considered as an element promoting further their independence.

Finally, it should be mentioned that the intervention of OMED is provided only if the parties have not created their own mechanisms for the settlement of their collective labour disputes.

The settlement of collective labour disputes in Greece remains an issue that generates doctrinal debate, jurisprudential disputes and social tension.

Each of these three procedures, provided by the law, has a different function, even if the tasks performed by the third person, who intervenes to settle the dispute, can be overlapping.

2.2. The conciliation

Conciliation is the first stage of the collective labour dispute settlement procedure. It is the method by which a third party (conciliator) tries to facilitate the contact between the parties with a view to reaching an agreement.

The basic characteristic of conciliation is that the third person who undertakes to settle the dispute cannot propose to the parties a specific solution. It should not comment upon the merits of either side's case. The purpose of conciliation is only to facilitate contact and discussion between the parties to a collective labour dispute who face significant difficulties to

arrive independently to a settlement.[11] However, he shall assist the parties in identifying what it would be required so as to reach an agreement in view also of the other party's position. [12]

Recourse to conciliation is possible not only for matters that may constitute, pursuant to legal provisions, content of a collective agreement, as it is the case with mediation and arbitration, but also for any other matter giving rise to a collective labor dispute (Article 13§ 1 of Law 1876/90). That is to mean that conciliation might concern all types of collective labour disputes arising between employers and employees.

The request for the conciliator's intervention might come from either of the concerned parties, i.e. from the competent trade unions on the one hand or from the employers' organizations (or the employer individually in cases of company level disputes) on the other hand.

Conciliation is not an obligatory step of the collective labour dispute settlement procedure. Therefore, recourse to mediation, another way of settlement of labour disputes, is possible without the prior conduct of conciliation being necessary. The parties are free to participate to conciliation as there is no sanction in the event that a party refuses to participate to the conciliation requested by the other party.

The law grants the conciliator a wide freedom of action concerning the prerogatives he may exercise to resolve the dispute. In this way he can adapt the procedure to the needs of each dispute and take the measures that seem most appropriate to him in order to arrive to a settlement.[13]

At the end of the conciliation process, an official protocol is drafted stating, among other formal elements, its outcome, i.e. the agreement or the disagreement between the parties (Article 13§ 9 of Law 1876/90).

If the result of the conciliation is positive, i.e. the parties agree and a settlement is reached through the conciliation procedure, a collective agreement shall be concluded on the basis of that settlement (Article 13§

11. K. Papadimitriou, Collective labour relationships and settlement of labour disputes v.A΄ The settlement of labour disputes, (in Greek) 1992, 64 ff . H. Touzard, Propositions visant à améliorer l'efficacité de la médiation dans les conflits collectifs du travail, Droit Social 1977, 87.

12. A. De Rojo-R. Jagtenberg, Settling labour disputes in Europe, 1994, 296. I. Koukiadis, Labour Law, Collective labour relationships (in Greek), 2017, 713.

13. L. Ntasios, Collective labour relationships (in Greek), 1991, 228.

10 of Law 1876/90), provided the other necessary conditions are also met (e.g. capacity of representatives for concluding an agreement etc.)

After a recent change of the legislation (Law 4808/2021), the conciliation is actually entrusted to OMED. Conciliators may be appointed from the Body of mediators.This new competence seems actually to be one of the Organization's main responsibilities, by taking into account that the number of mediation and arbitration requests has decreased.

3. THE CONVENTIONAL REGULATION OF THE CONDITIONS AND THE PROCEDURE OF SETTLEMENT OF COLLECTIVE LABOUR DISPUTES

The main novelty of the law 1876/90 (Article 14) is that it allows the parties to create, if they wish, appropriate mechanisms for the settlement of their collective labour disputes by means of a collective agreement. In this sense, the legal mechanism provided for the resolution of disputes is auxiliary to the will of the parties. Thus, the provisions of Articles 15 and 16 of Law 1876/90 concerning mediation and arbitration apply only in the absence of such agreements. In this way, primacy is given to conventional solutions over legislative rules.

The subsidiarity of the statutory provisions vis-a-vis the contractual rules is absolute in the sense that the contractual clauses may concern not only particular rules of dispute settlement, but also the whole system of settlement of collective labour law disputes.[14]

This supremacy of conventional regulation also favors, inter alia, the creation by the parties of institutions, which can contribute mainly to the prevention of collective disputes and the strengthening of social dialogue. This possibility should therefore be seen as a way of reinforcing the social responsibility of the parties by favoring the search of autonomous solutions.[15]

However, the parties have never, until today, been able to conclude such an agreement, and hence no private institutions for the settlement of collective labour disputes have been established.

14. G. Leventis, Collective Labour Law (in Greek), 2007, 546.

15. D. Tarakcioglu, Les méthodes de règlement des conflits collectifs du travail en droit comparé, 1974, 101 ff. O. Kahn-Freund's, Labour and the law, 1983, 130.

4. THE MEDIATION

If the parties cannot reach an agreement during negotiations or during conciliation, mediation (or arbitration) is possible.

Mediation is the second stage of the collective dispute settlement procedure. It refers to the method of resolving a dispute through the intervention of a third party who presents a recommendation to the parties at the end of the procedure.[16] It is available only for disputes arising between the parties to a collective agreement.

This process of settlement of collective labour disputes is characterized by the fact that the third party in charge for resolving the dispute examines its essence, that is to say it attempts to substantively perceive it and propose concrete solutions. Mediation can thus be seen as the fundamental institution of peaceful settlement of collective labour disputes, since recourse to arbitration, in accordance with the spirit of law 1876/90, should be the exception, not the rule.

4.1. The recourse to mediation

In the event of failure of the collective negotiations, and possibly of the conciliation, the parties concerned may initiate the mediation procedure. To this end, a relevant application is submitted to the Mediation and Arbitration Organization which, pursuant to Law 1876/90, is responsible for organizing the mechanisms for the peaceful settlement of collective labour disputes.

4.1.1. The parties entitled to request mediation

If the negotiations fail, either party (or both) may request the appointment of a mediator. It was not considered appropriate to grant such a right to third parties (for example: the Government or the Mediation and Arbitration Organization) in order not to undermine the autonomy of the parties.

Parties to mediation should in general have the capacity and competence to conclude collective agreements as provided by Law 1876/90, since the ultimate aim of mediation is the conclusion of a collective agreement.

16. K. Papadimitriou,The settlement of collective labour disputes (in Greek), 1992, 75 f.

4.1.2. The request for mediation

In order to appoint a mediator, a request is filed with the mediation office of the Mediation and Arbitration Organization.

This request must designate the representatives of the parties and describe briefly the causes of the dispute, the claims, the reasons justifying their satisfaction (in the case of a workers' request) or excluding it (in the case of an employer's request), alternative proposals and counter-propositions and, in general, any element that can facilitate the mediation (Article 15§ 2 of Law 1876/90).

4.1.3. The appointment of the mediator

The choice of the mediator's person is a matter of particular importance for the course of mediation, since its role is fundamental.[17]

As already mentioned above, workers and employers can create permanent or ad hoc institutions to settle their disputes. They can therefore agree in advance on the person of the mediator; priority is once again given to the will of parties.

But if such an agreement is missing, the mediator will be chosen from a special list of mediators, who form (as it is also the case with arbitrators) a particular Body within the framework of the Mediation and Arbitration Organization.

In order for the mediator to be appointed, the Mediation and Arbitration Organization shall summon the parties to the dispute to appear at a specified date and time, within 48 hours after the filing of the request. If the parties do not agree on the appointment of a mediator, he/she is chosen by lot among the mediators of OMED (Article 15§ 3 of Law 1876/90).

4.2. The procedure of mediation

Article 15§ 4 of Law 1876/90 establishes, specific rules relating to the procedure of mediation and the powers of the mediators. The Greek legislator avoided to excessively formalize this procedure. On the contrary, law describes in a broad way the powers conferred on the mediator, which is justified by the multiformity of collective labour disputes. Therefore, the concrete course of the procedure depends on the particularities of each dispute, which will be freely appreciated by the mediator. In this way, the

17. G. Leventis, Collective Labour Law (in Greek), 2007, 549.

personality of the mediator and his capacity for appreciation concerning the characteristics of the dispute play a crucial role in the mediation process. It is therefore rightly pointed out that 'mediation acquires value mainly from mediators'.[18]

The mediator may, ex officio, exercise all the prerogatives which, in his opinion, may safeguard him the necessary information and lead to the settlement of the dispute. He may therefore call the parties to pursue the discussions before him, which will enable him, inter alia, to establish a clear image of the collective dispute. First of all the mediator will seek, as the conciliator, to calm the spirits and encourage the parties to continue before him the negotiations. This intervention of the mediator in the negotiations may be decisive, since he will examine the features of the dispute. He will filter the arguments of the parties. He will propose some compromising solutions and he will eventually point out errors or lack of foundation in the arguments of each party.

The mediator shall draw at the end of the process the relevant minutes and establish the case file.

Finally, it should be noted that during mediation, employees may resort to strike action (Article 4§ 6 of Law 1876/90). The legislature wanted to separate the mediation from the prohibition of the exercise of the right to strike.

4.3. The mediator's recommendation

Article 15§ 6 of Law 1876/90 imposes certain short deadlines for the progress of the various stages of mediation. The potential slowness of the discussions would indeed pose serious problems for the peaceful settlement of the dispute; since the longer the conflict lasts, the more stringent the positions of the parties tend to become. The quickness of the procedure is therefore a favorable factor for the success of the mediation.[19]

If the parties cannot reach an agreement within twenty days, the mediator must present a recommendation.

The law obliges, expressis verbis, the mediator to justify his recommendation. Such motivation is in fact necessary for reasons of expediency.

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18. H. Touzard, Propositions visant à améliorer l'efficacité de la médiation dans les conflits collectifs du travail, Droit Social 1977, 92.

19. J. Denoyelle, Deux expériences récentes de médiation, Droit Social 1955, 160.

This recommendation must be notified to both parties to the dispute. The parties to the dispute are free to accept or reject the mediator's recommendation, since it does not create any rights or obligations for the parties. This element constitutes the feature that distinguishes mediation from arbitration. As we have already pointed out, the conception of the mediation is founded on both the freedom to participate in mediation and to reject or accept the recommendation.

The absence of acceptance of the mediator's recommendation within a period of five days is assimilated by law to a rejection. The purpose of this short deadline is to quickly terminate the mediation in order to pave the way for possible recourse to arbitration. Acceptance of the mediator's recommendation must be explicit and must be notified to the mediator and to the other party of the dispute within 5 days from the date of notification of the mediator's recommendation (Article 15§ 6 of Law 1876/90). If both parties accept the mediator's recommendation, they are invited to sign it in the form of a collective employment agreement. In this case, the recommendation is assimilated to a collective labour agreement.

5. THE ARBITRATION

The system of collective labour dispute settlement, and more particularly arbitration, has marked the Greek collective industrial relations for a long period.[20].

5.1. The arbitration procedure

5.1.1. The recourse to arbitration

The process of settling collective labour disputes, following a unilateral recourse to arbitration that had characterised Greek collective relations over the last 20 years, often providing a solution to several serious labour disputes, had been abandoned.

Recourse to arbitration might take place, since 2019, mainly through common agreement between the parties.

The law also provides for two cases of unilateral recourse to arbitration: a) in the context of essential services and b) in the context of disputes concerning the general interest. Therefore, unilateral recourse to arbitra-

20. K. Papadimitriou, The settlement of collective labour disputes (in Greek), 1992, p. 123 ff.

tion is considered an exceptional step either in the case of refusal by one of the parties to participate in dialogue and bargaining or in the case of rejection of the mediator's proposal[21].

5.1.2. The arbitration committee

Article 16 of law 1876/1990 provides that arbitration shall be conducted by a three-member arbitration committee. The three arbitrators are appointed by agreement between the parties from the persons included in the official list of arbitrators of OMED. If the parties do not agree on the appointment of arbitrators, these arbitrators are chosen by lot among the OMED arbitrators.

The appointed arbitrators must study all the elements and information collected during the mediation process. They also have the same powers as the mediator in order to complete this information. In other words, they can assemble the parties to discussions, interview witnesses, appoint experts, gather information and ask the employer for documents or information.[22]

5.1.3. The strike during the arbitration

Arbitration does not suspend in principle the exercise of the right to strike, since Greek legislator, as it applies also in the case of mediation, does not intend to combine the unilateral recourse to arbitration with an employers' advantage arising from the suspension or prohibition of the right to strike.

Exceptionally, however, the exercise of the right to strike is suspended for 10 days from the day of the appeal to arbitration (Article 16§ 9 of Law 1876/90).

5.2. The arbitration award

The arbitration award must be issued within a maximum of 15 days from the date of the assignment of arbitrators, if the arbitration is preceded by a mediation. On the contrary, the award must be rendered within 35 days, if the arbitration has not been preceded by a mediation, since, in this case,

21. Article 16 of Law 1876 as modified by Law 4635/2019.

22. L. Ntasios, Collective labour relationships (in Greek), 1991, p. 255.

the arbitrators cannot rely on information and documents previously collected by the mediator (Article 16§ 7 of Law 1876/90).

On the other hand, the arbitrators are not bound by the content of the mediator's recommendation. They can found their award on different elements or criteria, and evaluate in a different way the information collected by the mediator. The arbitration award must be reasoned and remains subject to judicial review.

The arbitration award has the force of a collective agreement. Consequently, all provisions relating to collective agreements apply by analogy to arbitration awards. Its binding effect initiates from the day following the submission of the request for mediation.

5.2.1. The reasoning and the content of the arbitration award

As to the requirement for reasoning of arbitration awards, the law seems to give a certain direction to the arbitrators. More precisely, it is explicitly stated that arbitrators should study all the data and conclusions collected at the mediation stage and the additional information gathered during the arbitration process, and in particular the economic and financial data, the development of competitiveness and the financial situation of the "weaker" companies in the branch, which refers to the collective dispute, as well as the progress in reducing the gap in competitiveness, in reducing labor costs and the evolution of value of wages (Article 16§ 5 and 6 of Law 1876/90).

5.2.2. The appeal against the arbitration award

An appeal against the arbitration award might be filed before a second-level arbitration committee composed by five members, i.e. three ordinary judges and two arbitrators drawn from the official list of arbitrators of OMED ("OMED arbitrators") (Article 16 A§ 2 of Law 1876/90). The two OMED arbitrators who participate in the second-level arbitration committee are selected by lot.

In this way, the system of arbitration appears to be changing conceptually. More specifically, it can be observed that in this second level of arbitration, the emphasis is now placed on the conduct of the proceedings not by independent and specialized persons, as the arbitrators of OMED, but by representatives of the judiciary, who now form the majority of the Arbitration Committee. We therefore depart from the idea of putting the

emphasis on the consensual resolution of the dispute by persons who have special education, particular knowledge and specialized experience.

5.2.3. The judicial control of the arbitration award

The provisions currently in force already specify a more extensive level of judicial review (Article 16 of Law 1876/90). In particular, the disputes might concern the "validity of the arbitral awards" as expressly provided in the text of the law. However, for the first time, it is also explicitly provided that the reasoning of arbitration awards will also be subject to judicial review (Article 16§ 6 of Law 1876/90), which clearly extends, albeit obliquely, their judicial review, ultimately turning a dispute of interests into a legal dispute.[23]

This system functions until today, but in a less decisive way than in the past, since less arbitration awards are currently being issued. In particular, only 5 arbitration awards (of first degree) were issued in 2019, 5 in 2020 and 1 in 2021.

CONCLUSION

Collective bargaining in Greece is still under the influence of the recent economic crisis. The number of collective agreements since 2012 follows a constantly declining tendency. Their content should be enriched in order to be able to respond to modern requirements of labour market. The above observations do not only concern the labour side, but also the employers' side.

23. G. Leventis, The new regulation of arbitration, (in Greek), Δελτίον Εργατικής Νομοθεσίας (Bulletin of Labour Law) 2014, 1588.

Recent trends of collective bargaining in Serbia*

Senad JAŠAREVIĆ**

1. INTRODUCTION

Collective bargaining in Serbia began to develop later than in other European countries, and still does not have the same importance in industrial relations as in certain countries in Europe, the United States or Canada. Influenced by former socialism, collective bargaining is still formalised and dominates the public sector, while in the private sector it is sporadically applied.

Before the First World War in the Kingdom of Serbia there was some modest practice of collective bargaining, because work in the form of an employment relationship was also less prevalent. After the First World War, the importance of collective agreements grew. They became regulated by statute in the Kingdom of Serbs, Croats and Slovenes (later: Kingdom of Yugoslavia) - by the Law on the Protection of Workers from 1922.[1] Also, collective agreements were regulated by the Law on Shops (1931),[2] and in the Regulation on Determination of Minimum Wages, Conclusion of Collective Agreements, Conciliation and Arbitration (1936).[3] Those acts regulated labor relations, as well as collective agreements, in a contempo-

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** Professor of Law Faculty, University of Novi Sad, Serbia.

1. See Arts. 5, 37 and 109 of the Law See in: *Radničko zakonodavstvo (Labour Legislation),* Izdavačka knjižnica Gece Kona, Beograd, 1927.
2. This act defines a collective agreement for the first time in Serbian legislation (Art. 209, paragraph 1).
3. Types, method of conclusion and effect of collective agreements are regulated in Articles 9-15 of the Regulation. See: Uredba o minimalnim nadnicama, kolektivnim ugovorima i arbitraži (Regulation on minimum wages, collective agreements and arbitration), Geca Kon, Beograd, 1937.

rary way at that time. However, the practice of collective bargaining itself was less developed, due to the economic underdevelopment of the state.

The process of development of collective bargaining was effectively interrupted for a long period by the onset of the Second World War. After the Second World War, collective agreements almost disappeared from the Yugoslav legal order. They have been reintroduced in Serbia in 1989 after abandoning the socializm.

After the abolition of socialism, collective bargaining was initially underdeveloped, as the "social partners" did not understand its essence. The conclusion of collective agreements was even mandatory until 2001 (which is not common in comparative practice), and it became voluntary after that.

Initially, collective agreements were concluded automatically, with mass taking over of legal provisions, without real "market negotiation". Specifically, collective bargaining has long been reduced to unnecessary repetition of provisions of labor legislation in collective agreements, with eventual regulating of salary levels, monetary benefits, paid holidays, etc.

After 2000, a slight improvement can be observed in terms of the quality of collective bargaining, since the social partners have began to better understand the "philosophy of collective bargaining", and the negotiation itself became more complex and diverse. Also, collective agreements played a significant role in the process of transition (privatization) of the economy (the first decade of the twenty-first century), when they served as an important means of guaranteeing employment stability and acquired employee benefits.

2. COLLECTIVE BARGAINING IN SERBIAN LEGISLATION AND PRACTICE

Today, in Serbia, collective agreements have a great legal importance in the field of labor law, which does not fully follow their importance in practice. Among the main reasons for such a situation is the still insufficient development of the market economy and the mentality that accompanies such an economy. Namely, the organizations of social partners are not sufficiently developed (both in terms of personnel and expertise), for collective bargaining to be successful. Neither employees, unions, nor employers fully understand the spirit and role of collective bargaining and collective agreements. Hence, the demands of employees are often economically unrealistic, while on the other hand, employers try to avoid negotiation. One of the reasons for this could be life in the period of socialism, when the role of trade unions was completely different than in the

market economy, and employers in the true sense of the word almost did not exist. Now they are learning "market rules" and getting used to their roles in the new market economy.

One of the prerequisites for successful collective bargaining is strong social partners' organisations, especially trade unions. In Serbia, formally, there are many unions, and the first impression is that the union movement is very strong. There are nearly 26,000 registered trade unions.[4] The most of them are enterprises union. The reason for such a large number of trade unions is that under Serbian law all trade unions and their affiliates are registered separately, from the level of the company, onwards (including those those that are part of the trade union federations of confederations).[5] So, in reality, there is a significantly smaller number of trade unions in Serbia.

Despite such a large number of unions, the union movement is not strong. In practice there are three important trade unions federations: 1) *Savez samostalnih sindikata Srbije* (Confederation of Autonomous Trade Unions of Serbia) 2) *Ujedinjeni granski sindikati "Nezavisnost"* (United Branch Union "Indipendence", *3) Udruženi sindikati Srbije „Sloga"* (Joined Trade Unions "Harmony"). There is no unity of the labour movement. Trade unions are disunited and they often act against each other. This affects collective bargaining negatively because it reduces the overall bargaining power of employees. Therefore, union membership is steadily declining (by the way, there is no precise statistic of trade union density).[6]

Employers' organizations are not developed either. There is only one major organization of employers - *Unija poslodavaca Srbije* (Serbian Association of Employers), which mainly gathers small and small entrepreneurs

4. In fact, according to the register of the Ministry of Labour, Employment, Combatant and Social Affairs, there are 25,497 trade unions. See https://www.minrzs.gov.rs/sr/registri/sektor-za-rad-i-zaposljavanje.
5. See Pravilnik o upisu sindikata u registar (Rulebook on union registration in the registry): The Official Gazette of the Republic of Serbia (RS), No. 50/2005 i 10/2010).
6. According to Zoran Stojiljkovic (former president of the "Independence" trade union), all trade unions together have barely 500,000 members, which is less than the number of members of the ruling political party. See *Broj članova sindikata u Srbiji opada (The number of union members in Serbia is declining),* RTV (Radio Televizija Vojvodine), 24. februar 2020, https://www.rtv.rs/sr_lat/ekonomija/aktuelno/ broj-clanova-sindikata-u-srbiji-opada_1096540.html.

and craftsmans, not major employers.[7] Generally, larger employers to achieve their professional goals in the field of labour are satisfied with informal lobbying and covert co-operation with political parties.

On the other hand, in contrast to the less developed social partner organizations and collective bargaining practice, the legislation on collective bargaining in Serbia is quite high-quality. Labor legislation encourages collective bargaining and can be said to meet international standards.[8]

By the Constitution of Serbia (2006),[9] collective agreements are recognized as sources of law, although they are only indirectly regulated by the Constitution.[10] In Labour Code – LC (2005),[11] a special section is devoted to collective agreements. In addition, collective agreements are mentioned in a series of provisions of other laws. Among other things, in Article 1 of the LC collective agreements are legally recognized sources of Labour law, in significance immediately behind the law and international treaties.[12]

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7. See Unija poslodavaca Srbije (Serbian Association of Employers), https://www.poslodavci.rs.
8. See S. Jašarević, *Bitni aspekti kolektivnog pregovaranja prema dokumentima Međunarodne organizacije rada (Important aspects of collective bargaining according to documents from the International Labour Organization),* Radni odnosi i upravljanje, Beograd, 2000, No 1, pp. 39-45. and S. Jašarević, The Autonomy of the Collective Agreement in Serbia and Montenegro, in: *Collective Bargaining, Discrimination, Social Security and European Integration,* European Regional Congress of the International Society for Labour Law and Social Security Law, Stockholm (September 2002), Bulletin of Comparative Labour Relations, Kluwer, The Hague/London/New York, 2003, pp. 339-352.
9. The Official Gazette of the RS, No. 98/2006.
10. They are mentioned in the hierarchy of legal acts, about regulating the right to strike i dr (Arts. 61, 167, 195).
11. The Code was published in the Official Gazette of the Republic Serbia (RS), No. 24/2005, and the remaining amendments in Nos: 61/2005, 54/2009, 32/2013, 74/2014, 13/2017, 113/2017, 95/2018. *Note:* in Serbian legislation, the date of actual enforcement of the law is not considered to be of great importance and no particular evidence is being made in this respect so that the date itself was not included.
12. Art. 1 of the LC states: „ (1) The rights, duties and responsibilities resulting from the employment relationship, i.e. based on employment, shall be regulated by this law and a special law, pursuant to ratified international conventions. (2) The rights, duties and responsibilities resulting from the employment relationship shall be regu-

Also, there is a *duty to negotiate*, but parties have no obligation to reach an agreement.

Under the Law, collective agreements have *priority* over labor rulebook and employment contracts. The employment relationship can be regulated by the labour rulebook and the employment contract only when collective agreement is not concluded (LC Arts. 1, 3). The condition is that there is no union with the employer, there was no interest in negotiating on the union side or the negotiations failed.

The legislator encourages collective agreements and by the same Article 3 of the Law it is foreseen that in case of failure of negotiations parties in the collective agreement shall continue the negotiating process in the spirit of good faith. Also, it is stipulated that an employer who does not accept the initiative of the representative trade union to enter the negotiations for the conclusion of a collective agreement shall not be able to use the labour rulebook to regulate the rights and obligations arising from an employment relationship. As well, labour rulebook shall become invalid on the day the collective agreement is concluded.

However, the aforementioned legal solutions has not increased the popularity and number of collective bargaining agreements. There is no statistics on concluded collective bargaining agreements (there is evidence of only branch collective agreements and collective agreements of national public enterprises), but it is clear that their number and coverage are not satisfactory. In addition, we estimate that since the adoption of the Labor Code (2005), their number is even decreasing.

Collective agreements have been concluded in almost all areas of public sector and public enterprises, while they are quite rare in the private sector. Therefore, in the private sector, the impact of collective agreements on employment contracts is negligible.

In the private sector, collective bargaining has never been enough developed. Employers generally obstruct the establishment of trade unions and avoid collective bargaining by trying to unilaterally regulate tariffs and working conditions - through labor rulebook.[13] They negotiate only under

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lated in the collective agreement and labour contract and by the Labour Rulebook only when this Labour Law stipulates so".

13. On the list of so-called of special collective agreements (as they are called in LC) - which are the only ones which have to be registered, there are a total of 21 such acts. Of these, 14 could be run as branches collective agreements, while the rest

the pressure of employees and unions, but there is often no one to exert such pressure, as the employees are generally not unionized. The organizers of the few trade unions with private employers are not looked upon favorably by the employers.

Interestingly, the LC does not regulate most important terms (such as employment contracts, employment relations), and thus did not foresee the definition of collective bargaining agreements. Instead of a definition, subject-matter and form of collective agreement are regulated. According to the Labour Code (LC) the collective agreement regulates: 1) the rights, obligations and responsibilities arising from an employment relationship, 2) the procedure of amendments to the collective agreement, 3) mutual relationships of the participants in the collective agreement and 4) other issues of importance for the employee and the employer.[14] The parties are, in essence, free to determine the subject-matter and content of the collective agreement.

Social partners enjoy complete freedom to negotiate. Nevertheless, that freedom is limited by compliance with compulsory regulations. According to Art. 8 of LC it is not possible to deviate the mandatory legislation: "Collective agreement and labour rulebook (general documents) and labour contract shall *not contain provisions that entitle the employees to lesser rights or set less favourable working conditions* than the rights and conditions stipulated under the law. The general document and labour contract *may set greater rights and more favourable working conditions* than the rights and conditions stipulated under the law." Therefore, in the Labor Code there is no possibility, which recently appeared in some comparative legislations, for workers to opt for a reduction of legal guarantees through a collective agreement in order to save their jobs.[15]

In practice, traditional issues are mainly negotiated - earnings and other cash benefits, holiday alowances, vacations. Collective agreements are often merely repeated the rules of the statutes, with few genuine legal solutions**.** In general, they represent an additional legal source on which

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were concluded for more important public companies. This list is maintained by the Ministry of Labour, Employment, Veterans and Social Affairs. See: https://www.minrzs.gov.rs/sr/registri/sektor-za-rad-i-zaposljavanje.

14. Art. 240 of the LC.

15. See *Pacts for employment and competitiveness,* EUROFOND, https://www.eurofound.europa.eu/pacts-for-employment-and-competitiveness (1 of April 2022).

employment contracts are based when it comes to topics such as salaries (rates), benefits, salary supplements, other benefits, leave, severance pay, redundancy selection rules, additional social insurance.

Collective agreements have no role in regulating the minimum wage at national level.[16] But they have when it comes to certain branches and sectors, where they set the minimum wage. Also, they set minimum wages with the employer.

The procedure, the way of negotiation, the effect, the types, the subjects of collective agreements are fairly detailed by the Labour Law. A collective agreement must be concluded *in writing*.[17] *Types* of collective agreements are following: 1) general, 2) special, 3) concluded with the employer. A *„general collective agreement"* should be concluded for the entire territory of the country (currently there is no such collective agreement in Serbia).[18] A *„special collective agreement"* is concluded for a certain branch, group, subgroup or activity, and can be concluded for the territory of the whole of Serbia, as well as for the territory of a unit of territorial autonomy (province) or local self-government (municipality). The third category of collective agreements are *agreements with the employer*. Plant level negotiation is not allowed.[19]

The *participants* in the negotiations and formation of a collective agreement are a *representative association* of employers and a representative trade union of employees (principle of bipartism).[20] Regarding collec-

16. According to LC (Art. 112), the national minimum wage is regulated by the decision of the socio-economic council (tripartite body – includes representatives of the Government and social partners). If there is no agreement, this is done by the Government.

17. LC, Art. 240. par. 2.

18. "General collective agreement" was concluded in 2008- expired 2011 - since collective agreements are valid for a maximum of 3 years.

19. LC, Arts. 241-250.

20. The condition of the representativeness of a trade union is that it acts on the principle of freedom of actions of the union, that it is independent, mostly self-financed, registered and having an appropriate number of members (15% of the employees of the given employer, or 10% in the branch, group or activity). Employers are required to bring together 10% of employers in the branch, industry and other negotiating unit, provided that these employers employ at least 15% of the total number of employees in the sector to which the agreement relates to. LC, Arts. 218- 220, 221 and 222.

tive agreements concluded on the level of enterprises, the signatory of the contract can also be a single employer. When it comes to public companies and public services, the founder (state), i.e. the competent body appears on the side of the employer.[21] In the case of a public enterprise (company), as well as a private employer, the collective agreement is signed on behalf of the employer by a person authorized to represent the employer.[22]

The LC also governs the situation when no association can be considered representative. Then the unions or the employers' associations can conclude an *association agreement*, in order to satisfy the condition of representativeness.[23]

In addition to the collective agreement the LC specifies another category of juridical act. It is named simply "*agreement*" (on wages), and it is concluded by the employees' council or the workers themselves with the employer. If the union is not organized at all by the employer, the salary, salary compensation and other employee benefits may be regulated by an agreement.[24] The agreement is signed by a person authorized to represent the employer and a representative of the employees' council[25] or an employee who has received an authorization of at least 50% of the total number of employees. Agreement ceases to be valid on the day the collective agreement enters into force.

The negotiatiators must have the *authorization* of their organizations.[26] The participants in the process of formation of a collective agreement have a *duty to negotiate*, but have no obligation to reach an agreement. If no agreement could be reached, they can initiate arbitration within 45 days in order to resolve disputed issues.[27]

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21. LC, Art. 246.
22. LC, Arts. 246-247.
23. LC, Art. 249.
24. LC, Art. 250.
25. By the way, in the practice emploees' councils does not exist (we know they exist only two councils in the entire country).
26. LC, Art. 253.
27. LC, Art. 254. The composition and procedure of the arbitral tribunal and the effect of the arbitral award shall be determined by agreement of the parties. The deadline for delivering an arbitral award is 15 days from the day of the formation of the arbitration (LC, Art. 255).

As before said, collective agreement is considered a source of law, by legal force immediately after the law and bylaws. The *personal scope of the application* of collective agreements is regulated bilaterally: in relation to employees, and in relation to employers. The collective agreement is binding on all employees, including those as well who are not members of the union, which signed the collective agreement.[28]

Defining the agreement's scope of application in relation to employers is somewhat more complicated. Namely, the general rule is that a collective agreement applies to all employers who are members of the association that signed the collective agreement, as well as to those who join it subsequently. The collective agreement obliges even those employers, who withdrew from the association, for the next six months from the day of the withdrawal.[29] The collective agreement may be accessed subsequently by an employer who is not a member of the association that signed it.[30]

The Government may *extend* the effect of a collective agreement by prescribing that the collective agreement as a whole or its individual provisions also applies to employers who are not members of the association that signed the agreement. The legislator prescribed this procedure in detail.[31] The Government may extend the effect of a collective agreement, if there is a justified interest (with a view to exercise economic and social policy and in order to ensure equal working conditions and wages). The condition is that the collective agreement whose effect is extended obliges employers employing more than 50% of employees in a certain branch, group, subgroup or activity. Some, financially weaker employers, may be exempt from the mandatory effect of the collective agreement.

The *temporal validity* of a collective agreement is limited. Previously, collective agreements could be concluded to an indefinite period (indefinite time validity), which had adverse effects in practice because the working conditions often could not follow the new circumstances but a new agreement could not be reached. That is why now collective agreement can be concluded for a maximum of three years. After the expiry of that period, the agreement ceases, unless the participants agree otherwise, no

28. LC, Art. 262.

29. LC, Art. 256.

30. LC, Art. 256a.

31. LC, Arts. 257-258.

later than 30 days before the expiration of its validity. Its validity may be terminated earlier by an agreement of the participants or by termination, in the manner determined by that agreement. In that case, the collective agreement shall apply for a maximum of six months from the date of submission of the notice. After the termination, the participants are obliged to commence negotiations within 15 days.[32]

In order to have the text of a collective agreement available to the public and facilitate the determination of its content, collective agreements concluded at all levels above the company level (general and special collective agreement) must be registered with the Ministry of labour, employment, veteran and social affairs, as well as their amendments.[33] They are also to be published in the Official Gazette of the Republic of Serbia.[34]

According the Article 268 of LC "Supervision over implementation of this law, other labour regulations, general documents and the employment contracts regulating rights, duties and responsibilities of employees shall be conducted by *labour inspection*." This includes supervision of the application of collective bargaining agreements. Also, as collective Agreements are binding legal acts, they can be enforced in *court procedure*.

Disputes settlement regarding collective bargaining agreements is possible in five ways. These are: 1) arbitration, 2) conciliation (which is exactly mediation), 3) „preventive mediation", 4) court procedure, 5) informal (political) mediation.

The Labour Law provides for two types of arbitration regarding collective bargaining agreements: 1) *ad hoc interest arbitration* - for interest disputes (within 45 days of fealure of the negotiations);[35] 2) *ad hoc right arbitration* – for right disputes (set up within 15 days).[36] In practice, these arbitrations are extremely rarely applied.

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32. LC, Arts. 263-264.

33. According to the Ministerial Decree on the Registration of Collective Agreements.

34. LC, Arts. 266-267.

35. The deadline for delivering an arbitral award is 15 days from the day of the formation of the arbitration. (LC, Art. 255).

36. According the art: „(1) Disputed issues in implementation of a collective agreement may be resolved by arbitrage set up by parties to the collective agreement 15 days after the dispute has arisen at the latest. (2) Decision of arbitrage on the disputed issue shall be binding to the parties".

The next possibility, which is much more used in practice, is a conciliation (which is exactly – mediation) before the Agency for Peaceful Settlement of Labour Disputes (settled on 2005). The work of the Agency and the dispute resolution procedure are regulated in detail by the Act on Peaceful Settlement of Disputes, of 2004.[37] Conciliation is voluntary (except in the case of a strike announcement in the essential sector). The parties choose a conciliator by mutual agreement. Conciliation is carried out by a panel presided over by a conciliator, in which representatives of the parties to the dispute participate. The settlement period is 30 days (exceptionally it can be extended to 60). If the parties fail to reach an agreement, one of them can propose that the conciliator make a recommendation (hence at that moment the process turns into mediation). If collective agreement is the subject of dispute, the agreement becomes an integral part of the collective agreement. If collective agreement is not the subject of dispute, the agreement has the power of court settlement.[38]

Also, according to the Act on Peaceful Settlement of Disputes, conciliators can provide assistance to the parties in collective bargaining (so-called preventive mediation).[39] The conciliator in the collective bargaining procedure: 1) attends the negotiations; 2) indicates to the participants proposals that are not in accordance with the law and other regulations; 3) provides assistance to participants in order to prevent the occurrence of a dispute. The conciliator is obliged to be impartial during the negotiations (Art. 17).

The next option is to settle dispute before the court. Employees can enforce their rights from the collective agreement before the court, if the employer does not respect those rights (individual right labor dispute). Also, Civil Procedure Law (2004),[40] provides that in case of inability to conclude collective agreement (collective interest dispute), the disputed issue

37. The Official Gazette of the PC, No. 125/2004, 104/2009, 50/2018. See Arts. 16-29.

38. LC, Art. 26, paras. 3 and 4.

39. According to Art. 16, s. 1. of the Act on Peaceful Settlement of Disputes, participants in the negotiations may submit a proposal to the Agency for Peaceful Settlement of Labour Disputes for the participation of conciliators in collective bargaining in order to provide assistance and prevent the occurrence of a dispute.

40. Official Gazette of the Republic of Serbia" No. 125/04 and 111/2009, 9/2013, 74/2013, 55/2014, 87/2018, 18/2020.

should be resolved through the courts.[41] We consider this legal solution inappropriate because in many situations the court simply does not have a basis for determining what should be the subject of an agreement between the social partners (eg level of wages, benefits, special privileges for employees).[42]

One of the ways of the disputes settlement that occurs in practice is - political mediation. Workers, especially in the case of major strikes often turn to the Government or the Ministry of Labour - for *informal mediation.*[43] It is probably one of the relics of socialism, when the state has unilaterally regulated labor relations, and now the state is expected to settle the disputed issues if this is not possible by agreement of social partners.

3. COLLECTIVE BARGAINING IN NEW CIRCUMSTANCES (FINANCIAL CRISIS, GLOBALISATION, COVID – 19, NEW FORMS OF WORK)

The persistent financial crisis has diminished importance of an already minimal company collective bargaining. Collective bargaining only survives in public enterprises, especially in the essential sector – where workers have a good "negotiating position" and may achieve conclusion of collective agreements.

The economic crisis has not affected the level of bargaining. The situation has been similar since the introduction of collective bargaining. Unlike other countries, in Serbia the trend of decentralization is not represented. Branch/sectoral collective bargaining dominates from the beginning. Role of company bargaining is modest – except in public enterprises.

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41. In civil proceedings pertaining to collective agreements, the signatories of a collective agreement shall claim legal protection of rights determined by a collective agreement in case of dispute arising from signing, amending or supplementing of a collective agreement, if such dispute is not settled amicably or through arbitration agreed between the signatories of a collective agreement, pursuant to provisions of a specific law. (Art. 443). By the verdict in litigation regarding collective agreements, the court pronounces the wording of the provision in the collective agreement which regulates the disputed issue from the collective agreement. The operative part of the judgment is an integral part of the collective agreement as long as it is valid (Art. 445).
42. See Arts. 442-442 of the Law.
43. The official title of the ministry is: Ministry of Labour, Employment, Veterans and Social Affairs. See https://www.minrzs.gov.rs/sr.

Globalization had led to an increase in unemployment, a decline in the number of full-time employees (the trends of flexibilization of employment and "false flexibilization") and an intensification of the economic crisis.This has hampered hitherto weak collective bargaining.

Covid issues have not been included in recent collective bargaining. The unions were unprepared for such circumstances, so they did not react even there was evident uncontrolled suspension of many human rights of employees. The emphasis of unions activities during that period was on preserving jobs (job security). The bargaining was during that period on minimum level. The unions were unprepared for such circumstances, so they did not react even there was evident uncontrolled suspension of many human rights of employees.

Too, in Serbia there is no collective bargaining in relation to new forms of work. The problems related to platform work and other new forms of work in Serbia are similar to the same ones worldwide, but trade unions and the state are almost completely unaware of the problems in this area so far. The unions have not tried to unionise workers in non-standard forms of work and collective bargaining in this area is still far from the reality.

4. CONCLUSION

Collective bargaining was restablished in Serbia thirty years ago. In the meantime, it has come to life, but it can be said that it is still at rudimentary level when it comes to the private sector. In the public sector, it is slightly more developed, but there is often no great freedom of negotiation, since the frameworks are limited by the financial possibilities and plans of the state.

There is real room for improving collective bargaining in Serbia, especially in the private sector. In this sense, the preconditions are the strengthening of social partner organizations and the market economy. Also, unions should turn to the protection of new categories of workers (platform and other atypical workers). In addition, trade unions should work on deepening the employees protection through collective agreements, since protection of employees has stagnated in the last twenty years under the influence of the privatization of the economy, the influx of foreign investments and the interference of international financial institutions (WB, IMF). It would also be useful to popularize the peaceful resolution of labor disputes, rather than use slow and costly court proceedings.

Recent trends of collective bargaining in Cyprus

Nicos TRIMIKLINIOTIS*

1. HISTORICAL TRENDS

Cyprus has a relatively high level of trade union organisation – although it is probably now below 50%. There are two major trade union confederations, the Pancyprian Federation of Labour (PEO) and the Cyprus Workers Confederation (SEK),broadly similar size,[1] the important unions outside the confederations are the Pancyprian Public Employees Trade Union (PASYDY) with 22,513 members (2016) who are public servants, Cyprus Union of Bank Employees (ETYK) with 9,341 (2015) members, the three big teachers unions organized in public sector education i.e. OELMEK with 5,150 (2016), which organises secondary teachers, and POED with 5,545 (2015), Cyprus Technical Education Teachers Union (OLTEK). Smaller unions, Democratic Labour Federation of Cyprus (DEOK) and the Pancyprian Federation of Independent Trade Unions (POASO).[2]

Trade unionism in Cyprus emerged in the 1920s and 1930s together with Labour centres in cities and workers' committees emerged in the mines, construction sites, tailors and shoe-makers. By the 1930s and early 1940s trade union membership expanded and involved both Greek-Cypriot and Turkish-Cypriot workers organised in ethnically mixed trade unions. However, by there was a rupture by 1950s, reflecting the ethnic conflict which begun to divide the also the trade union movement. The ethnic separation was completed with the de facto partition of the country in 1974 with the Greek-Cypriots were expelled from the north to the south, and the Turkish-Cypriots moved to the north. There is an active

* Professor of Sociology, Social Sciences and Law at the School of Social Sciences, University of Nicosia; national expert for European Network on Labour Law.

1. PEO 61,529 members, SEK 55,813 (2016 figures). Trade Unions / Cyprus* / Countries / National Industrial Relations / Home - WORKER PARTICI- PATION.eu (worker-participation.eu).
2. In 2016 it claimed 7,123 members but the numbers must be less today.

trade union in the northern break-away TRNC (only recognized by Turkey). However, trade unions are primarily organized in the public sector. The trade unions are organised along similar lines and retain relations with trade unions in the southern part of the country, territory under the control of the Republic of Cyprus.[3] Despite the division of the country, they retain connections with Greek-Cypriot trade unions, via the Pancyprian Trade Union Forum.

Cyprus has a strong tripartite tradition that go back to the British colonial times in the 1940s. These were strengthened with independence. The Industrial Relations Code (IRC)[4] was revised and signed by the Social Partners in 1977. The Ministry of Labour and Social Insurance website underscores the importance of the Code: "Even though the Code is a voluntary agreement, it is highly respected by the social partners, and they very rarely fail to adhere to its provisions." The dominance of regulated employment relations continued up to the 1980s, but since the 1990s, the rise of various services around the tourist and restaurant sector, as well as the process of 'financialization' with ludicrous financial services has result in the rise of no-regulated, often atypical, unionised and precarious work, characterized by personal contracts or subcontracting.

Since independence, the first tripartite agreement was "the Basic Agreement" was a code signed in 1962. It was about a simple set of rules which functioned efficiently until replaced by the more elaborate IRC rules. The code is based on the philosophy of tripartite cooperation, good industrial relations, who will reach a compromise that would serve all parties and the general interest of the country, irrespective of their own objectives. The IRC currently governs the system of collective industrial relations both the private and the semi-public sector and public sector. The Code consists of two parts. In the first part, "Substantive Provisions", contains two main participating parties (trade unions and employer organizations) recognise and ensure certain fundamental rights to free collective bargaining:

3. Gregoris Ioannou and Sertac Sonan (2020) *CYPRUS Trade Union Monitor*, Friedrich Ebert Stiftung Briefing, 2020 and Gregoris Ioannou and Sertac Sonan (2014). *Trade Unions in Cyprus, History of Division, Common Challenges Ahead*, paper for Friedrich Ebert Stiftung, https://library.fes.de/pdf-files/id-moe/11143.pdf.
4. The Industrial Relations Code, Thttp://www.mlsi.gov.cy/mlsi/dlr/dlr.nsf/All/2F3F042BE716A91EC22586E900410E72/$file/Industrial%20Relations%20Code.pdf?OpenElement.

i. The right to organise.
ii. The right to collective bargaining, collective agreements and joint consultation.
iii. The definition of negotiable issues though collective bargaining, joint consultative issues and management prerogatives.
iv. Strict adherence to the provisions of all International Labour Conventions, which the Government of Cyprus has ratified.

The second part, "Procedural Provisions", the Code stipulates separate procedures to be followed for the settlement of disputes over interests, and for the settlement of grievances/ disputes over rights.

Collective agreements do not generally specify working conditions below the standards defined by law. With the implementation of EU acquis on labour law, new legislative provisions may provide for more favourable terms than those provided for in collective agreements (e.g. annual leave).

The IRC does not apply to the public/ government sector. Instead the right to free collective bargaining, consultation and settlement of disputes in the public sector belongs to four separate and independent bodies:

- The Joint Staff Committee (for Civil Servants)
- The Joint Labour Committee (for government industrial workers)
- The Joint Committee (for Technical School Teachers and Teachers of the basic and secondary education)
- The Joint Committee (for Members of the Police Force).

Sparsis (1998) suggests that these committees are modelled on the lines of the Whitney Councils, which were established in the UK during the 1940s.

The Pandemic and Industrial relations in country dominated by SMEs

Despite the strong tripartite traditions of collective bargaining, the dominance of micro enterprises means that large sections of the of labour are not covered by these. SMEs are the backbone of the Cypriot non-financial business economy as their contribution to total value added and employment is striking, at 76.3% and 83.8% respectively. Both are substantially higher than the respective EU averages of 56.4% and 66.6%. Cypriot SMEs employ 3.9 people on average, consistent with the EU average.

The country's economic dependence on SMEs has not prevented unionisation, as Cyprus has historically enjoyed a high level of unionisation and union density. Over the last years this however has been falling: the industrial manufacturing sector has been shirking, whilst the shift towards

a service economy and financialization saw the massive rise of sectors which are not unionised. Moreover, trade unions have been unable to adapt to these changes. Collective Bargaining Coverage is estimated to be at 52% and the proportion of employees in unions is estimated to be at 55%.[5] This may be exaggerated (Ioannou and Sonan, 2020).

The Covid19 pandemic has brought about closure of a large numbers of SMEs but they remain dominant and new ones are emerging. With the exception of the public sector which employs about 69,000 persons[6] and some exceptional sectors, the private sector is dominated by SMES. According to the latest statistics, for the second quarter of 2021, out of the total workforce 417,330 (m: 228,505, f: 198,796) currently in employment, the vast majority are employed in sectors where SMEs dominate with very few exceptions of large enterprises.[7] There are 74,087 employed in Wholesale and Retail Trade, Repair of Motor Vehicles and Motorcycles, 41,278 in Construction, 32,803 in Manufacturing (essentially light manufacturing industry), 26527 in accommodation and foodservice activities, 14,946 in transport and storage, 18,00 in household service etc which are made up by small firms with little, if any at all, trade union traditions and any traditions of worker participation in decision-making.

There are a few large enterprises, the most of which are in the public sector. In the public sector, both the civil service, government, education, security forces and public corporations (known in Cyprus as the broader public sector), there are strong trade un- ions, which have a strong input in the shaping of policies that have a di- rect and indirect effect on embayment, employees' terms of employment, working conditions, obligations, rights, benefits and welfare.

Another relevant factor that does not favour collective bargaining is the fact that there is a large section of non-unionised workers and the recent growth in of 'new', precarious and atypical forms of employment,[8] of-

5. ETUI, *CYPRUS Key Facts*, Worker participation in the EU (February 2023), https://www.worker-participation.eu/national-industrial-relations/countries/cyprus.
6. Republic of Cyprus (2021) *EMPLOYMENT IN THE BROAD* PUBLIC *SECTOR,* 14 June 2021.
7. Republic of Cyprus (2021) *Statistics LABOUR FORCE SURVEY, 2nd QUARTER 2021*, published 2 March 2021; reproduced in Annex 1.
8. Trimikliniotis, N., Demetriou, C. (2019) "Atypical Employment Relationships in Cyprus", Bernd Waas and Guus Heerma van Voss (eds.) *Restatement of Labour Law in Europe*, Volume II, *Atypical Employment Relationships*, Hart Publishing and Blooms-

ten in multiparty-relations.[9] In this sense, this is a factor that has resulted in the non-unionisation as these workers whose pressing priorities are shaped by their insecurity and precarity as a matter of everydayness, makes unionisation difficult, particularly for traditional unions.

2. THE RIGHT TO COLLECTIVE BARGAINING: CONSTITUTIONAL PROVISIONS

The Constitution of the Republic of Cyprus safeguards the right to collective bargaining is guaranteed and safeguarded by article 26, which is part of freedom of contract:

1. Every person has the right to enter freely into any contract subject to such conditions, limitations or restrictions as are laid down by the general principles of the law of contract. A law shall provide for the prevention of exploitation by persons who are commanding economic power.

2. A law may provide for collective labour contracts of obligatory fulfilment by employers and workers with adequate protection of the rights of any person, whether or not represented at the conclusion of such contract.

No law based on Article 26(2) has been enacted. Also, relevant here is the right to strike under Article 27 which provides:

1. The right to strike is recognised and its exercise may be regulated by law for the purposes only of safeguarding the security of the Republic or the constitutional order or the public order or the public safety or the maintenance of supplies and services essential to the life of the inhabitants or the protection of the rights and liberties guaranteed by this Constitution to any person.

2. The members of the armed forces, of the police and of the gendarmerie shall not have the right to strike. A law may extend such prohibition to the members of the public service.

Again, no law based on Article 27(2) has been enacted so far.

In practice, the system of free collective bargaining developed in the framework of the Industrial Relations Code (from now, IRC) that applies to both the private and the semi-public sector. It is not binding on the un-

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bury Publishing, Oxford, Portland and Oregon, ISBN-10: 1509912479, ISBN-13: 978-1509912476, 107-138.

9. Trimikliniotis, N. (2021) ECE Thematic Review 2021: Multiparty Work Relationships; Ioannou, G. (2021) Employment, Trade Unionism and Class, The Labour Market in Southern Europe since the Crisis, Routledge.

ions who have singed it, but via the *incorporation* of the terms of the collective agreement in the individual contracts of the employment of workers, therefore collective agreements do have a legally binding effect, as discussed further down.

3. CYPRIOT LABOUR LAW

Cypriot labour law derives from common law contract principles. It was first developed as a specific area of law with statutory interventions under British colonialism and assumed its present form with Cypriot independence in 1960, with various statutory provisions that define distinct areas of law, labour law and employment law.[10]

Cypriot labour law is made up by common law and statute law, the employment relationship is regulated by ordinary contract law principles (Contract Law, Cap 149 as amended), supplemented by statutory rights and obligations where appropriate. Prior to the accession to EU, industrial relations in Cyprus was regulated by established norms and practices, guided by Common Law and a rather small number of statutes, such as the Laws on the Termination of Employment as amended from 1967 until 2002 (89(I)/2016)[11] and the Laws on Annual Holidays with Payment as amended from 1967 until 2002 (169(I)/2002). With the process of accession to the EU, the EU acquis in the area of labour law, a new body of laws were introduced since 2002 onwards that form a crucial body of law regulating employment in Cyprus.

The sources of labour law in Cyprus reflect Cyprus' EU membership and the country's historical evolution of law. Apart from the Constitution, the sources of labour law include EU law, international labour treaties and norms incorporated through the adoption and ratification of international treaties, such as Art. 169 of the Constitution (eg, the ILO treaties), the

10. P Polyviou, *Η Σύμβαση Εργασίας*, (Nicosia, Chryssafinis & Polyviou, 2016); P Polyviou, *Το Κυπριακό Εργατικό Δίκαιο Κύπρου. Θεωρία και Πράξη*, (Nicosia, Chryssafinis & Polyviou, 2018); S Yiannakourou, *Κυπριακό Εργατικό Δίκαιο* (Athens, Nomiki Bibliothiki, 2022); A Emilianides and C Ioannou*, Labour Law in Cyprus* (Alphen aan den Rijn, Wolters Kluwer International, 2016); N Trimikliniotis and C Demetriou, 'The Concept of "Employee:" The Position in Cyprus' in B Waas and G H van Voss (eds) *Restatement of Labour Law in Europe. The Concept of Employee*, Vol I, (Alphen aan den Rijn, Kluwer Law International, 2017).

11. Οι περί Τερματισμού Απασχολήσεως Νόμοι του 1967 (Αρ. 2) available at Ο περί Τερματισμού Απασχολήσεως Νόμος του 1967 - 24/1967 (cylaw.org).

European Convention of Human Rights and the case law of the Strasbourg Court, Cypriot Labour Law and other relevant legislation, aspects of administrative law (for public sector employees and workers), the common law principles of labour law developed by case law and by the binding precedent of English courts up to 1959 (and the Cypriot courts since then) as well as labour law practices and customary norms developed by social partners. The most important legal source of labour relations is the Industrial Relations Code 1977,[12] which codified a well-functioning labour relations system based on a strong tradition of tripartism.[13] EU accession, particularly since the economic crisis and the imposed austerity measures, has led to high unemployment, particularly amongst youth,[14] weakened trade unions,[15] increased precariousness and emigration amongst younger Cypriots, with adverse effects on workers' rights. [16]

Although the Cypriot legal system is based on common law, courts do not constitutionally have the power to 'make' law, but only to interpret it. Nevertheless, on many questions concerning dismissals, such as redundancy, an extensive body of judicial decisions fill the gaps of the law. Employment relationships are governed by contracts –private or collective– and contract law principles therefore apply, supplemented by statutory rights and obligations primarily found in the Termination of Employment Law No 24 of 1967, as amended. A rich body of judicial decisions exists with interpretations of

12. *Κώδικας Βιομηχανικών Σχέσεων*.

13. M Sparsis, *Tripartism and Industrial Relations: The Cyprus Experience* (Nicosia, 1999); M Sparsis, *Σύντομη Ιστορία του Κυπριακού Εργατικού Κινήματος και της Οργάνωσης των Κυπρίων Εργοδοτών* (Nicosia, 1999).

14. G Ioannou and S Sonac, *Youth Unemployment in Cyprus An Examination of the 'Lost Generation'* (2016) Report for Friedrich-Ebert-Stiftung, September 2016, available at: http://library.fes.de/pdf-files/id-moe/12825.pdf; G Ioannou, 'Employment in Crisis: Cyprus 2010-2013' (2014) *The Cyprus Review*, Vol 26, Issue 1, 107-126.

15. G Ioannou and S Sonan, 'Trade unions and politics in Cyprus: an historical comparative analysis across the dividing line,' *Mediterranean Politics*, 2017 Vol 22, Issue 4, 484-503.

16. N Trimikliniotis, S Stavrou and C Demetriou, *The reality of free movement for young European citizens migrating in times of crisis, Cyprus National Report* (2016), ON-THE-MOVE, available at: http://euonthemove.eu/wp-content/uploads/2017/05/Cyprus-national-report.pdf; N Trimikliniotis and C Demetriou, 'Atypical forms of employment in Cyprus', B Waas (ed) *Restatement of Labour Law in Europe. Atypical Forms of Employment*, Vol II (Alphen aan den Rijn, Kluwer Law International, 2019).

legislative provisions, drawing on case law from the British courts as well, which Cypriot courts turn to in the absence of Cypriot judicial precedents, and which is generally highly regarded and adhered to by Cypriot courts.

There is no statutory definition of *employment relationship* (in greek: "σχέση εργασίας"); neither does the Termination of Employment Law N. 24 of 1967 define the notion of employment relationship as such. Article 2 however does define the terms 'employee' and 'employer', under. The definition defines an employee as a person who works for another "in circumstances from which the existence of a relation of employee and employer may be concluded". In an influential case, Judge Loizos underlines the nature of this relationship as a follows: "The employee-employer relationship has always been understood to be one of master and servant and the expression in circumstances from which its existence may be concluded".[17] Therefore, the employment relationship, as a matter of law, is decided by the Courts from the facts of the particular case.

The employment relationship is governed by contracts, private or collective, and thus Contract law principles apply, [18] which are however supplemented by statutory rights and obligations, primarily to be found in the Termination of Employment Law N. 24 of 1967, as amended.[19]

3.1. Industrial relations and the incorporation of terms of collective agreements in individual contracts of employment

There is misconception about the Cypriot industrial relations by those who not versed in the British industrial relations and common law traditions. The fact that that the collective bargaining process is said to be voluntary, often described in the old sexist wording as 'gentlemen's agreements' and this has no legally binding effect on the parties who sign it (ie employers

17. *Christofides v. Redundant Employees Fund*, Case Stated No. 149, 1.3.1978. The judgement was delivered in English by judge Loizos.
18. Cypriot employment law consists of Common law (i.e. Court decisions), original derived from general Contract principles, and statutes. Courts only have the power to interpret the law and not rule contrary to any existing statute or create new legislation. 29(1)(c) of the Termination of Employment Law N.24 of 1967, explicitly notes that the aforementioned statute does repeal or restrict the provisions of the law on Contracts, under Cap. 149 or the principles of Common Law.
19. This law covers redundancy and arbitrary dismissal of all employees including public employees and was enacted in an effort to transpose Recommendation 119 of June 1963 of the ILO.

and trade unions) against each other may generate confusion. This does not mean that collective agreements have no legally binding effects on employers and workers, collectively and individually. In fact, derived from British common law principles, Cypriot Labour law recognises the incorporation of the of terms contained in collective agreements in individual contracts of employment, but three alternative conditions or logics or routes must apply.

The first condition is that the terms of the agreement must be the established norms, as the wage scales and other 'codes' it contains can become 'crystalised customs'. These are practices, customs and prevailing logics as understood and applied in the industry and sectoral customs that must be incorporated within individual contracts.[20] An English authority is the case of *Burton v Smith* 1977, where the court found that the collective agreement had impacted on individual contracts, allowing this the CA to cross outside to inside the contract of employment as a 'bridging term' providing it considered to operate, as the trade union here which signed the collective agreement was considered to be an agent of the worker.[21] In the absence of a statutory code to govern the impact of the collective agreement on the individual contract of employment (as in some other countries) incorporation is neither compulsory nor automatic. Therefore, it depends on the presence of a bridging term in the contract of employment which may be either *expressed* or *implied* and the mere existence of a collective agreement is not enough. There are those who consider that agency, which as an alternative conceptual basis for incorporation, is generally rejected as the basis for analysis of the relationship between the collective agreement and the individual contract, but consider that it may apply where a small group of employees is involved. There are Cypriot cases that have followed this line of authority logic.[22] In the case of *Lanitis* the logic of agency was followed which explicitly referred to "the doctrine of agency when union officials negotiate a settlement of a dispute on behalf of a few employees identified by

20. Polyviou, (2018) *Το Κυπριακό Εργατικό Δίκαιο Κύπρου. Θεωρία και Πράξη*, (Nicosia, Chryssafinis & Polyviou, 2018) pp. 714-715, quotes Otto Kahn-Freund. See Paul Davies and Mark Freedland (1983) *Sir Otto Kahn-Freund's Labour and the law*, The Hamlyn lectures, 3rd ed., Stevens & Sons.

21. Burton Group v. Smith [1977] IRLR 35.

22. Lanitis Bros Co. Ltd v. Cleopas Ioannides and Others (1979)1CLR, 815, and Χρύσανθου Χατζηχρυσάνθου ν. Κυπριακές Αερογραμμές, 763/2005 15.10.2014.

name" to justify whey the terms of collective agreement become binding on the parties.[23]

The second condition or route via which judicial decisions illustrate that the there has been an incorporation of the terms of a collective agreement in individual contracts is where it can be construed by the conduct and behaviour of the parties. If for instance the unions and employers had previously used terms of collective agreements as a point of reference or as part of the relevant individual contract, then it is highly likely the courts would construe that the parties had continued to be negotiation on the basis of their practice in the course of their dealings.[24]

The third issue pertains to the nature of the of the terms of the collective agreements to be incorporated. The terms must 'suitable', according to the common law. There is a distinction between those terms which are deemed to be suitable and those which are not. *Suitable* are those terms which are usual in individual contracts such as wages, work time, early retirement, severance pay, redundancy or disciplinary arrangements imposed on the employer etc.[25] On the contrary, courts consider as being not apt for incorporation which are mere broader statements of general expression of policy or aspiration or unspecified generalities about the future of a firm or party agreements of procedural aspects of collective bargaining, in which case the court will consider that such aspects do not have any binding effect.[26] In other instances, judges would have a more general regard to "the contractual intention of the parties".[27]

Cypriot courts would therefore draw on these general principles to construe the terms of the employment relationship in the specific context having regard to the context and content of the collective agreement to decide on whether a term is apt for incorporation or not. The courts will examine the fairness or otherwise under specific situation under examina-

23. Lanitis Bros Co. Ltd v. Cleopas Ioannides and Others (1979)1CLR, 815, cited in Polyviou 2018, 717.
24. Polyviou 2018, pp. 721-722.
25. Judge Scott in the case of National Coal Board v NUM [1986] IRLR explicitly refer to these examples as being suitable.
26. These were cited in National Coal Board v NUM [1986] IRLR and in the case of Malone ve British Airways [2011]1CR 125.
27. Judge Hobhouse in Alexander v Standard Telephones & Cables Ltd (No2) [1991] IRLR 287.

tion and if it reflects the arrangement between the parties and their mutual expectations.[28]

3.2. The role of the Ministry of Labour where bargaining position of labour is weak

The basis of the current industrial relations system is based on two fundamental principles are entrenched: voluntarism and tripartite cooperation. Collective bargaining has therefore traditionally played a leading role in regulating industrial relations, and legislation has constituted a secondary tool (see above). Along the same lines, state intervention generally in industrial relations and particularly in the formulation of terms and conditions of employment is kept to a minimum. In this context, the role of the state is mainly a mediatory one. It intervenes, as also laid down in the Industrial Relations Code (IRC), through the Mediation Service of the Ministry of Labour, Welfare and Social Insurance (MLWSI) in cases where agreement can't be reached in the direct bipartite bargaining between the employer organisations and the trade unions. In sectors of economic activity where trade union representation is not present or is weak, the state regulates with legislation minimum standards of the basic terms and conditions of employment, such as the minimum wage and working time for specific occupations or sectors of economic activity – for example, in the retail sector. In light of decreasing trade union density and in particular given the economic and financial crisis, trade unions after 2013 are more inclined than before to opt in favour of state intervention in the regulation of the minimum terms of employment. For example, in April 2016, following the renewal of the collective agreement in the hotel industry, the House of Representatives amended the 'Terms of employment regulation for employees in hotels' by obliging all employers of the sector to extend the minimum entitlements and benefits to all hotel employees, independently of the collective agreement coverage. This was a major demand of the sector's trade unions. In a similar process concerning the construction industry, the sectoral social partners reached an agreement in 2019 for the renewal of the industry's collective agreement including the introduction of a legislation setting minimum terms of employment for all of the sector's workers. Unlike any other legal instrument setting minimum terms of employment, this in 2020 adopted legislation, provides for the automatic

28. Polyviou, 2018, pp.728-729.

evolution of these minimum terms in accordance with the respective provisions of the industry's collective agreement. These developments lead to the assumption that in future, regulatory and legislative authorities will be called upon more frequently to adopt measures regulating the minimum terms of employment.

4. WAGE BARGAINING COVERAGE

It is difficult to assess the true level of the coverage of collective bargaining. Available data on collective bargaining coverage data are fragmented and derive from various sources, while the methods by which they are collected and processed are unknown. In this context, it is problematic to cite any specific data, while it is extremely important to differentiate the public and the broader public sector, where the proportion of coverage reaches almost 100%, from the private sector. As far as the private sector in concerned, without providing for an exact figure, trade unions have reported that bargaining coverage has shown a tendency to fall already since 2007, a tendency that has shown a steady increase since 2010. This tendency became more evident in course of the recent financial and economic crisis.

Collective wage bargaining coverage of employees at different levels[29]

Level	% (year)	source
All levels	**43,3 (2016)**	2021 – OECD/AIAS ICTWSS Database 2021
All levels	61 (2013)	2013 – ECS
All levels	35 (2019)	2019 – ECS

29. Sources: Eurofound, European Company Survey 2019 (ECS), private sector companies with establishments >10 employees (NACE B-S) – multiple answers possible; Eurostat, Structure of Earnings Survey (SES), companies >10 employees (NACE B-SxO), single answer for each local unit: more than 50% of employees covered by such an agreement – online dataset codes: [EARN_SES10_01], [EARN_SES14_01], [EARN_SES18_01] (Percentage of employees working in local units where more than 50% of the employees are covered under a collective pay agreement against the total number of employees in the scope of the survey); OECD/AIAS ICTWSS Database 2021.

All levels	49 (2010)	2010 – SES
All levels	44 (2014)	2014 – SES
All levels	36 (2018)	2018 – SES

5. BARGAINING LEVELS

In Cyprus, collective bargaining takes place at sectoral and enterprise levels. At sectoral level, direct negotiations are always held between the two sides of industry, in most cases between the two biggest confederations PEO and SEK from the employees' side and OEB from the employers' side. At enterprise level, collective agreements are drawn up and negotiated usually directly between the trade union representatives and the employer, but in a number of cases with the assistance of the company's affiliated employer association.

Despite a clear trend towards decentralisation of collective bargaining studies refer to 'a mixed situation' that continues to exist in Cyprus where bargaining levels alternate between sector and company level. In this context, it is rather difficult to assess which is the predominant level, mainly with regard to the total bargaining coverage rate. Specifically, despite the numerical preponderance of the enterprise level, the sectoral level is seen just as important, if not more important as far as coverage is concerned.

6. UNITY OF THE LABOUR MOVEMENT AND LEVEL OF ORGANIZATION OF LABOUR UNIONS

There is a strong tradition of unionisation. Hence, there is a relatively high level of trade union organisation but has now fallen below 50%.[30] The level of unionisation has been shrinking over the years. First there was the process of financialization and the rise of service-based sectors since 1990s, which have labour union and no collective bargaining traditions. A second factor is the increasing utilisation of migrant labour who are situated at bottom of the labour hierarchy, particularly those performing jobs

30. *Trade unions, Worker participation in the EU* (2001), ECRI Second Report on Cyprus, European Commission against Racism and Intolerance, Council of Europe, Strasbourg, ETUI, available at: https://www.worker-participation.eu/National-Industrial-Relations/Countries/Cyprus/Trade-Unions.

unattractive to Cypriots in sectors without a strong labour tradition. These are considered vulnerable workers: Different groups of vulnerable workers exist in Cyprus. Many studies suggest that third-country migrant workers are in 'a vulnerable position', as the Second ECRI Report on Cyprus[31] first noted. They continue to be in a vulnerable position in spite of improvements to the institutional and legal framework, as pointed out in the Third and Fourth ECRI Reports. Moreover, over and above TCNs, it is now recognised that the categories of 'vulnerable groups' in terms of their employment situation include EU citizen workers, Turkish-Cypriots and Roma: the Third ECRI Report recorded that the working conditions in the farming and agriculture sectors, which are almost entirely made up of migrant workers and are the only sectors open to asylum seekers, are 'extremely poor': wages are well below the minimum wage fixed by collective agreements for other sectors of the economy. The vast majority of EUNs who work in similar low skill and low pay jobs are in a similar position, as documented in many reports and studies: EUNs in the hotel industry[32] face widespread discrimination.[33] Discrimination and inequality in the labour market is a pattern that becomes apparent when looking at the types of jobs migrants from third countries, EU citizens from poorer countries and some other numerically smaller ethnic groups perform. Low skill and low

31. ECRI (2021) *Second Report on Cyprus*, European Commission against Racism and Intolerance, Council of Europe, CRI (2001) 35, Strasbourg, https://rm.coe.int/ second-report-on-cyprus/16808b5632.

32. Cyprus Equality Body Report, Position of the Equality Authority on the violation of the principle of equal treatment between Cypriots and union workers in the hospitality industry, File Number A.I.T 1/2011, 22 June 2011.

33. See N Trimikliniotis, 'Report on the Free Movement of Workers in Cyprus in 2012-2013', National Expert Report for the European Network on Free Movement of Workers within the European Union coordinated by the Radboud University, Nijmegen's Centre for Migration Law; C Demetriou, 'The impact of the crisis on fundamental rights across Member States of the EU - Country Report on Cyprus',, commissioned by the LIBE Committee of the European Parliament (2015), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/ 2015/ 510017/ IPOL_STU(2015)510017_EN.pdf; C Demetriou, 'Country report Non-discrimination Cyprus 2018, State of affairs up to 31 December 2017, European Network of Legal Experts in the Non-discrimination field on the grounds of race or ethnic origin, age, disability, religion or belief and sexual orientation, https://www.equalitylaw.eu/ downloads/4682-cyprus-country-report-non-discrimination-2018-pdf-2-98mb

pay migrant workers, both EUNs and TCNs, have little, if any opportunity, for training and improvement, and no opportunity whatsoever to move up the ladder in terms of promotions or career moves.[34] The majority of migrants to Cyprus are women. One important transformation in Cyprus is directly linked to the status and condition of women migrants in the light of the increasing number of Cypriot women entering the workforce. Cyprus is not atypical in southern Europe, particularly with respect to the role of women as the sole providers of domestic work and childcare. Nonetheless, the traditional pattern is being transformed and dramatically altered and to a degree unknown to previous generations. Therefore, native women's increasing participation in the labour market and their high level of tertiary education create conditions favouring the employment of other women in traditionally gender biased jobs in the private sphere. Thus, in part as a result of the social modernisation of Cypriot society, migrant women have started filling in an emerging gap that has developed as an increasing number of Cypriot women become active in formal employment. Migrant women are taking up jobs related to the informal private sphere (household chores, childcare and care for the elderly). The studies were based on figures before the sharp rise in the number of EU citizens working in Cyprus, hence only dealt with the employment of third-country nationals (TCNs). Since the economic crisis, major changes have been observed, particularly as regards EU citizens seeking employment in Cyprus.[35] The 'paradox' noted in studies

34. See Cyprus Equality Authority, Report Ref AIT 1/2015, 24 August 2015; N Trimikliniotis, 'Report on the Free Movement of Workers in Cyprus in 2012-2013', Expert Report for the European Network on Free Movement of Workers within the European Union coordinated by the Radboud University. Centre for Migration Law (https://www.ru.nl/law/cmr/) under the European Commission's supervision, 2013; N Trimikliniotis, 'Migration and Freedom of Movement of Workers: EU Law, Crisis and the Cypriot States of Exception' (2013) 2(4) Laws, 440-468, available at: http://www.mdpi.com/2075-471X/2/4/440.

35. In this light, Chapter 9 of the SRP argues that there has been strong evidence of displacement of Cypriots since 2009. It notes that: The displacement of Cypriot workers is even more evident in 2010, as while the total number of employed persons increased by 3,892 persons, the number of Cypriots decreased by 9,147 persons, while the number of foreign workers (EU and others) increased by 12,977 persons (8,140 and 4,837 persons respectively). Again, at the same time, the total number of unemployed in Cyprus increased by 4,047 persons, out of which 2,372 were Cypriots.

based on 2011 figures indicating an increase in both the number of unemployed Cypriots and the number of EU nationals is no longer the case.

The third factor is the increasing numbers of atypical forms of employment (part time, fixed term contracts etc), 'new forms of employment and the rise of precarity, particularly since the financial crisis that hit Cyprus in 2013.

7. THE NUMBER OF COLLECTIVE AGREEMENTS SINCE THE PANDEMIC

Trade unionists interviewed suggested that it is impossible to say what has happened and is happening since the pandemic in terms of whether the number of collective agreements have increased or decreased. However, they do not consider that the pandemic as such or the lockdown has had an impact on the numbers of collective agreements made, when compared with the previous period. However, there are issues that were the following:

- Firstly, they point out that the pandemic is not over yet as there are still restrictions in place which are gradually eased.
- Second, they argue that just before the pandemic there was new dynamic process which had brought about some positive changes for workers, for instance in the construction and in the hotel industry but this process was halted by the pandemic. The priority of the labour movement was ensure that protection to keep them in employment was afforded for workers, and efforts were made to obtain 60% of their income during the lockdown period. This was particularly in the hotel industry.
- Third, the pandemic has *not* reduced the numbers of workers who are unionized and covered by collective agreements. However, there was in issue with implementation and disputes arose over deviation and outright violation of collective agreements. Trade unions point to large numbers of labour disputes particularly in the hotel and construction industry. The pandemic has already halted the process of extension of rights of workers that was developing just before the pandemic, ie the legislative changes that came about as a result of the exit of the country from the crisis and MoU, as well as the new confidence by unions. The current war in Ukraine has made the unions pessimistic about any immediate prospects for a return to some kind of normality.

- The fourth change pertains to the extension of the use of telework which required regulation. A new legal framework is currently being discussed by social partners.

Employers on the other hand suggest that the hotel industry was badly hit in 2020 and 2021[36] and only started to pick up in 2022. This has shown that certain sectors have recovered. They do not consider that the pandemic or the lockdown has fundamentally change matters, but it has certainly created new conditions which bring about new challenges.

8. IMPACT OF GLOBALIZATION OF THE CYPRIOT ECONOMY

Cyprus is an internationally exposed economy heavily exposed to turbulences, as it is based on tourism and financial services. Hence globalization has been a key force in shaping this small economy. One of the reasons for the changing landscape from a highly regulated system of labour relations via a robust system of tripartism to a dual, or better a multiple segmented labour system is the increasing growth of more 'globalised' economic sectors and the labour relations with little if any unionization or some form of traditions in collective bargaining.

The deregulation of the labour market in Cyprus in the last three decades has led to a reorganization of labour relations that have mainly taken place in various forms of informal labour and to the division / diversification of the workforce.[37] Cyprus is characterised by relatively high shares of non-standard employment and labour fragmentation[38] and is marked by one of the highest adjusted wage gaps in the EU between permanent and temporary employees.[39] Many workers in precarious jobs work in the in-

36. Iro Efthymiou, "Βαθιά κρίση στα ξενοδοχεία", *Stockwatch* https://www.stockwatch.com.cy/el/article/toyrismos/vathia-krisi-sta-xenodoheia and Eliana, N Michael Συνέπειες πανδημίας covid-19 στην κυπριακή τουριστική βιομηχανία και η αντιμετώπιση τους απο το Alion Beach Hotel https://kypseli.ouc.ac.cy/ handle/11128/5063.

37. Kosmas et al (2022); Kosmas et 2023; Lambrianou, L. (2023) "Το πρεκαριάτο της Κύπρου", *Processes*, Vol.1 2023 (forthcoming).

38. Ioannou, G. (2015). "Labor force fragmentation in contemporary Cyprus", *Working USA: the Journal of Labor and Society*, Vol. 18, No. 4, 595-612.

39. Da Silva, A. and Turrini, C. (2015), "Precarious and less well-paid? Wage differences between permanent and fixed-term contracts across the EU countries", European Economy, Economic Papers No. 544. Koutsampelas, C. (2018) "Non-

formal sector, a large portion of whom are migrant workers, are irregular. The informal sector is estimated to be over 25 per cent of the Cypriot economy, which is the sixth largest percentage in the EU. This compares eastern European countries which have larger informal economies.[40] Cyprus and Latvia are the only countries where informal wage employment is more prevalent than self-employment across all EU Member States covered by the comparative study undertaken.[41] Whilst non-standard employment is more likely to be met among women and young persons, following the financial crisis in Cyprus after 2012, non-standard employment increased considerably among men and persons with tertiary qualifications. Studies have shown how the crisis has adversely affected these pre- carious workers, in terms of their rights[42] and their income and benefits.[43] Inequalities in the labour market are translated into higher risk of in-work poverty and disparities in social provisions, mostly in regard to the adequacy of earnings-related benefits, including pensions.[44]

9. COLLECTIVE BARGAINING ISSUES

These regulate all aspects of employment except those covered by legislation.

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standard employment in Cyprus: Trends and policy responses", *Cyprus Economic Policy Review*, Vol. 12, No. 1, pp. 41-58 (2018) 1450-4561.

40. OECD (2015) *Policy Brief on Informal Entrepreneurship Entrepreneurial Activities in Europe*, European Union/OECD, 2015.
41. Hazans (2011), "Informal Workers across Europe: Evidence from 30 Countries", *IZA Discussion Paper* No. 5871, Institute for the Study of Labor, Bonn; OECD (2015) *Policy Brief on Informal Entrepreneurship Entrepreneurial Activities in Europe*, European Union/OECD, 2015 and OECD, 2015.
42. Demetriou, C., (2015), *The impact of the crisis on fundamental rights across Member States of the EU: Country Report on Cyprus*, Directorate General for Internal Policies, European Parliament.
43. Ioannou, G. (2015). "Labor force fragmentation in contemporary Cyprus", *Working USA: The Journal of Labor and Society*, Vol. 18, No. 4, 595-612.
44. Koutsampelas, C. (2018) "Non-standard employment in Cyprus: Trends and policy responses", *Cyprus Economic Policy Review*, Vol. 12, No. 1, pp. 41-58 (2018) 1450-4561.

10. MINIMUM SALARY AT NATIONAL LEVEL AND ROLE OF COLLECTIVE AGREEMENTS

10.1. The framework for minimum wages in Cyprus

Until now there has been is no national minimum wage in Cyprus but there is a minimum wage for some specific groups of vulnerable workers, such as clerical workers, shop assistants, childcare workers and personal care workers. However, as part of the bailout package, these minimum rates remained frozen from 2012 to 2017.

The Republic of Cyprus does not have a national minimum wage, but pursues a policy based on the Minimum Wage Law, a law in force since Colonial times,[45] which empowers the Council of Ministers to fix minimum rates of wage for any occupation in the Republic either generally or in any specified are, place or district, in any case in which it is convinced that the wages paid to any persons employed in any occupation are unreasonably or unjustifiably low.[46] The law does not specify the criteria upon which the Council of Ministers may decide. The relevant legal provision other than that provided in the original law which provides, under art. 3(1) that the Council of Ministers may, by Decree published in the Official Gazette of the Republic, set salary limits for any work in the Republic either in general or in any specific region, place or province, in any case in which it is satisfied that the wages paid to any person employed in any such work are unjustifiably low.[47] This is the wording of the legal provision to be interpreted and be adapted to the situation. In practice and according to customary practices developed over the years, Ministers of Labour follow a process of consultation with social partners and after an analysis of the market situation before deciding as to whether they will issue a decree/order. There are no fixed criteria that work as basis for the Council of Ministers to decide that wages in a specific occupation are unreasonably/ unjustifiably low. However, by examination of relevant factors in the sector relating to the situation in the wage market by considering various social and economic indicators and statistical data relating to wages, the poverty line etc

45. Minimum Wage Law, Chapter 183 (ANAK.307), in operation since November 1941 Ο περί Κατωτάτου Ορίου Μισθών Νόμος - ΚΕΦ.183 (cylaw.org).
46. Section 3, Ο περί Κατωτάτου Ορίου Μισθών Νόμος - ΚΕΦ.183 (cylaw.org).
47. The Greek terms used are: "οποιαδήποτε τέτοια εργασία είναι αδικαιολόγητα χαμηλοί" [εννοεί οι μισθοί].

are taken into consideration. These are regulated as explained below. There is no official document available that sets out the criteria.[48]

The practice of regulating occupations where there are sectors not regulated by collective agreements or there is a risk of exploitation is established,[49] but this practice does not cover all the sectors where dire conditions exist.

This applies only to specific segments of the following occupation: shop sales assistants, general office clerks, child care assistants in nurseries, child care assistants in kindergartens, teachers' aides, health care assistants, cleaners and care takers of patients in private clinics and hospitals.[50]

In 2020, the decree was extended to cover some other occupations in the tourism sector. During the 2019 negotiations for the renewal of the multiemployer agreement of the industry, employer organisations and trade unions reached an agreement on the introduction of minimum wages for 13 professions, to be applied by the sector's employers, independently of their adherence to the collective agreement. The agreement was signed in the presence of the Minister for Labour, Welfare and Social Insurance on 18 December 2019. Hence, based on a proposal from the Minister of Labour, the Council of Ministers issued a decree in January 2020 setting minimum wages for all the sector's employees in these 13 professions in the hotel industry.[51]

Prior to 2012, the established practice was to have an annual review. The level of minimum wage was set annually by the government in consultation with the social partners within the tripartite Labour Advisory Committee. The minimum wage fixed and enforced by a decree of the Council of Ministers.

During the financial and economic crisis of the years 2013 to 2017, which saw the implementation of the Memorandum of Understanding

48. Interview with former Minister of Labour.

49. Emilianides, A. and Ioannou, C. (2016) *Labour Law in Cyprus*, Wolters Kluwer, The Netherlands, p. 100-102.

50. See Eurofound (2020) *Minimum wages in 2020: Annual review (europa.eu)*, Eurofound, p. 20.

51. Minimum Wage Decree for the hotel industry, Ε.Ε. Παρ. III(I) Κ.Δ.Π. 6/2020 Αρ. 5201, 10.1.2020, http://www.cylaw.org/KDP/data/2020_1_6.pdf. The decree was announced on the 8th of January 2020 and is applicable from the 1st of January 2020.

with the Troika, minimum monthly rates remained unchanged. The last annual review by decree occurred in May 2012.[52] Thus, the minimum wages have been frozen at the level of 2012.[53]

In 2012, the outgoing Government tabled a legislative bill proposing that if a number of specified preconditions applied, this would entitle the Minister of Employment to issue a decree extending coverage of the terms contained in a relevant sectoral collective agreement to all the sector, following the Minister's assessment or should one of the social partners request it.[54] The draft law was submitted in December 2012 but was withdrawn by the new Government which took office in March 2013. In 2019, the main opposition party proposed legislation to the same effect but has not moved beyond the Parliamentary Committee on Labour matters stage.[55]

The employers had strongly opposed to such a draft. They argued that the minimum wage is too high, beyond what the economy can afford (approaching the minimum wage of far wealthier countries), and poses a serious disincentive for creating new jobs.[56] The Cyprus Employers & Indus-

52. Minimum Wage Decree 2012, *Διάταγμα δυνάμει του άρθρου 3(1)*, ΚΔΠ No. 180/2012.

53. In 2003, the Council of Ministers set the target that the minimum wage should be gradually increased to 50 per cent of the median wage. The target was reached by 2008, when the minimum wage was set at a level slightly over the 50 per cent threshold of the median wage. From 2008 to 2013 the minimum was also set above the 50 per cent threshold. No statistics have ever since been published in this regard. However, despite the fact that the minimum wage remained unchanged since 2012, it was also in the following years assumed to be over 50 per cent of the median wage, as a result of the general wage cuts that occurred during the economic and financial crisis (Information provided by Pavlos Kalosinatos, Director of INEK-PEO and Sotiroulla Charalambous, Deputy General Secretary of PEO.

54. Interview with the former Minister of Employment, 20 February 2021.

55. A new draft legislation was resubmitted to Parliament in February 2019. It is unlikely that the matter will proceed further in the deliberations of the Labour Law Committee before the next Parliamentary elections in May 2021.

56. *Alpha Ενημέρωση: Συζήτηση για τον κατώτατο μισθό*, 20 November 2019. The last Annual Report of Employers Association 2019 repeated the association's long held position which is advocate the abolition of the minimum wage. They consider that the minimum wages are "calculated in a distorted way", they are "very high and beyond the capabilities of the Cypriot economy, as it approaches the minimum wages of other much more economically advanced countries while

trialists Federation (OEB) is opposed to the logic of the EU Commission Directive; the new Annual Report of Cyprus Employers & Industrialists Federation (OEB) 2020 will reiterate the view that the Association opposes the statutory regulation of wages in Cyprus.[57] While one research claims that minimum wages have adverse effect on employment;[58] other studies dispute such claim.[59]

The trade union movement is in favour of extending minimum wage setting beyond the existing fields and sectors which have no tradition in unionisation. However, the two large trade unions have different positions as to the way this may adversely affect collective bargaining and existing collective agreements and institutional mechanism for determining wage fixing.

One of the main trade union, SEK, supports the establishment of a national minimum wage[60] and the EU Commission Directive.[61] The other large trade union, PEO, suggests that the way forward is to extend what is already an established law and practice in the construction industry, except for wages, i.e. wherever there is a collective agreement, the wages and benefits must be regulated via collective agreement.[62] PEO considers that on the basis of the existing mechanisms of tripartite Labour Advisory

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at the same time it is a serious disincentive for job creation" (*Έκθεση Διοικητικού Συμβουλίου ΟΕΒ για το έτος 2019*, p. 44).

57. Interview with Officer of Cyprus Employers & Industrialists Federation (OEB).

58. Based on his PhD research, Mitsis, P. (2015) Effects of Minimum Wages on Total Employment: Evidence from Cyprus, *Journal of Labor Research* 36(3) September 2015, DOI: 10.1007/s12122-015-9205-0. See also, Christofides. N. L. (2019) *Host Country Discussion Paper – Cyprus*, Peer Review on "Minimum wages – extending coverage in an effective manner Towards a National Minimum Wage?", Mutual Learning Programme, DG Employment, Social Affairs and Inclusion, Limassol (Cyprus), 19-20 September 2019.

59. Ioakimoglou, E. & Trimikliniotis, N. (2021) *The Post-pandemic stimulus to restart the Cypriot economy: A wage-led growth strategy*, Report for Friedrich-Ebert-Stiftung.

60. SEK (2019) "Αναγκαία η εισαγωγή εθνικού κατώτατου μισθού - Εκ του πονηρού, οι αντιδράσεις των εργοδοτικών οργανώσεων", SEK, December 2019.

61. SEK (2020) "Η ΣΕΚ χαιρετίζει την προώθηση οδηγίας για καθορισμό Ευρωπαϊκού Κατώτατου Μισθού", SEK, 8 November 2020.

62. *Ο περί Εργοδοτουμένων στην Οικοδομική Βιομηχανία (Βασικοί Όροι Υπηρεσίας) Νόμος του 2020*, Ν.52(Ι)/2020 Αρ. 4757, Ε.Ε. Παρ. Ι(Ι), 28.5.2020.

Body,[63] a tripartite mechanism must be established that would allow for proper deliberations via consultations and negotiation that will agree and fix by decree the wages, terms and benefits. PEO proposes that this is institutionalised via law. PEO maintains that criteria must be agreed upon via a quasi-collective bargaining system and mechanism. PEO considers that wages cannot and must not be decided by actors who have no involvement in the industry and without the effective participation of trade unions elected by workers themselves, and have cited as bad precedent the example of the wage and contract fixing of migrant domestic workers, where wages, employment contract terms and conditions are decided by the Council of Ministers on the recommendation of the Ministry of Interior.[64]

The concern of PEO is that the mechanism must be such so as not to undermine and waken the traditions of trade union bargaining in many industries by relying to extra-industrial mechanisms. Moreover, they are concerned that there is a danger that a fixed national minimum wage may be used to drag wages to the bottom, rather than operate a floor that would lift those at the bottom upwards. PEO proposes the model used to extend collective agreement norms as basic rights (except wages) in the construction industry to be extend further to cover minimum wages. The fact that there is first a collective agreement negotiated by the social partners for workers in the construction industry that is then extended by a law to regulate the basic terms of employment, except minimum pay, is the model to be used to extend minimum wages by way of statute. This will reflect the norms agreed vial collective bargaining, rather than superimposing them from above and without.[65]

10.2. The minimum wage decree implemented in 2023

On 1 January 2023 Cyprus has implemented the decree for national minimum income.[66] Under art. 5 of the decree, the wage for the first six months

63. See JH Slocum, *The Development of Labour Relations in Cyprus* (Nicosia, PIO, 1972); *M Sparsis, Tripartism And Industrial Relations: the Cyprus Experience* (Nicosia, 1998).

64. Interview with PEO trade unionist, 20 February 2021.

65. *Ο περί Εργοδοτουμένων στην Οικοδομική Βιομηχανία (Βασικοί Όροι Υπηρεσίας) Νόμος του 2020*, N.52(I)/2020 Αρ. 4757, Ε.Ε. Παρ. I(I), 28.5.2020.

66. Περί Κατώτατου Ορίου Μισθών Διάταγμα του 2022, Διάταγμα δυνάμει του άρθρου 3(1), Κεφ. 183. ΑΝΑΚ. 307, Κ.Δ.Π. 350/2022, Επίσημη Εφημερίδα της

of employment the wage is fixed at least at €885, rising to the minimum threshold of €940.

In the past the Republic of Cyprus did not have a national minimum wage,[67] as it pursued a policy based on the Minimum Wage Law, a law in force since Colonial times,[68] which empowers the Council of Ministers to fix minimum rates of wage for any occupation in the Republic either generally or in any specified are, place or district, in any case in which it is convinced that the wages paid to any persons employed in any occupation are unreasonably or unjustifiably low.[69]

The decree stipulates that the hours of full-time employment of employees in any economic activity shall be those in effect at the time of the adoption of this Ordinance, by law, ordinance, contract, custom or practice. In the case of part-time workers, the minimum monthly wage shall be adjusted in accordance with the hours worked in relation to the full-time work.

Under art. 6, a Minimum Wage Adjustment Committee shall be established, appointed by the Council of Ministers and consisting of three (3) representatives of the employees, three (3) representatives of the employers and three (3) independent academics or experts of recognised standing, experts in labour matters, one of whom shall be appointed by the Council of Ministers as the chair of the Committee.

Under, art. 7(2) The adjustment mechanism with the appointment of the members of the Minimum Wages Commission shall come into force for the first time after the entry into force of this Decree on 1 January 2024 and shall thereafter come into force every two years.

The Committee shall prepare a report which shall be submitted to the Minister at least two months before each review, taking into account the following parameters:

(i) the purchasing power of the minimum wage, taking into account the variation in the cost of living,

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Δημοκρατίας Παράρτημα Τρίτο (I): 10.1.2020.

67. Trimikliniotis, N. (2021) Legal interpretation of certain aspects of the Proposal for a directive on adequate minimum wages in the European Union, Report on Cyprus, European Centre of Expertise in the field of labour law, employment and labour market policies (ECE), ICF, 5 March 2021.

68. Minimum Wage Law, Chapter 183 (ANAK.307), in operation since November 1941 Ο περί Κατωτάτου Ορίου Μισθών Νόμος - ΚΕΦ.183 (cylaw.org).

69. Section 3, Ο περί Κατωτάτου Ορίου Μισθών Νόμος - ΚΕΦ.183 (cylaw.org).

(ii) trends in employment levels and unemployment rates,
(iii) diversification in economic growth and productivity levels,
(iv) the variation and trends in earnings levels and their distribution,
(v) the impact that any change in the minimum wage will have on employment levels, relative and absolute poverty rates, the cost of living and the competitiveness of the economy.

Under art. 7(b), the Minister, after taking into account the views of the members of the Labour Advisory Board on the report of the Commission, shall submit a specific reasoned recommendation for the adjustment of the minimum wage to the Council of Ministers, including a recommendation for a zero adjustment. The Minister may, at his or her discretion, seek and take into account the views of any other bodies or persons or authorities before making his or her recommendation to the Council of Ministers.

The Minister of Labour stated that the minimum wage resulted from a compromise between the "opposed views of social partners". The minister announced that the Government estimates that about 40,000 workers are set to benefit from implementing the minimum wage. However, another 60,000 workers whose income is below the poverty, according to the national statistics cited by the Minister.[70]

10.3. Exclusions and disagreements

More than 40,000 workers working in agriculture, shipping and domestic workers are excluded from the minimum wage requirements. Also excluded are interns or individuals undertaking training for a degree or professional qualifications.

The decree explicitly declares that Decree shall not apply:

- Domestic workers, agricultural and livestock workers and maritime workers, under art. 3(2).
- Any employee to whom more favourable arrangements apply by law or contract or practice or custom, under art. 3(3).
- Employees to whom the Minimum Wages in the Hotel Industry Decree 2020 applies, under art. 3(4).
- Persons who receive training or education which is provided by law, practice or custom for the purpose of obtaining a diploma and/or exercising their profession. under art. 3(5).

70. "National minimum wage set at €940", *Financial Mirror* 1st September 2022.

It must be noted that art. 4 provides that where more favourable arrangements, the provisions of this Decree relating to the minimum wage shall not affect in any way any legislation and/or contract and/or other agreement or practice or custom which provides for more favourable arrangements for employees.

The Decree under art. 8 provides that any termination of employment which[71] is not considered a termination of employment for the purposes of this Decree.

As for remuneration outside the normal working hours, under art. 9, any other arrangements for overtime pay or working outside normal working hours or working on public holidays or other benefits shall not be affected by the provisions of this Decree.

Under art. 10, specific provisions are made for payment for food and accommodation. Where, under the agreed employment contract, the employer provides the employee with decent board and/or lodging, the minimum monthly wage may be reduced, by agreement between the employer and the employee, as follows:

(a) up to 15% when board is provided, and/or

(b) up to 10% when accommodation is provided.

The employee may terminate the above agreement for the provision of food and/or accommodation by giving forty-five (45) days' notice to the employer.

As for occasional employment, under art. 11, in the case of employment of persons aged up to 18 years for occasional work not exceeding two consecutive months, the minimum wage in cash may be reduced by 25%. However, the above 25% reduction may not be applied at the same time as any other reductions provided for by the provisions of this Decree.

Unions and employers' organisations have disagreed over the method of determining a median salary, on which the minimum salary would be based. The median wage calculated by the Cyprus Statistical Service is lower than that calculated by EU-SILC which the unions want the minimum wage to be based on. The unions argue that the most correct methodology of the median salary is the EU-SILK, as it was the late minister of Labour's, which ranged between €940 and €950. Employers' organisations want the former.

71. Under Part II of the Second Schedule to the Termination of Employment Acts 1967 to 2016.

Unions, youth organisations and opposition parties have criticised the decision and the provisions contained. Unions said that in talks with the late Labour Minister, they had been told the minimum wage would apply to a 40-hour working week, at around €1,000. The €940 proposed is insufficient as it does to ensure a decent standard of living. The General Secretary of trade union PEO argued that the decision would act as a timebomb at the foundations of industrial peace as the minimum wage is lower than collective agreements in sectors like hotels. She argued that "the decree on the minimum wage comes as a reward for phenomena of deregulation and cheap labour." She argued that the minimum was needed to protect the basic rights of workers, which have been deregulated in recent years, but the government, instead of dealing with these problems, leaves people unprotected. Also, she said the decree on the minimum wage leaves collective agreements unprotected, as employers could use it to scuttle deals in place.

The Minister of Labour refuted accusations by unions that the minimum wage would allow employers to push collective agreements aside: where there are collective agreements, newcomers will be paid according to agreements in place and not based on the decree on the minimum wage. He also explained that those who receive more favourable terms through a contract would be excluded from the decree.

The social partners had agreed at the Labour Advisory Council to exclude domestic and agricultural workers and sailors will be excluded from the national minimum wage provision that is scheduled to be enacted during May 2022.[72] The decision to exclude agricultural and domestic workers was strongly criticised by the Union of Doctoral Teaching and Research Scientists (DEDE) which expressed its outrage at the intention of the government, social partners, institutional bodies, as well as a large number of MPs and noted these jobs are held almost exclusively by migrants and asylum seekers, who are the most vulnerable and impoverished social groups in the country, working in conditions of modern slavery, who need legal protection more than any other group of the population, since they do not even have the right to freely organise themselves into trade unions. The Union considers that this is a racist logic that on the basis of origin denies the needs of immigrants and refugees a decent living and

72. Annie Charalambous 'Three exemptions in minimum national wage by law in Cyprus', In-Cyprus philenews, 28 April 2022.

constitutes is an example of institutional racism.[73] Publicly, none of the largest unions has expressed misgiving about the exclusions, even though PEO trade unionists suggest that the written submission of PEO expressed its disagreement.[74]

11. NEW ISSUES AND CHALLENGES RECENT COLLECTIVE BARGAINING

11.1. Procedure for recognition of trade union

Since 2012, unions have a legal right, under certain conditions, to compel individual employers to negotiate with them under the trade union recognition law (Law 55 (I)/2012). If an employer refuses to negotiate with the union, the union can ask the Trade Union Registrar to investigate, provided there are at least 30 employees in the bargaining unit –the area where the union is seeking to negotiate– and at least 25% of the workforce are already members of the union. In these circumstances the Trade Union Registrar will conduct a secret ballot, and, if a majority of the workforce vote in favour, the employer is compelled to negotiate with the union, in other words to recognise it. Recognition is also granted without a ballot, where the union can show that it already has more than 50% of the workforce in membership.

The Law on Recognition of Trade Union Organisation and of the right to provide Trade Union Facilities for Recognition Purposes for Collective Bargaining No 55(I)/2012. The Law regulates the procedure to be followed where an employer refuses to recognise a registered trade union for the purpose of negotiating a collective agreement. The procedure involves an application by the trade union to the Registrar of Trade Unions for the issuance of an order requiring the given employer to recognise the trade union. When more than one trade union submits an application to the Registrar for recognition in the same undertaking, the Registrar will join these applications and examine them as one, following consultation with the applicants; if there is no consensus amongst the applicants on such joining of the applications, the Registrar will examine all applications in the chronological order in which they were submitted.

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73. Stockwatch, "Να μην εξαιρεθούν εργάτες και οικιακές εργάτριες ζητά η ΔΕΔΕ", 30 April 2022.

74. Communication with leading PEO Trade unionist. I have not seen the written submission of PEO.

The procedure only applies to those undertakings that employed at least 30 employees during the six months preceding the submission of the application for recognition, provided that 25 percent of employees in the business were already members of the applicant trade union at the time of submission of the application. The Law authorises the Registrar of Trade Unions to conduct a secret ballot for workers to decide whether they wish to be represented by the applicant trade unions. If the result shows that more than 50 percent of those taking part in the vote (they must represent at least 40 percent of all workers entitled to vote) voted in favour of recognition of the trade union, then the Registrar issues a Recognition Order. Such Orders may be issued without a vote in the event that over 50 percent of employees are already members of the applicant trade union. Employers who do not comply with the Law[75] and for any person who obstructs the Registrar in the execution of its duties will face criminal sanctions.[76]

12. COVID ISSUES AND COLLECTIVE BARGAINING

The economy of the RoC seemed to be recovering relatively quickly from the Covid19-related measures, which affected severely the lives of labour, mostly the unorganized, non-unionised, informal and uninsured labour. As a result of union initiative sand pressures on the Government and availability of EU funding, during the lockdown various measures were adopted to alleviate the situation that resulted from the lockdowns.

The lockdown period and the various COVID-19 restrictions led to a deterioration of the income of employees. Studies based on the Eurostat

75. Employers who refuse to comply with the Recognition Order issued by the Registrar or refuse to negotiate with a trade union for the purpose of concluding a collective agreement following the issuance of a Recognition Order from the Registrar or prevent or obstruct workers' representatives in the execution of their duties, or in the process of recognition, unilaterally change the terms of the conditions of employment of their employees, are guilty of an offence and liable to pay a fine of up to EUR 5,000 and / or imprisonment up to three months.

76. Any person who obstructs the Registrar in the execution of its duties under this Law, or in the process of an investigation carried out under this Law, refuses to answer or gives false answers, or omits to present any document or data required under this Law, or attempts to prevent any person from appearing before the Registrar or from being questioned by the Registrar, is guilty of an offence and liable to a fine of up to EUR 5,000 and / or to imprisonment up to three months.

figures[77] show that since 2013, at the height of the last economic crisis in Cyprus, employees contributed 7.5 per cent less in the share of the gross domestic product compared to the pre-2013 period. Cyprus has a special category of the working poor, who are in relative poverty and at risk of social exclusion, in spite of being in employment because their wages are low: Eurostat figures show that in 2008-2011 the percentage of the population at risk of poverty or social exclusion based on the 2008 poverty line was 16 per cent of the population, the corresponding rate in 2018 was 26 per cent. The Eurostat figures show that, based on the 2008 poverty line, one in four Cypriots today is at risk of poverty or social exclusion compared to one in six in 2008.[78]

The percentage of employees on temporary contracts reached 14.3 per cent in 2016 (compared to 11.2 per cent in 2008), 3.1 percentage points above the EU28 average. The part-time employment rate stood at 13.3 per cent in 2016 (below the EU28 average of 18.9 per cent; albeit significantly higher than its pre-crisis level of 6.5 per cent in 2008).[79]

13. ECONOMIC CRISIS, AUSTERITY AND PRECARIOUSNESS IN THE PANDEMIC AND POST-PANDEMIC ERA

The pandemic crisis in many ways has brought the economy to a halt and have further weakened the labour and trade unions which had received serious blows due to the financial crisis and austerity years that had preceded it. The unprecedented economic intervention during the pandemic has allowed the country to avoid widespread defaults, dismissals and high unemployment,[80] due to prompt and policy support.[81] According to the

77. Eurostat (2020).

78. Ioakimoglou, E., INEK-PEO (2020) *Ετήσια Έκθεση για την Οικονομία και την Απασχόληση* [Annual Review of Economy and Employment], Cyprus Labour Institute (INEK-PEO), Nicosia. Ioakimoglou, E., INEK-PEO (2021) *Ετήσια Έκθεση για την Οικονομία και την Απασχόληση* [Annual Review of Economy and Employment], Cyprus Labour Institute (INEK-PEO), Nicosia.

79. Koutsampelas, C. (2018).

80. Cyprus Labour Institute, *Έκθεση για την Οικονομία και την Απασχόληση 2020*, INEK-PEO, March 2021, Nicosia.

81. A. Tuladhar, Ee Xue Liu, and R Zhang 'A Three-Point Plan to Tackle the Pandemic in Cyprus', IMF News, 16 June, 2021, https://www.imf.org/ en/News/Articles/ 2021/06/15/na061521-a-three-point-plan-to-tackle-the-pandemic-in-cyprus.

EU Commission summer forecasts, the indicators project uncertainty but a return to economic growth: whilst in 2019 GDP grew by 3,1 percent, in 2020 there was negative growth 5,1 percent, and project the rather ambitious 4,3 percent for 2021.[82] According to one study, by 2020, businesses in all developed countries have suffered large reductions in their profits and their debt was greatly increased in order to be covered against the decline of their sales.[83] During the first wave of the health crisis ie the second quarter 2020, the purchasing power of wages was reduced by 3.5% compared to the corresponding quarter of 2019, but in the third quarter the average real salary returned to the levels of the second half of 2019. As a result of these developments, the purchasing power of the average wage is currently at the level of 2013.[84]

The financial crisis and introduction of austerity measures has intensified certain vulnerabilities, particularly increased precariousness, and has created new vulnerable groups, as the right to decent work has changed as has the broader context of labour relations. The economic crisis and austerity measures were connected to the implementation of the Memorandum of Understanding between the Government of the Republic of Cyprus and the Troika. Since the imposition of the 'haircut' on bank deposits and the subsequent austerity measures, Cyprus' economy has suffered a severe blow that has affected the levels of employment and labour relations and has undermined the legal and regulatory system regulating the employment relationship.[85] However, the pressure on la-

82. EU Commission, Economic forecast for Cyprus, Based on the Summer 2021 Economic Forecast (07/07/2021) https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-performance-country/cyprus/economic-forecast-cyprus_en.

83. Cyprus Labour Institute, *Έκθεση για την Οικονομία και την Απασχόληση 2020*, INEK-PEO, March 2021, Nicosia, p 8.

84. Cyprus Labour Institute, *Έκθεση για την Οικονομία και την Απασχόληση 2020*, INEK-PEO, March 2021, Nicosia, p 30.

85. See Cyprus Labour Institute (2015) *Έκθεση για την οικονομία και την απασχόληση* [Report forthe economy and employment] (Nicosia, Cyprus Labour Institute, 2015); G Ioannou 'Employment in Crisis: Cyprus 2010-2013' (2014) *The Cyprus Review*, Vol 26, Issue 1, 107-126 on matters relating to employment and labour relations.

bour began prior to 2013.[86] The economic and social indicators have not improved since the implementation of the Memorandum of Understanding agreed between the Troika and the Cypriot government. The social indicators that have been affected the most are those related to employment, the quality of work, the right to work and labour rights. This broader economic and policy context has multiple effects on the right to work and employment relationships, standards, norms and practices in work. One of the most severe impacts of the economic crisis and of the austerity measures has been on the right to work, a right that has been severely affected in multiple ways. There has been a significant rise in atypical, insecure and precarious forms of employment. The rise in insecure, flexible and precarious forms of employment in what used to be called atypical work since the beginning of the economic crisis is a strong indicator that employment rights are changing and must be viewed in the broader context of rising unemployment, particularly amongst the youth in Cyprus. The current social and employment situation in Cyprus is characterised by an expansion of insecure/flexible and precarious forms of employment.

14. COLLECTIVE BARGAINING AND REGULATION OF NEW FORMS OF EMPLOYMENT SUCH AS TELEWORK OR CROWDWORKING

Following the pandemic, the new legal framework is currently being prepared about the regulation of telework. Prior to that, there were no initiatives that regulate access to collective bargaining rights for people who work through platforms or other telework.[87] Despite the fact that Cyprus has an established tripartite system which is regulated via the Code of Industrial Relations as the established norm,[88] the sectors

86. See N Trimikliniotis, *Ανεργία, Υποαπασχόληση και Ετεροαπασχόληση: Μια Έρευνα για την Εργασιακή Αβεβαιότητα και Ανασφάλεια των Νέων στην Κύπρο*, [Unemployment, Underemployment and Irregular Employment: a Research on Labour Uncertainty and Insecurity of the Youth in Cyprus] (Nicosia, Cyprus Labour Institute, 2004); G Ioannou, 'Employment in Crisis: Cyprus 2010-2013' (2014) *The Cyprus Review*, Vol. 26, Issue 1, 107-126.

87. See Demetriou, C., Trimikliniotis, N. (2021) Study to support the impact assessment of an EU Initiative on improving the working conditions of platform workers, Cyprus, study for the EU Commissions, Employment, Social Affairs & Inclusion.

88. The system of industrial relations in Cyprus dates back to the period of British

which are not unionised, such as the service sectors, are rising, as discussed. Since accession to the EU, a statutory regulation has been introduced.[89] As a result, a number of terms and conditions of employment that were previously determined by collective agreements are now legally enforceable. Whilst this has not affected the significance and process of collective bargaining, it has nonetheless assisted in providing the minimum terms and conditions of employment for non-unionised employees and unionised employees.[90] When asked, trade unionists do acknowledge that there is an expansion of platform work and that there are important labour issues. However, they note such workers are difficult to reach and to organise and that, at least so far, none of them tried to reach trade unions or sought advice.[91] The self-employed have no collective bargaining rights.

15. THE ECONOMIC CRISIS HAS AFFECTED THE LEVEL OF BARGAINING

The economic crisis, which hit Cyprus in 2012-13 accelerated processes that were already in place. However, crisis imposed a new labour regime that accentuated these processes via the MoU that was imposed following the 'haircut' i.e. confiscation of deposits, closure and amalgamation of banks, the collapse of the runaway financial and banking sectors and the privatization of the Coop banks.

Cyprus managed to exit the crisis and economic growth had returned. However, the income level of workers has been reduced and overall, the percentages of wages has shrunken when compared to profits. Also there has been a growth in atypical and precarious forms of employment.

Colonial Administration, and still retains some 'British' characteristics. The most prominent features are tripartite cooperation and voluntarism.

89. See JH Slocum, *The Development of Labour Relations in Cyprus* (Nicosia, PIO, 1972); *M Sparsis, Tripartism And Industrial Relations: the Cyprus Experience* (Nicosia, 1998).

90. Since the Basic Agreement signed in 1962, this social contract was replaced in 1977 with the Industrial Relations Code, which is of 1977, is essentially a voluntary agreement, not legally enforceable, that lays out the procedures to be followed for arbitration and the settlement of labour disputes.

91. Interview with two trade unionists, 4 May 2021.

Young persons who face unemployment[92] are particularly affected adversely in the processes.

16. THE PRINCIPLE OF FAVOUR

Subcontracting and outsourcing are major problems in circumventing the rights of workers. The prevalence of this in the construction industry is an issue of concern; the agreement for regulation of the basic terms of employment is positive step in the right direction to safeguard and extend what sectoral collective agreements provide and thus ensure that the basic terms with regard to working hours and overtime; holidays, provident funds and bonuses. However, minimum pay is not regulated, and this is a gap in this law. An important attempt to address the conditions and terms of employment in an industry where "bloody subcontracting" is prevalent is the Employees in the Construction Industry (Basic Terms of Service) Law,[93] following the agreement by the social partners, to regulating the basic terms of employment, except minimum pay, of workers in the construction industry.[94] Article 3 of the new law that came into force on 28 May 2020, stipulates that the following basic terms of the sectoral collective agreements are mandatory for all contractors and employers who engaged in construction work pertaining to the following:

- Working hours and overtime
- Holidays
- Provident Fund, as the construction works have a well-established provident fund that covers various benefits (lump sum after retirement; borrowing scheme; supplementary pension etc.)
- Bonus

92. Ioannou, G. and Sonan, S. (2016) *Youth Unemployment in Cyprus, An Examination of the 'Lost Generation'*, Report for Friedrich-Ebert-Stiftung; Labrianou, L. (2021) "Το πρεκαριάτο της Κύπρου", *Processes*, Vol.1 2021 (forthcoming).

93. *Ο περί Εργοδοτουμένων στην Οικοδομική Βιομηχανία (Βασικοί Όροι Υπηρεσίας) Νόμος του 2020*, N.52(I)/2020 Αρ. 4757, Ε.Ε. Παρ. I(I), 28 May 2020.

94. Schierup, C.U. (2007) "Bloody subcontracting in the network society: migration and post Fordist restructuring across the European Union". In Berggren, E., Likic-Brboric, B., Toksöz, G. and Trimikliniotis N. (eds) *Irregular Migration, Informal Labour and Community: A Challenge for Europe*, Maastricht, Shaker Publishing.

17. COMPANY AGREEMENTS: LESS FAVOURABLE LABOUR CONDITIONS THAN THE NATIONAL AGREEMENTS?

Freedom of contract allows the parties to make any arrangement they decide. However, the relations between the parties must such so that freedom is genuine. Where there are national agreements, the terms of the national agreement, if they are suitable, and the one of the parties pursues the matter in court, then they are inserted in the individual contract.

18. ENFORCEMENT OF COLLECTIVE AGREEMENTS

The Labour authority is the Department of Labour Relations (the Industrial Relations Service- IRS) of the Ministry of Labour, Welfare and Social Insurance has a major mediation role in the Cypriot system of labour relations as explained below.

19. THE SETTLEMENT OF LABOUR DISPUTES

The IRC currently governs the system of collective industrial relations both the private and the semi-public sector and public sector. The second part of the Code consists of procedures to be followed for the settlement of disputes over interests, and for the settlement of grievances/ disputes over rights. According to the Code, "disputes over Unionization rates interests" is a dispute arising out of negotiations for the conclusion of a new collective agreement or for the renewal of an existing collective agreement or in general, because of negotiations over a new claim. On the other hand, a "grievance" is a dispute arising from the interpretation and/or implementation of an existing collective agreement or of existing conditions of employment or arising from a personal complaint including a complaint over a dismissal.

The settlement of disputes over interests is based on direct negotiations between the two sides: The two sides submit claims to be realised in a new agreement or in the renewal of an agreement. If they cannot agree, then they can seek mediation from the Ministry of Labour, or voluntarily seek arbitration, in which case both sides undertake to accept the arbitrator's decision as binding and final. For settlement of grievances/disputes over rights, the Code stipulated the parties may first engage in direct negotiations, both in grievances arising from the interpretation or implementation of a collective agreement and of personal complains. If they cannot agree, mediation is offered by the Ministry of Labour or compulsory/voluntary arbitration. Disputes over interests might lead to strikes or

lockouts, while strikes or lockouts in disputes over rights are prohibited by the code. Sparsis, (1998, 32) points out "strikes are permitted in all cases where there is a flagrant violation of an existing agreement or practice".

In 2004, a new voluntary agreement on the settlement of labour disputes in essential services was signed which is an extension of the IRC. This does not prohibit strikes in essential services which respects the right to organize: The IRC explicitly provides that both sides recognise "the right of employers and employees to organise freely and to belong to organizations of their own choice without any interference or victimization from either side". Also, the right to collective bargaining is explicitly stipulated: "it is accepted that free collective bargaining constitutes the basic method for the determination of conditions of employment and remuneration".

There was no mechanism, set either by law or collective agreement, providing for the extension of collective agreements. In 2012 the Government proposed to establish a framework for extending collective agreements to bind parties without negotiations under specific circumstances where it was impossible or difficult for workers to organise. However, such suggestions that collective agreements should be given legal force, with the possibility of extending them to those not directly covered, were abandoned in 2013, when the new conservative Government took office.

20. MEDIATION / CONCILIATION

The main ways of resolving disputes a mediation and arbitration. The most important one is mediation via the Department of Labour Relations (the Industrial Relations Service- IRS) of the Ministry of Labour, Welfare and Social Insurance. The IRS is the unit responsible for providing mediation assistance in a dispute after negotiations have reached a deadlock and the two sides ie the employers and trade unions formally request the mediation of the Ministry. According to the Industrial Relations Service, the IRS mediates approximately 250 to 300 such cases annually and generally succeedes in resolving more than 90 per cent of cases without a strike. The Ministry prides itself that the low number of strikes registered in Cyprus confirms that the existing conflict resolution mechanisms enjoy a high degree of effectiveness. The mediation process is governed by the procedures of the IRC, which provides detailed procedures as set out in the Code.[95] The me-

95. The IRC specifies the procedures for dispute resolution in the private and semi-public sectors and there are different rules governing the public sector.

diation process governed by the IRC is not a mandatory procedure and is not governed by legislation; however, collective agreements between employers and their employees may expressly provide that any labour law dispute is to be subject to mediation. The aim of mediation is to assist employers and employees in reaching a mutually acceptable solution.
There are two types of industrial relations disputes that the Ministry mediates:

i. industrial disputes about interests (concerning the conclusion of a collective agreement or the renewal of an existing one); and
ii. industrial disputes about rights that refer to the interpretation of a collective agreement (grievances).

If mediation fails to produce results in disputes about interests, then the unions may go on strike or employers may lock out their employees. However, this is not an option in the case of grievances, as both parties have agreed not to proceed to strike or lockout for disputes over grievances; in these cases, the mediator shall refer the matter to binding arbitration.

21. ARBITRATION

The IRC provides for arbitration both parties agree to refer all or any of the issues of a dispute about interests to arbitration instead of mediation, at any time either before or after the submission of the dispute to the Ministry. By so doing, they both accept that the decision of the arbitration shall be binding on the parties. A dispute about grievances may be referred to arbitration instead of mediation, if the parties so wish; if a dispute about grievances has been submitted for mediation, and no settlement of the dispute by mediation has been achieved, the dispute is submitted to binding arbitration.

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Collective bargaining in Bulgaria

Krassimira SREDKOVA*

1. INTRODUCTION

1.1. Historical development and social significance of collective bargaining

1.1.1. Origin of collective bargaining

Collective bargaining and conclusion of collective labour agreements is a basic institution, typical for labour law only. It is a means of collective protection of the labour rights and interests of employees. This paper does not contain fundamental ideas, but it aims to present the situation in Bulgaria now a days.

In Bulgaria, collective bargaining and conclusion of collective labour agreements originated in the early twentieth century. Initially, the legislation did not regulate the collective labour agreement as a contract, binding on its parties. The struggle of workers and in particular strikes achieved it. This period in Bulgaria lasted from 1905, when the first collective labour agreement was concluded (in Sofia private printing houses) until 1936, when legislation was adopted.

At a later historical stage of their development, the states develop a legal framework for collective bargaining and conclusion of collective labour agreements. Certain rules had been laid down on their conclusion, as well as certain guarantees for the observance of the latter. This also applies to Bulgaria. The beginning of this stage was set with the adoption of the Ordinance-Law on Collective Labour Agreements and the Settlement of Labour Disputes of 1936. It stipulated that collective labour agreements also have a certain normative effect, as they may establish more favourable working conditions than those established in the labour laws.

The Labour Code of 1951 also recognised the importance of the collective agreement. However, it was treated there only as a contract-bargain, which can establish specific reciprocal rights and obligations of

* Professor of Labour Law and Social Security at Sofia University "St. Kliment Ohridski".

the parties relevant to the organisation of work, the implementation of the production plan and others. Due to the centralised and fixed regulation of employment relationships, there was no room left to include many provisions with normative effect.[1]

The current Labour Code (LC) of 1987 grants the collective agreement the meaning of a normative agreement, which can regulate the issues of labour relationships with more favourable for the employees provisions than those envisaged in the law.

1.1.2. Societal functions of collective bargaining

Collective bargaining and conclusion of collective agreements is a powerful tool for **protecting the interests of employees**. This protection is achieved through a bilateral contractual laying down the general conditions for rendering labour, which in many cases is more efficient than individual negotiation.

The collective bargaining **enriches the normative regulation of labour relationships**. It is the second pillar of the legal framework – it establishes higher standards for protection of employees than the minimum ones set out in labour law. And, on the basis of what is established in the collective labour agreement, in the individual agreements of the parties to the employment relationship even more favourable conditions may be specified.

Collective bargaining is also a key tool for **settling collective labour disputes**. The Law on the Settlement of Collective Labour Disputes (LSCLD) provides as the main means for settling these disputes the negotiations between the disputing parties and reaching an agreement between them, the effect of which is equivalent to the effect of the collective agreement (§ 1, item 2 SP LSCLD).

Collective bargaining develops also **the labour democracy**. It provides that in the regulation of general labour issues of the enterprise, in addition to the interests of the employer, the interests of the employees, expressed by their trade union organisations, are also taken into account.

Unfortunately, in recent years the conclusion of collective labour agreements in our country has been on a steady decline. According to National Institute for Conciliation and Arbitration (NICA) data, 1,330 collective labour agreements were registered in 2011; 1,403 in 2012; 1,214 in

1. See **Радоилски, Л.** Трудово право на Народна Република България. София: Наука и изкуство, 1957, p. 231.

2013; 1,260 in 2014; 1,115 in 2015; in 2016 – 1,158, and in 2017 – 1,015.[2] Of these, in 2017 at the enterprise level some 922 agreements were concluded, at the municipal level – 87, at the level of industry or branch – 6.[3] This is mainly due to the economic difficulties for employers, who cannot guarantee conditions that are more favourable for the employees than the working conditions established by law, and to the decrease in trade union association and in establishing trade union organisations among others.

1.1.3. Legal framework of collective bargaining

1.1.3.1. International regulation

Collective bargaining and conclusion of collective agreements is one of the main areas of legal regulation by the **International Labour Organisation** (ILO) acts. As is well known, the ILO has enshrined the right to collective bargaining primarily in two of ***its fundamental documents*** – the 1944 ILO Declaration of Philadelphia concerning the aims and purposes of the International Labour Organisation and the 1998 ILO Declaration on Fundamental Principles and Rights at Work. It is governed by two specific ***conventions*** *– the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* and *the Collective Bargaining Convention, 1981 (No. 154)*. In force, for Bulgaria is Convention No 98[4]. In addition, a number of conventions on specific issues of the protection of labour also include collective bargaining.

From the **regional European acts** Article 6 of *the European Social Charter (revised)* is dedicated to the right to collective bargaining and conclusion of collective agreements. This provision has been ratified by Bulgaria.

The right to collective bargaining is explicitly laid out as a fundamental right in the **EU law** in Article 28, *Charter of Fundamental Rights of the European Union*.

2. See **NICA.** Annual report on collective labour agreements and collective labour disputes in the Republic of Bulgaria. 2018. Sofia, 2018, p. 36 – www.nipa.bg.
3. Ibid., p. 38.
4. See in more detail about the international legal regulation of collective bargaining **Мръчков, В.** Българското трудово законодателство и международните трудови конвенции и препоръки. София: Наука и изкуство, 1978, p. 78-81.

1.1.3.2. National regulation

4. The main national legal framework for collective bargaining and conclusion of collective labour agreements in Bulgaria is contained in Chapter IV **LC**. Separate rules are also established in other provisions – for example Article 66, para. 2; Article 74, para. 1; Article 156a, among others. LC. **Other labour laws** also regulate these issues, such as the Law on the Settlement of Collective Labour Disputes.

2. COLLECTIVE BARGAINING

2.1. Subject

As is well known, collective bargaining is a mechanism for determining the working conditions through the common will of trade union organisations as representing the interests of employees, and their employer or an employers' organisation as representing the interests of employers. The collective agreement is the legal act that expresses the common understanding reached between the parties to the collective bargaining.

The subject of the collective bargaining and of the collective agreement concluded as a result is determined by the range of issues on which the negotiations are conducted and which are included in the agreement reached. For Bulgaria, these issues are set out in Article 50, para. 1 LC. There are two groups of issues:

a. Issues of **employment relationships**. These are the relationships between the employees and the employer during and on the occasion of supplying labour force. Such are the labour relationships within the meaning of Article 1, para. 1 LC.[5] These issues are prevalent in collective bargaining. They may relate to wages, leaves, social and welfare services, etc .;

b. Issues of **social insurance relationships**. The social insurance relationships are related to the material security of the employees, when due to (temporary) disability, maternity and other reasons provided for by the legislation they couldn't gain means of subsistence for their personal work.[6]

5. See **Средкова, Кр.** Трудово право. Обща част. С.: УИ „Св. Климент Охридски", 2010, 12-17; **Мръчков, В.** Трудово право. 10 изд. С.: Сиби, 2018, 145-152; In: ***Мръчков, В., Кр. Средкова, Ат. Мръчков, В., Кр. Средкова, Ат. Василев, Ем. Мингов.*** Коментар на Кодекса на труда. С.: Сиби, 2021, 18-27.

6. On these relationships, see **Средкова, Кр.** Осигурително право. 5. изд. С.: Сиби, 2016, 288-295; **Мръчков, В.** Осигурително право. 7. изд. С.: Сиби, 2019, 164-180.

They are regulated in the Social Insurance Code, the Health Insurance Act and the Code of Tax and Social Insurance Procedure, mainly by binding legal rules. Hence, there are fewer opportunities left for the collective bargaining. An agreement may be reached, for example, on voluntary pension insurance for the employees under an occupational scheme, for supplementary unemployment insurance, etc.

2.2. Limits of contractual freedom

2.2.1. Formal limits

In order to be subject to collective bargaining and to be included in a collective labour agreement, the issues of labour and social insurance relationships **must not be regulated by mandatory provisions of the law**. "Law" here means any statutory instrument adopted by a competent state authority, and not just an act of the National Assembly (Parliament). As is well known, mandatory are those provisions, which determine precisely the due or possible conduct of their addressees and do not allow any deviation either by the unilateral will of one of the parties or by mutual consent of both parties.

Not regulated by mandatory provisions of the law are:

a. Issues that ***are not regulated at all*** in any statutory instrument. These are issues, on which the collective agreement may create a primary legal framework. It can establish, for example, an obligation for the employer for various gratification payments – additional remuneration for the time of the paid annual leave, "Christmas bonuses", etc.;

b. Issues that ***are regulated by dispositive provisions*** of a statutory instrument. These are provisions that set the limits of possible behaviour. Within these limits, the parties to the respective legal relationship are free to determine their conduct either unilaterally or by mutual consent. Such are, for example, the rules regarding the minimum duration of paid annual leave (Articles 155 - 156a LC);

c. Issues for the regulation of which a statutory instrument ***explicitly refers to the collective labour agreement.*** For example, according to Article 297, para. 2 LC, the criteria for providing housing to the employees by the employer shall be determined by the collective labour agreement.

2.2.2. Content limits

The limits of the contractual freedom of the parties to the collective bargaining on the issues on which it is conducted, are established in Article

50, para. 2 LC. The provisions of the collective labour agreement should be **more favourable for the employees** than the ones in the legal acts issued by the state. For example, the collective labour agreement may provide for 25 working days of regular paid annual leave, but not for 19 days, because according to Article 155, para. 4 LC, the minimum duration of this leave is 20 working days. Thus, a higher degree of legal protection is achieved, than the one established in the law only as a minimum standard.

2.3. Levels of collective bargaining

The levels at which collective bargaining may be conducted and collective labour agreements may be concluded in Bulgaria are laid out in Article 51, para. 1 LC. The main level is the level of **enterprise**. It is regulated in Article 51a LC.

The enterprise within the meaning of Article 51a LC is the one within the meaning of § 1, item 2 LC – any place where work is performed under an employment relationship. The nature of the activity carried out in the enterprise – economic, educational, etc. – is irrelevant. Naturally, greater opportunities exist in manufacturing enterprises, where there is economic capacity to provide conditions that are more favourable for employees than those established by law, but there are certain opportunities in public enterprises as well, although still limited by the budget.

Collective bargaining can also be conducted in **municipalities** for activities financed by the municipal budgets (Article 51, para. 1 in conjunction with Article 51c LC). The municipality is a basic administrative-territorial unit (Article 136, para. 1 Const.). Authorised to conduct collective bargaining there, are the representative organisations of the employees and of the employers (Article 51c, para. 1 LC). The mayor cannot conduct collective bargaining and conclude collective labour agreements in his/her capacity of mayor. Article 51c LC does not provide him/her with collective bargaining capacity.

A collective labour agreement may also be concluded at the **branch** level (Article 51, para. 1 in conjunction with Article 51b LC). The branch is a subdivision according to the Statistical classification of economic activities in the European Community (NACE)–2008, built by sub-sectors and types of produce – for example "Manufacture of textiles, apparel, leather and related products". The branch is a division of a certain industry. Collective bargaining at branch level can be conducted only by the representative

organisations of the trade unions and of the employers in the respective branch (Article 51b, para. 1 LC).

The highest level of collective bargaining is at **industry level** (Article 51, para. 1 in conjunction with Article 51b LC). The industry is an activity defined by a letter code in the NACE–2008, for example, "Manufacturing". Collective bargaining by industry can be conducted only by the representative organisations of the trade unions and of the employers in the respective industry (Article 51b, para. 1 LC).

2.4. Parties to collective bargaining

2.4.1. Employer

The right to conduct collective bargaining and to conclude a collective labour agreement rests above all with, and is most often exercised by the employer. This is the employer in the individual enterprise as a place of employment (Article 51a, para. 1 LC). It is irrespective of whether the former is an employer in the economic or non-economic sector.

2.4.2. Employers' organisation

Collective bargaining may also be conducted by an employers' organisation. This is the hypothesis of bargaining at industry, branch or municipal level (Article 51b, para. 1; Article 51c, para. 1 LC). The **representative** employers' organisation is the competent body to conduct collective bargaining.[7]

2.4.3. Trade union organisation

In ***the individual enterprise*** collective bargaining may be conducted and a collective labour agreement may be concluded by **any trade union organisation**, regardless of its size, capacity of being representative, etc. (Article 51a, para. 1 LC). However, the law requires only one collective labour agreement to be concluded at one level (Article 51, para. 2 LC). This is to ensure unity in the rights and obligations of the employer and the employees. For the same purpose, the law stipulates that where more than

7. See on representative employers' organisations **Средкова, Кр.** Трудово право. Специална част. Дял II. Колективно трудово право. С: УИ „Св. Климент Охридски", 41-44; **Мръчков, В.** Трудово право, 792-799; In: *Коментар*, 100-113.

one trade union organisations exist within one enterprise, they shall submit a common draft (Article 51a, para. 2, sent. 2 LC). If they fail to reach an agreement, each organisation may prepare its own draft. All drafts are submitted to the General Assembly of Employees (Article 51a, para. 3 LC). The General Assembly of Employees decides which draft favours most the employees. The trade union organisation that has submitted this draft shall conduct the collective bargaining and upon reaching an agreement with the employer, shall conclude the collective labour agreement.

Similar to the employers' organisations, trade union organisations may also conduct collective bargaining and conclude collective agreements ***at a higher than the enterprise level*** (e.g. industry, branch) only if they are **representative** (Article 51b, para. 1, and Article 51c, para. 1 LC).

2.5. Obligations of the parties to the collective bargaining

The main obligations in connection with the collective bargaining are those of the **employer**. These are three:

a. The employer is obliged ***to negotiate*** – to conduct collective bargaining with the relevant trade union organisations. This obligation of the employer is established in Article 52, para. 1, item 1 LC. It arises at the request of a trade union organisation. Its implementation means for the employer to set the time and place for the bargaining, to appoint his/her representatives for the bargaining, to discuss the demands of the trade union organisations, to look for opportunities to satisfy them. It should be specifically emphasised that the employer is not obliged to come to an agreement, i.e. to conclude a collective labour agreement, but to negotiate – to participate in good faith in the discussions and possibly to accept the requests when there is an opportunity to do so;

b. The employer is obliged ***to make available certain information*** in connection with the possible conclusion of the collective labour agreement. This obligation is established in Article 52, para. 1, item 2 LC. It arises at the request of the trade union organisation, which conducts collective bargaining. The subject of the due information is specified in Article 52, para. 1, item 2 LC. It includes two groups of issues.

One group refers to *the collective agreements to which the employer is bound*. These are collective labour agreements at a higher level than the enterprise – municipal, branch, etc. This is necessary because these agreements are mandatory for the employer when he/she is a member of the representative employers' organisation that has concluded these

agreements at the respective levels – the enterprise may only enter into a collective labour agreement with more favourable provisions than the ones laid out in the agreements at the higher level.

The other group of issues for which the employer is obliged to make information available for the collective bargaining is related to the *economic situation at the enterprise*. It is significant for the inclusion in the collective labour agreement of provisions that the employer is able to fulfil – higher remuneration, more generous forms of social and welfare services, etc. However, the provision of this information may be refused or granted subject to a requirement of confidentiality. This is the case when the information may cause injury to the employer – for example in the competition with other employers;

c. The employer is obliged ***to inform the employees of the collective labour agreement.*** This obligation for the employer is established in Article 58 LC. It requires that the employer should inform employees about the collective agreements binding on him/her – in the enterprise, municipality, industry, etc. The employer is obliged to make these agreements available to the employees. This can be done by displaying them in some place in the enterprise accessible to all, in a certain room or in another appropriate way.

The employer's organisation, which conducts collective bargaining and concludes collective labour agreements, has similar obligations.

The trade union organisation also has obligations in relation to collective bargaining. These are two:

a. ***To submit a draft collective labour agreement.*** This obligation is derived from the provisions of Article 51a, para. 2; Article 51b, para. 3 and Article 51c, para. 2 LC, which stipulate that a draft collective labour agreement shall be submitted by the trade union organisation. It arises when the trade union organisation would like to conclude a collective labour agreement;

b. ***To provide information to the employer***. This obligation is established in Article 52, para. 4 LC. It arises at the request of the employer. The subject of the information is *the actual number of members of the trade union organisation*. It is required in order to make the employer aware of the minimum number of employees that the collective labour agreement will be applied to, and for whom the employer should provide the appropriate material resources. The information required refers only to the number of members, but not to the names of the members of the organisation.

The law explicitly regulates the **legal consequences** of failure to fulfil the obligations of the employer in connection with collective bargaining. This is done in Article 52, para. 2--3 LC. The consequence is ***compensation for the detriments inflicted***. It may be due to complete non-fulfilment or delayed implementation. The delay occurs within one month from the invitation to negotiate – for the obligation to negotiate, and within 15 days from the request – for the obligation to provide information (Article 52, para. 3 LC). The detriment may in the form of not granted benefits to the employees due to the non-conclusion of the collective labour agreement or in its delayed conclusion, expenses of the trade union organisation for experts in conducting the bargaining, etc. The liability of the employer shall be enforced by a judicial procedure.

As for the obligations of the trade union organisation, their non-fulfilment – for example, failure to submit a draft collective agreement will result in ***not concluding*** such an agreement.

3. COLLECTIVE LABOUR AGREEMENT

3.1. Concept and legal characteristics of the collective labour agreement

The collective agreement is the legal act expressing the agreement reached in the process of collective bargaining. This is an agreement between an employer or an employers' organisation and a trade union organisation, which establishes more favourable working conditions for employees than those provided for in the labour law. It is a non-state legal source of labour law – an internal act of the enterprise.[8]

In terms of its ***form***, a collective labour agreement is an **agreement** – it is concluded by means of an agreement between an employer (employers' organisation) and a trade union organisation. In this sense, a collective agreement is an agreement between private entities.

In terms of ***content***, the collective labour agreement is a **normative agreement**. It is defined by its effect and legal consequences.

The collective labour agreement ***has effect*** with regard to personally undefined circle of individuals – the employees of the employer who con-

8. See **Гевренова, Н.** Недържавен източник на трудовото право – понятие, характеристика и белези. – Юридически свят, 2005, № 1, 44-70; **Средкова, Кр.** Трудово право. Обща част, 106-110; **Мръчков, В.** Трудово право, p. 96, 820-832.

cluded the contract (or bound by a collective labour agreement concluded by the employers' organisation of which he/she is a member) (Article 57 LC). Its provisions are consistently and repeatedly applied – every month the respective employees are due the remuneration provided for in the agreement, every year – the envisaged in the agreement leave, etc.

The collective agreement establishes rules of conduct. They are part of the normative content of individual employment relationships. Therefore, individual agreements may not include provisions that are less favourable for the employee than those provided for in the collective labour agreement (Article 66, para. 2 LC). The provisions of the agreement are effective without being explicitly included in the content of the grounds for the origin of any concrete individual employment relationships. These are its main *legal consequences*.

The procedure for concluding a collective labour agreement shall be determined by the parties to the collective bargaining upon its commencement. The law (Article 54, para. 3 LC) sets only one requirement – the negotiations for concluding a new collective labour agreement shall commence no later than three months prior to the expiry of the agreement in effect at the time.

The collective labour agreement is concluded in **writing**. Such is the explicit requirement of the binding rule of Article 53, para. 1 LC. The written form is a requisite for the validity of the agreement. This is the usual written form. What is special here is that the agreement is concluded in ***triplicate*** – one for each of the parties and one for the respective Labour Inspectorate, where the agreement shall be registered.

The Labour Code does not regulate **the moment of conclusion** of the collective labour agreement. In this situation, the rules for conclusion of transactions should be applied by analogy with the law (Article 46, para. 2 Law on Normative Legal Acts), insofar as this agreement is a type of legal transaction. Pursuant to Article 14, para. 1 of the Law on Obligations and Contracts, it will be concluded at the time of reaching an agreement between the parties. This is the moment of ***signing*** the collective labour agreement by the two parties.

The moment of entry into effect of the collective labour agreement is explicitly defined in Article 54, para. 1 LC. From that moment on, the collective labour agreement gives rise to the rights and obligations provided for in it. As a rule, it enters into effect on the day of ***its conclusion*** (Article 54, para. 1, proposition 1 LC). This rule applies insofar as the parties have

not determined ***otherwise*** (Article 54, para. 1, proposition 2 LC). They can determine that the collective agreement will be applied from a later moment. There is no obstacle to that, and it often happens in practice, for certain provisions – for example regarding the size of remuneration, to apply the collective agreement retroactively.

The collective labour agreement is subject **to registration**.[9] It is regulated in Article 53, para. 3-5 LC.

The authority competent to register collective agreements is ***the Labour Inspectorate.*** This is because the Labour Inspectorate is an authority for the overall control over compliance with labour law.[10] The competent Labour Inspectorate is determined by the level at which the collective labour agreement has been concluded (Article 53, para. 4 LC). Where the agreement is concluded at an enterprise level, the competent Labour Inspectorate is the one in the area where the employer's registered office is located. If the employers are more than one, and they have different registered offices, the collective agreement shall be registered with one of the respective inspectorates. The collective labour agreements at a branch or industry level shall be registered with the Central Office of the Labour Inspectorate in Sofia. In the event of a dispute regarding the competent inspectorate, it shall be settled by the Minister of Labour and Social Policy.

The collective labour agreement registration shall be effected on the basis of an application (Article 53, para. 4 LC). The application may be submitted by either party to the agreement. There is no impediment to being submitted jointly by both parties. One of the three copies of the concluded agreement shall be attached to it. The law does not specify a deadline for submission of the application. It sets a deadline for registration as from the date of submission of the application. This period is one month.

The Labour Inspectorate is obliged to make the registration. It is expressed by indicating the features that individualise the collective labour agreement – the place where it was concluded, the parties to the agreement, the date of conclusion, etc. The Labour Inspectorate is not authorised to decide whether to register the agreement or not. It is not compe-

9. See in more detail regarding the registration of collective labour agreements **Банова, Ем.** Вписване на колективния трудов договор. – In: ***Трудови отношения 2017***. С.: Труд и право, 2017, 378-382.

10. See **Мръчков, В.** -- In: *Коментар*, 1150-1152.

tent to decide on its content either. If the Labour Inspectorate would find inconsistencies with the law or other irregularities, the Inspectorate may draw the attention of the parties to that, but may not refuse registration.

Like any registration, the registration of a collective agreement has above all a ***declaratory significance***. Through registration, the content of the agreement is made public. Anyone who is interested can be acquainted with it.

The registration also has ***probative value***. It is defined in Article 53, para. 6 LC. In the event of a dispute as to the text of the collective agreement, the text of the registered copy shall be considered authentic.

The Labour Inspectorate is obliged to provide *ex officio* **copies** of the registered collective labour agreements to the ***National Institute for Conciliation and Arbitration***. This institute is entrusted with the development and maintenance of an information system on the collective agreements (Article 53, para. 5 LC).[11]

3.2. Effect of collective agreements

As a rule, the collective labour agreement is concluded for a term of **one year**. This rule is established in Article 54, para. 2, sent. 1, proposition 1 LC. One year is a period during which the situation in the enterprise, branch, etc. is relatively consistent and the obligations of the employer provided for in the collective labour agreement can be fulfilled.

The law allows the negotiation of **another term** of the collective labour agreement (Article 54, para. 2, sent. 1, proposition 2 LC). It depends on the will of the parties. This is limited only by the maximum duration of the agreed term – it cannot be more than ***two years***.

It is also possible to negotiate ***a shorter than the total term*** of the collective labour agreement. This is admissible for *some individual provisions* – for example on remuneration.

The law establishes two hypotheses for **extending** the term of the collective labour agreement. These rules are binding. They relate to:

a. Termination of the membership of the employer in the employers' organisation, which has concluded the collective labour agreement (Article 55, para. 1 LC). This hypothesis refers to collective agreements con-

11. This legislative decision cannot be taken unreservedly. It provides NICA with a function that is outside its scope of activity, defined in Article 4a, para. 1 LSCLD – assistance "for the voluntary settlement of collective labour disputes".

cluded at a higher level than the enterprise. The rule applies, of course, to cases where the employer terminates his/her membership in the organisation after the conclusion of the collective agreement;

b. Change of employer under the employment contract (Article 55, para. 2 LC). These are the cases under Article 123 and Article 123a LC. Just as all rights and obligations under individual employment relationships are assumed by the new employer, so are the rights and the obligations under the collective agreement concluded before the change. It continues to be effective until a new collective agreement is concluded with the new employer. However, the law establishes a maximum period of one year from the date of the change of employer, so as not to commit the new employer for a long time with obligations he/she did not participate in entering into.

The collective labour agreement may be **amended** (Article 56 LC). This can be done following the procedure of its conclusion – reaching a ***mutual agreement*** between the parties through collective bargaining.

The collective labour agreement is binding on the **employer, who has concluded** it as a party to it. Where the collective labour agreement is concluded by an employers' organisation, the agreement is binding on the **employers – members of the organisation**, even after the termination of their membership in it, until the expiration of its validity.

By way of exception, the collective labour agreement also applies to an employer who has not participated in its conclusion. These are the abovementioned cases of change of employer under Article 123 and Article 123a LC, when the contract binds **the new employer** until the conclusion of a new collective labour agreement, but for not more than one year (Article 55, para. 2 LC).

The collective labour agreement may give rise to certain rights and obligations for the **trade union organisation** – **party to it**. Such is, for example, the right to give consent for dismissal under Article 333, para. 4 LC – due to downsizing of personnel or reduction in the volume of work. Obligations for the trade union organisation may also arise from it – for example, to observe social peace, i.e. not to organise strikes during the term of the collective labour agreement.

Since the collective labour agreement is a normative contractual agreement, it is implemented under the individual employment relationships with the employer – party to it. ***Directly by operation of law***, without the need for any additional action, it is effective under the employment re-

lationships of **employees** who are members of the trade union organisation – party to it. It does not matter whether they had worked for the employer at the time the contract was concluded or started working thereafter. It is necessary and sufficient for them to be members of the trade union organisation.

Not all employees in the respective company, branch, etc. may be members of the trade union organisation that concluded the collective labour agreement. Some of them may be members of another trade union organisation, while others may not be members of such an organisation at all. For them, the law provides for the possibility the collective labour agreement to be applied to them through their ***accession*** (Article 57, para. 2 LC). It is a subjective right of every employee outside the members of the trade union – party to the contract. Accession is a unilateral declaration of intent by the employee that he/she wishes the clauses of the collective labour agreement to be applied to his/her individual employment relationship. It does not need to be approved, but only to reach its addressee. The form of the declaration of intent is *in writing*. The addressee of the declaration of intent may be any of the parties to the collective labour agreement – the employer or the trade union organisation in the person of its leadership. When the declaration of intent is addressed to the employer, this is sufficient – the employer must consider the rules provided for in the collective agreement included in the content of the individual employment relationship. When the declaration of intent is addressed to the trade union organisation, its leadership should inform the employer who applies the labour law. The law stipulates that acceding to the collective labour agreement is done under the terms and conditions determined by the parties to the agreement. These terms and conditions may include specifying the party to the contract to which the applications are to be submitted, the place of their submission, etc. In Article 57, para. 3 *in fine* LC, three requirements have been established, the violation of which will be grounds for invalidity of the established terms and conditions. Such grounds are contravention of the law, circumvention of the law or violation of moral or ethical standards.

Certain collective agreements may be granted **general effect**, i.e., effect regardless of the parties that concluded them. This is laid out in Article 51b, para. 4 LC. It *refers to collective agreements concluded at* ***industry*** *or* ***branch level***. As mentioned above, such collective agreements are concluded by the representative employers' and trade union organisations in

the industry, respectively branch (Article 51b, para. 1 LC). Extension of their effect is admissible when they are concluded between all representative employers' and trade union organisations at the respective level – this is the precondition for the extension. The condition for applying the option under Article 51b, para. 1 LC is a joint request of the parties to the contract. Although this is not explicitly provided for in the law, the request must be in writing. It shall be addressed to the ***Minister of Labour and Social Policy*** – the Minister is the authority competent to grant the general effect of the contract. The granting of such effect is carried out by a unilateral act of the Minister – *an order*.

3.3. Guarantees for the implementation of the collective labour agreement

The legislation has established important guarantees for the implementation of the collective labour agreement with a view of achieving its social purpose – to provide working conditions more favourable for the employees than the ones established by law. For that purpose, it is necessary first for the employees to be aware of the collective labour agreement, to know its contents, to demand its observance under the individual employment relationships, when it is applied to them. Therefore, the employer is assigned the obligation **to inform** the employees of the collective labour agreements binding on him/her (Article 58 LC). These are both the collective labour agreement concluded by the employer in his/her enterprise and the collective labour agreements concluded at a higher level by an employers' organisation of which the employer is a member or to which a general effect has been granted under Article 51b, para. 4 LC.

The law does not specify the method of providing the information. It depends on the discretion of the employer. He/she can do this by informing the General Assembly, displaying them on the notice board in the enterprise, by e-mail, etc. The employer must "make the texts of collective agreements available to the employees". This can be done by displaying them at a specific place in the enterprise of which the employees are notified and to which they have access, to provide them by electronic means, etc.

A guarantee for the implementation of the collective labour agreement is also **the continuation of its effect** discussed above in the event of change of employer under Article 123 and Article 123a LC (Article 55, para. 2 LC). The agreement concluded with the previous employer is also binding on the new one – from the change to the conclusion of a new collec-

tive labour agreement, but for not more than one year. Thus, employees continue to enjoy the rights acquired before the change.

A collective labour agreement may be **invalid** in whole or in part. The grounds for this are specified in Article 60 LC. These are contravention of the law and circumvention of the law. An invalid collective labour agreement shall take effect until the invalidity is declared. The declaration may be issued only by court.

The right to bring a legal action belongs to:

a. *Each of the parties* to the collective labour agreement – the employer or the trade union organisation;

b. *Any employee* to whom the collective agreement applies – *ex lege* or on the grounds of accession.

Only upon the entry into force of the decision to declare invalid certain collective agreement or individual provisions thereof will their effect be terminated.

The implementation of the collective labour agreement may be achieved not only ***voluntarily***, but also ***in court*** (Article 59 LC). This is done through legal action in the event of non-compliance. Disputes in the event of non-compliance with collective labour agreements constitute labour disputes within the meaning of Article 357, para. 1 *in fine* LC.

Non-compliance may be total or partial. It can be either complete or delayed. The form of the non-compliance is irrelevant to the legal action.

The right to bring a legal action in the event of non-compliance with the collective labour agreement belongs to the same subjects as in the event of legal actions for declaring its invalidity – these are:

a. *The parties to the collective labour agreement* – the employer and the trade union organisation. Legal action on the part of the employer is a rarer hypothesis – if, for example, the collective agreement had established an obligation of social peace during its operation, but the trade union would organise a strike, the employer would have the right to claim compensation for damages suffered by him/her from the suspension of work. The trade union organisation has the right to legal action in the event of general non-compliance with the collective labour agreement or individual provisions thereof, which affect all employees to whom it applies – for example, in the event of non-fulfilment of the employer's obligation to build a sports ground in the enterprise;

b. *Any employee to whom the collective agreement applies*. He/she has the right to legal action in the event when the non-compliance affects

his/her rights under his/her individual employment relationship – for example, higher remuneration for length of employment and professional experience.

The subject of the legal action in the event of non-compliance with the collective labour agreements may be:

a. ***Actual implementation***. The plaintiff may ask the court that the employer should be ordered to comply with the provisions of the collective agreement – for example, to pay the employees the additional remuneration for the New Year holidays provided for in the agreement;

b. ***Compensation*** – the typical civil law instrument of giving instead of performing. If, for example, the collective agreement stipulates that the employer will provide vacation packages to employees and the employer will fail to comply with this obligation, compensation for the detriment suffered by employees may be claimed in the form of payment of the higher price for the packages secured by them.

Disputes regarding non-compliance with the collective labour agreements like any labour disputes are subject to the jurisdiction of the ordinary **civil courts** (arg. Article 160, para. 1 LC). Their generic jurisdiction is before the district courts regardless of the sum of the legal action (Article 103 of the Civil Procedure Code (CPC)). Local jurisdiction shall be determined by the location of the defendant (Article 105 CPC) – if, for example, the trade union brought an action for non-compliance with the obligation to increase wages, the action should be brought before the district court according to the location of the employer.

The negotiation for concluding a collective labour agreement and its implementation may also be the subject of a **collective labour dispute** under the Law on Settlement of Collective Labour Disputes. In these cases, employees can use the means to settle such disputes ***voluntarily*** (negotiations, conciliation, arbitration), and in certain cases ***a strike*** as well.

Recent trends of collective bargaining in Montenegro

Vesna SIMOVIĆ-ZVICER *

BASIC INFORMATION

Montenegro (*Crna Gora*), a country in south-eastern Europe, which lies on the Adriatic coast. It is bordered on the east and north with Serbia, in the west and northwest with Croatia and Bosnia and Herzegovina and Albania to the southeast. The capital, and largest city is Podgorica. In Montenegro there are around 662.000 citizens. Montenegro became an independent state after the dissolution of the State Union called "Serbia and Montenegro" on 21 May 2006. Montenegro is membership of United Nations, International Labour Organization, OSCE, Council of Europe and NATO. Montenegro is a candidate for accession to the EU and is in the process of harmonising its legal system with European standards.

According to the Constitution[1], Montenegro is a country of social justice. Fundamental economic and social rights are guaranteed by the fourth chapter of the Constitution, such as the right to work, prohibition of forced labour and freedom of entrepreneurship. Apart from that, Constitution also guarantees the right of the employed to adequate salary, right to limited working hours, right to occupational safety and health and right to paid vacation. Women, young people and persons with disabilities enjoy special level of protection at work.

Concerning collective employment rights, Article 53 of the Constitution guarantees the freedom of trade union organizing without prior approval. In addition to that, no person can be forced to become a member of an association. The Constitution further provides for the right to strike, while allowing restrictions of this right for the employees of the military, police, state authorities and public service, with a view to protecting the public interest, in accordance with the law.

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* Professor at the University of Montenegro.

1. Constitution of Montenegro, Official Gazette of Montenegro, No. 1/2007.

1. THE MAIN TRENDS OF COLLECTIVE BARGAINING

Constitution is the highest legislative act in the legal system of Montenegro[2]. A separate chapter in the second part of the Constitution of Montenegro (chapter 4) defines economic and social and cultural rights and freedoms, constitutionalized after the personal and political rights, and considered the third-generation rights[3].

Concerning collective rights arising from employment, Article 53 of the Constitution guarantees freedom of trade union organising without prior approval, but does not contain provisions relating to collective bargaining.

The rights guaranteed by the Constitution are regulated in more detail by other pieces of legislation governing employment relations, such as laws, by-laws, collective agreements and acts issued by employers. Labour Law[4] is the systemic law in the field of employment relations. Concerning the rights arising from employment, Labour Law regulates individual and collective rights. Regarding obligations arising from employment, Labour Law governs obligations of both employees and employers, while allowing for them to be regulated also by collective agreements.

Collective agreements come right after the laws as the second most relevant source of labour law in Montenegro. According to the Labour Law, collective agreements can be concluded at three levels, as follows: general collective agreement (only one, at the national level); sector-specific collective agreement (at the level of a sector, group and subgroup of business activity) and collective agreement with employer (at the level of organisation). It should be noted here that collective agreements concluded at a certain level apply to all workers at that level of organising, regardless of whether they are members of representative organisations that have entered into such agreements. In addition to that, matters regulated by collective agreements are the same, irrespective of the level of collective bargaining.

The conclusion of collective agreements in Montenegro is basically voluntary, but according to the Labour Law, the social partners are obliged to negotiate collectively. This is confirmed in Article 185, paragraph 1. This ob-

2. The Constitution of Montenegro in force was passed by the Constitutional Assembly of the Republic of Montenegro on 22 October 2007.
3. More information: M.Vukčević, Comments on the Constitution of Montenegro, Mediterranean University, Podgorica, 2015, p. 169.
4. Official Gazette of Montenegro, No 74/2019, 08/21, 59/21, 68/21.

ligation of collective bargaining does not always have to result in the conclusion of collective agreements, but it is important because it contributes to the improvement of social dialogue. In order to produce legal effect, a collective agreement must be signed by all participants in the collective bargaining. It is necessary to emphasize here that in case there are several representative trade unions at a certain level of collective bargaining, each of them must be a signatory of the collective agreement.[5] The conditions for acquiring the status of a representative trade union (general and special), as well as the procedure for determining the representativeness of a trade union are defined by the Law on the Representativeness of Trade Unions[6]. The general conditions are: to be registered in the Register of Trade Unions, which is kept by the Ministry of Labour and Social Welfare; to be independent of state bodies, employers and political parties; and to be financed from membership fees and other sources, while special conditions depend on the level at which representativeness is determined.

Special conditions for determining representativeness refer to the percentage of employees who are members of a trade union and it is determined differently, depending on the level of trade union organization. Thus, in order to determine the representativeness of the trade union, it is required that the trade union gathers at least 20% of the employees at the employer. At the level of branch of activity, group or subgroup - that percentage is 15% of the total number of employees in that branch, group or subgroup. To determine a representative trade union at the state level, the percentage of employees who are members of that union is 10%, but with this condition, it is also required that at least five representative branch-level trade unions are members of that union. These solutions were also provided for in the previously valid Law on the Representativeness of Trade Unions ('Official Gazette of Montenegro', Nos. 26/10, 36/13 and 55/16), but the Law adopted in 2018 specifies the condition regarding political neutrality. Thus, Article 9 of this Law states that if a trade union representative is a member of a body of political parties or is on the electoral list as a candidate of a political party, the condition of independence is not fulfilled. In addition, this Law specifies the evidence on the basis of which

5. Such a solution also derives from Article 6 of the Law on Trade Union Representativeness, which, as one of the rights of a representative trade union, provides for the right to collective bargaining and the conclusion of collective agreements.

6. Official Gazette of Montenegro, No. 12/2018

the fulfilment of the general conditions is assessed, namely: confirmation of entry in the Register; a statement by the trade union representative that he/she is not a member of the body of political parties and that he/she is not on the electoral list as a candidate of a political party; the statute or the rules of the trade union organization; and a trade union statement on the method of financing.

In accordance with the Labour Law, collective bargaining is conducted at three levels: at the state level, at the branch level and at the enterprise level.

The general collective agreement is concluded for the territory of the state and it has legal effect on all employees and employers in the territory of Montenegro. It is concluded by the competent bodies of representative organizations of trade union and employers, whose representativeness is determined at the level of Montenegro and the Government.[7]

A branch-level collective agreement is concluded for a certain branch of activity, group or subgroup of activities, and its signatories depend on whether it is an activity of public interest or other activities, as well as whether the state appears as the founder of enterprises and institutions. In accordance with the Labour Law, the signatories are defined as follows:

- in the field of economy, the competent body of the representative association of employers and the competent body of the representative organization of the trade union (currently they are: the Union of Employers of Montenegro and the representative branch-level trade union/s);
- for enterprises whose founder or majority owner is the state, the Government, the Union of Employers and a representative branch-level trade union(s), and for other enterprises a representative trade union organization and founder;
- for public institutions and public services founded by the state, the Government and a representative branch-level union(s), and for other public institutions and public services, a representative trade union organization and the founder (local self-government, a repre-

7. The competent authority is specified in the internal acts of these organizations. Currently, there are two representative trade union organizations at the state level in Montenegro: the Federation of Trade Unions of Montenegro and the Union of Free Trade Unions (whose representativeness is determined in accordance with the Law on Representativeness of Trade Unions) and one representative association of employers: the Union of Employers of Montenegro.

sentative branch-level trade union/s);
- for organizations of obligatory social insurance, the Government and representative branch-level trade union(s);
- for state bodies and organizations and bodies of local self-government, the Government and the representative branch-level trade union(s);
- for sports entities, at the branch-level, the Government and representative branch-level trade union(s) and at the level of group or subgroup of activities (eg. for certain types of sports): the Government, the Montenegrin Olympic Committee and representative branch-level trade union/s);
- for persons who independently perform artistic or other cultural activities - the Ministry of Culture and the representative trade union(s) of artists.

In Montenegro, collective bargaining at the bipartite level is not sufficiently represented. This is confirmed by the fact that there is no branch-level collective agreement nor a representative trade union in the field of commerce, while there are only 10 representative trade unions at the enterprise-level in this sector.

The enterprise-level collective agreement is concluded by the competent body at the employer and the representative trade union organization (or representative trade union organizations, if there are more than one). However, in some cases, the state or local self-government, can also appear as a signatory of an individual collective agreement - if it is a collective agreement in an enterprise, institution or other public service, whose founder is the state or local self-government. In this case, they do it through the governing body, which is appointed by the state, or local self-government.

We can conclude that the level at which collective agreements are concluded also determines the scope of the agreement itself. This is due to the fact that less satisfied interests, i.e. a lower level of rights, require a territorially wider level and vice versa. On the other hand, the higher level of the collective agreement reduces the differences in the labour and social law position of employees, which leads to equalization in business and rights.[8] Collective agreements concluded at a lower level are richer in con-

8. M. Učur, Collective bargaining and expanding the application of the collective agreement, Proceedings of the Faculty of Law, University of Rijeka *(*1991) v. 27, br. 1, p. 543-573 (2006).

tent, more specific and more favourable for employees. This means that they can provide for a larger scope of rights and conditions that are more favourable for their exercise in relation to collective agreements concluded at a higher level.

A collective agreement shall be concluded for a definite period or for indefinite period. A collective agreement concluded for a definite period shall cease to be valid upon the expiration of the period for which it was concluded. However, in accordance with Article 187, paragraph 4 of the Labour Law, the validity of a collective agreement concluded for a certain period may be extended based on the agreement of its signatories, if the agreement is signed 30 days before the expiration of the agreement. Thus, the application of the General Collective Agreement was extended until December 31, 2022. on the basis of an agreement signed by the Government of Montenegro, the Board of Directors of the Union of Employers of Montenegro, the Assembly of the Federation of Trade Unions of Montenegro and the Main Board of the Union of Free Trade Unions of Montenegro[9].

In the previous period, and particularly since the restoration of Montenegro's independence in 2006, intensive reform of labour legislation has been taking place. Following 2015 – when Montenegro started the EU accession negotiation process – and especially after the opening of chapter 19 – Employment and Social Policy – labour legislation reform has become even more intensive to achieve conformity with the EU standards.

An example of good practice in drafting the labour legislation is the application of the principle of tripartism, which means active participation of the social partners in creating labour legislation – ensured through their involvement in relevant working groups and the Social Council– which gives its opinion on legislation governing rights arising from employment and based on employment.

2. COLLECTIVE BARGAINING ISSUES

Collective agreements have two types of norms, i.e. they have two parts: obligatory and normative.

The obligatory part of the collective agreement regulates the rights and obligations between its signatories, i.e. it contains provisions that act *inter partes*, such as provisions related to: duration of the collective agreement, procedure of amendments to the collective agreement,

9. Official Gazette of Montenegro, No. 21/2021.

manner of peaceful settlement of collective disputes. This section may contain a number of clauses that may be aimed at providing privileges for the trade union that is a signatory to the collective agreement, maintaining social peace or affirming peaceful methods for resolving labour disputes.[10]

The normative part of the collective agreement consists of norms that regulate working conditions, i.e. rights, obligations and responsibilities from the employment relationship. It is precisely these norms of the collective agreement that represent the source of labour law, because they act *erga omnes*, i.e. it is binding on all employees and employers. The issues regulated by the collective agreement are the same, regardless of the level of collective bargaining. However, the level at which collective agreements are concluded also determines the scope of the agreement itself. This is due to the fact that less satisfied interests, i.e. a lower level of rights, require a territorially wider level and vice versa. Collective agreements concluded at a lower level are richer in content, more specific and more favourable for employees. This means that they can provide for a larger scope of rights and more favourable conditions for their exercise in relation to collective agreements concluded at a higher level. In other words, the relationship between collective agreements concluded at different levels is determined by the *in favorem laboratoris* clause, or the greatest benefit clause for employee. This clause means that in situations where there are different solutions in two collective agreements that are in a hierarchical relationship, the solution that is more favourable for employees will be applied (eg. the collective agreement at the enterprise level must be harmonized with the collective agreement at the branch level, and this one with the General Collective Agreement). In accordance with the Labour Law, the following issues can be regulated by collective agreements:

- duration and manner of conducting probationary work;
- cases in which an annex may amend the employment contract (in addition to those provided for in Article 47 of the Labour Law);
- additional cases in which an agreement between the Agency and the beneficiary cannot be concluded (in addition to those provided for in Article 54, paragraph 4 of the Labour Law);
- duration of readiness and amount of salary increase on that basis (in

10. For more details see: B.Lubarda, Collective labour agreements, Belgrade, 1990, p. 92 and the like.

accordance with Article 60, paragraph 3 of the Labour Law);
- a collective agreement may determine full-time work shorter than 40 hours in a working week (Article 61, paragraph 2 of the Labour Law);
- the collective agreement may provide for a maximum duration of overtime work at the annual level of 250 hours (Article 64, paragraph 8 of the Labour Law);
- redistribution of working hours may last one year, and the maximum duration of working hours during the week is 54 hours per week, or up to 60 hours per week on seasonal jobs, while redistributed working hours may last longer than the agreed working hours for a maximum of six months, if so provided by the collective agreement and with the fulfilment of other conditions provided in Article 68 of the Labour Law;
- annual leave: the number of days of annual leave is determined in accordance with the collective agreement, because the Labour Law in Article 79 provides for a minimum duration of annual leave, and the collective agreement may provide criteria and manner of increasing the number of days of annual leave (Article 81 of the Labour Law) ;
- duration of paid leave due to personal needs (in accordance with Article 87 of the Labour Law, the employee is entitled to paid leave in case of marriage, birth of a child, serious illness of a close family member, taking a professional exam related to the work performance with the employer and in other cases determined by the collective agreement and the employment contract;
- duration of absence due to voluntary donation of blood, tissues and organs (in accordance with Article 90 of the Labour Law);
- duration and cases in which the employee is entitled to unpaid absence from work (in accordance with Article 88 of the Labour Law);
- other sources that provide the costs of professional training (except for the funds of the employer, in accordance with Article 93, paragraph 2 of the Labour Law);
- deadlines for payment of salaries, work obligations of employees, which in accordance with Article 145 of the Labour Law may be more difficult and easier;
- the manner of increasing the salary for overtime work, past work, night work and work on public holidays and other grounds for increasing the salary;

- other cases in which the contracted salary can be determined by the employment contract (in accordance with Article 100 of the Labour Law);
- amount of salary compensation;
- salary for the trainee;
- other income of employees (except for salary and salary compensation), such as: the right to a jubilee award, transportation costs, severance pay; various types of assistance to employees, etc.
- work obligations of employees, as violations of work obligations, which in accordance with Article 145 of the Labour Law may be easier and more difficult;
- territorial validity of the prohibition of competition;
- the possibility of payment of salary compensation and equipment in a larger amount than the one determined by law;
- results of work - whose non-realization in accordance with Article 172, paragraph 1, item 1 may result in termination of the employment contract, as well as other reasons for termination (in addition to those established by law);
- conditions and means for work of the trade union;
- leave for work and salary compensation for an authorized shop steward due to performing trade union activities.

None of the considered branch-level collective agreements contains provisions related to the minimum salary, and the provisions governing the right to severance pay in case of termination of the need for work are provided only by the Branch-level Collective Agreement for Education[11]. Also, none of the considered collective agreements deals with the regulation of certain forms of employment contracts (teleworking, part-time work, fixed-term work, etc.). No bipartite dialogue has been developed in the field of safety and health at work, which is confirmed by the fact that none of the considered collective agreements contains provisions governing this issue, nor in terms of special protection at work, but only refers to the application of the Law and enterprise-level collective agreement.

In Montenegro, it is necessary to improve bipartite social dialogue, especially in the private sector. In this sense, it is necessary to encourage trade union organization in sectors where there are no collective agreements - and especially in the trade sector - which employs the largest

11. Official Gazette of Montenegro, No. 10/2016 and 76/2019.

number of workers in the economy. Also, collective agreements must be harmonized with the Labor Law, especially in the part of the decision that refers to wages, but also to the exercise of collective rights (informing and consulting trade unions). In order to encourage alternative methods of resolving labor disputes, collective agreements should include clauses referring to the peaceful settlement of disputes. Collective agreements should take advantage of the possibilities left by the Labor Law, which relate to different regulation of overtime work and redistribution of working hours. Also, collective agreements could regulate the specifics of certain branches related to flexible forms of work, such as: teleworking, part-time work, fixed-term work, etc.

In the period from the emergence of Covid-19 until today, we have not recorded major negative deviations when it comes to collective bargaining compared to the results of collective bargaining that we had in the period before the emergence of Covid-19. However, the fact is that, when it comes to ongoing collective bargaining, employers are strongly trying to, using the negative consequences of Covid-19, reduce the scope of employees' rights, which significantly complicates the bargaining position of trade unions.

3. THE LEVEL OF COLLECTIVE BARGAINING

Collective agreements may be concluded at three levels, so we distinguish general, special (branch-level) and enterprise-level collective agreement.

The General Collective Agreement is concluded for the territory of the entire state and it has a legal effect on all employees - regardless of the jobs and tasks they perform. It enables the equalization of working conditions of employees and the reduction of large inter-branch differences in the working conditions of employees.

The general collective agreement is concluded for the territory of the state and it has legal effect on all employees and employers in the territory of Montenegro. It is concluded by the competent bodies of representative organizations of trade union and employers, whose representativeness is determined at the level of Montenegro and the Government.[12]

12. The competent authority is specified in the internal acts of these organizations. Currently, there are two representative trade union organizations at the state level in Montenegro: the Federation of Trade Unions of Montenegro and the Union of Free Trade Unions (whose representativeness is determined in accordance with the Law on

The branch-level collective agreements are concluded for a certain branch or activity and have legal effect for employees in that branch or activity.

A branch-level collective agreement is concluded for a certain branch of activity, group or subgroup of activities, and its signatories depend on whether it is an activity of public interest or other activities, as well as whether the state appears as the founder of enterprises and institutions. In accordance with the Labour Law, the signatories are defined as follows:

- in the field of economy, the competent body of the representative association of employers and the competent body of the representative organization of the trade union (currently they are: the Union of Employers of Montenegro and the representative branch-level trade union/s);
- for enterprises whose founder or majority owner is the state, the Government, the Union of Employers and a representative branch-level trade union(s), and for other enterprises a representative trade union organization and founder;
- for public institutions and public services founded by the state, the Government and a representative branch-level union(s), and for other public institutions and public services, a representative trade union organization and the founder (local self-government, a representative branch-level trade union/s);
- for organizations of obligatory social insurance, the Government and representative branch-level trade union(s);
- for state bodies and organizations and bodies of local self-government, the Government and the representative branch-level trade union(s);
- for sports entities, at the branch-level, the Government and representative branch-level trade union(s) and at the level of group or subgroup of activities (eg. for certain types of sports): the Government, the Montenegrin Olympic Committee and representative branch-level trade union/s);
- for persons who independently perform artistic or other cultural activities - the Ministry of Culture and the representative trade union(s) of artists;

Representativeness of Trade Unions) and one representative association of employers: the Union of Employers of Montenegro.

The enterprise-level collective agreement applies to all employees of that employer, regardless of whether they are members of a trade union that appears as its signatory.

The enterprise-level collective agreement is concluded by the competent body at the employer and the representative trade union organization (or representative trade union organizations, if there are more than one). However, in some cases, the state or local self-government, can also appear as a signatory of an individual collective agreement - if it is a collective agreement in an enterprise, institution or other public service, whose founder is the state or local self-government. In this case, they do it through the governing body, which is appointed by the state, or local self-government.

The Labour Law in Article 181, paragraph 3 defines the principle of directness - which means that it is not necessary to adopt any special act to ensure its implementation. On the other hand, the principle of indirectness applies in the relationship between the collective agreements themselves. Namely, the collective agreement closest to the regulated relationship is applied first, which is the enterprise-level collective agreement. If there is no enterprise-level collective agreement, the branch-level collective agreement is applied and if there is no branch-level collective agreement, the general collective agreement is directly applied.

It should be noted that collective agreements concluded at a certain level of negotiation are valid for all employees and employers at that level of organization, regardless of whether they are members of representative organizations that have concluded them. So, there is no possibility of expanding the application of the collective agreement in the Montenegrin system of collective bargaining.

3.1. The principle of favour

Labour Law prescribes the principle of direct and indirect application of collective agreements. More precisely, collective agreement which is closest to the relationship being regulated applies first, which is the collective agreement concluded with the employer; in the absence of such agreement the sectoral agreement applies, and if there isn't even this agreement in place, then the general collective agreement is applicable directly. Mutual relationship between collective agreements at various levels of bargaining is based on the *in favorem labouratoris* principle, i.e. the principle of the most favourable option for workers. This means that provisions in collective agreements concluded at the lowest level of collective bar-

gaining can only be more favourable than those in the agreements at higher levels of collective bargaining. In the event that agreements at different levels of collective bargaining provide for different arrangements, any given legal situation (employment and legal relationship) will be governed by the agreement which is more favourable for workers.

Article 6 of the Labour Law regulates the relationship between the law - as a heteronomous source of (labour) law, a collective agreement - as an autonomous source of (labour) law and an employment contract - as an individual act. Namely, the hierarchy of these regulations is determined in such a way that the law is at the top, then the collective agreement and finally the employment contract. This means that acts that are below the Law in the hierarchy must be harmonized with it. The term 'compliant with the Law' means that they cannot foresee a smaller scope of rights in relation to the Law or less favourable working conditions. On the other hand, 'compliance with the Law' will not be called into question if they provide for a greater scope of rights and more favourable working conditions than the Law. More favourable working conditions mean conditions for exercising employment rights, although this term may have a broader meaning, so it may refer to some other rights that are not recognized by the Labour Law and may be provided for in acts that have less legal force in relation to the Law.

The Labour Law also defines the consequences of 'non-compliance with the Law'. Namely, if the collective agreement contains a smaller scope of rights and less favourable working conditions, the provisions of the Law will apply. However, this is not the only consequence of non-compliance of the collective agreement with the Law. In accordance with Article 145 of the Constitution of Montenegro, the Law must comply with the Constitution and ratified international treaties and other regulation must comply with the Constitution and the Law. In this way, the Constitution protects two interrelated principles: constitutionality and legality. The legal dimension of constitutionality implies the supremacy of the Constitution with legal acts of lower legal force that exist in the legal system,[13] while legality implies the conformity of lower legal acts with the Law. The Constitutional Court has jurisdiction to protect the principles of constitutionality and legality,

13. Apart from the legal principle, the principle of constitutionality also has a political dimension, which is reflected in limiting the power of political structures and controlling their actions. See: M. Vukčević, Commentary on the Constitution of Montenegro, Podgorica, 2015, p. 343.

which, in accordance with Article 149, decides on the conformity of lower acts with the Constitution and the Law.

4. ENFORCEMENT OF COLLECTIVE AGREEMENTS

All collective agreements contain a clause providing for the establishment of a special body for the implementation, monitoring, application and interpretation of that agreement (committee or commission). This body is formed on a parity basis, from an equal number of representatives of each contracting party. These bodies give opinions regarding the application of certain institutes regulated by the collective agreement.

The protection of individual and collective rights of employees is achieved, primarily by the labour inspection, which performs inspection supervision over the application of labour law regulations, collective labour agreements and other general acts of autonomous law. The Labour Inspectorate is competent to perform inspections, to take preventive measures (counselling of employers, employees), corrective and repressive measures.

In its actions, the Labour Inspectorate applies the provisions of the Law on Inspection Supervision[14] and the Law on Labour Inspection[15].

The most important preventive measure is to point out the observed irregularities to the employer and make suggestions to eliminate them, in order not to apply corrective or repressive measures. If he notices irregularities in the performance of inspection supervision, the labour inspector may also take corrective measures, i.e. he may, by his decision, order the employer to eliminate the established irregularities within the set deadline. Repressive measures are applied in the event that the employer does not act upon the decision of the labour inspector imposing corrective measures within the set deadline. The labour inspector has discretion in the choice of measures, i.e. sanctions, so that in addition to imposing a fine and submitting a request for initiating misdemeanour proceedings, he may also impose a protective measure - a ban on performing activities. In addition, the Law on Labour Inspection envisages cases in which the labour inspector will prohibit the work of the employer (until the irregularities are eliminated, i.e. while the circumstances, due to which the work ban was imposed, last), and these are:

14. Official Gazette of the Republic of Montenegro, No. 39/2003 and Official Gazette of Montenegro, Nos. 76/2009, 57/2011, 18/2014, 11/2015 and 52/2016.

15. Official Gazette of Montenegro, No. 79/2008.

1) an employer has not concluded an employment contract with a person who is employed before starting work;

2) an employer has not concluded an employment contract for an indefinite period, if the employee continues to work after the expiration of the period for which the employment contract has been concluded for a definite period.

3) an employer has not concluded an employment contract with a foreigner (foreign citizen and stateless person), under the conditions determined by a special law;

4) an employer has not registered the person with whom he/she has concluded an employment contract or a special type of employment contract for compulsory social insurance (health, pension-disability and unemployment insurance), in accordance with the law;

5) an employer has not paid contributions for compulsory social insurance for a person with whom he/she has concluded an employment contract or a special type of employment contract;

6) an employer has not made payment for all unpaid salaries, salary compensations and other incomes that the employee has earned until the day of termination of employment, as well as payment of contributions for compulsory social insurance, in accordance with the law.

5. THE SETTLEMENT OF LABOUR DISPUTES

The procedure for the peaceful settlement of labour disputes is regulated by the Law on the Peaceful Settlement of Labour Disputes[16]. This Law applies to the settlement of both, individual and collective labour disputes. Collective labour dispute, in terms of this Law, is a dispute regarding the conclusion, amendment or application of a collective agreement, the exercise of the right to organizing and to strike. These disputes are settled before the Agency for Peaceful Settlement of Labour Disputes, which performs professional tasks related to the peaceful settlement of labour disputes, selects conciliators and arbitrators, their training and professional development, decides on their exemption, etc. The basic principles on which the Law is based are: the principle of voluntariness, the principle of equality, the principle of impartiality, the principle of confidentiality and the principle of secrecy. A mediator is hired to resolve a collective labour dispute, who, in order to resolve the dispute, makes a recommendation, which

16. Official Gazette of Montenegro, No. 145/2021.

does not bind the parties to the dispute. If the parties to the dispute accept the recommendation, an agreement on the settlement of the dispute shall be concluded. If the subject of the dispute is a collective agreement, this agreement becomes an integral part of the collective agreement. In the event that the subject of the dispute is not a collective agreement, the agreement has the force of a court settlement. However, if the party to the dispute does not accept the mediator's recommendation, it is obliged to state the reasons for not accepting the recommendation within three days from the day of submitting the recommendation. At the proposal of the mediator, the Agency for Peaceful Settlement of Labour Disputes may publish in the media a recommendation and the reasons for its non-acceptance.

These provisions apply to collective disputes that arise at all levels of collective bargaining.

The General Collective Agreement contains a provision referring to the peaceful settlement procedure in the event of a dispute of interest. Namely, Article 68 stipulates that in case an initiative is submitted to change the existing or to conclude a new collective agreement, and the contracting parties do not reach an agreement within two months from the beginning of negotiations, a procedure will be initiated before the APSLD. In this case, it is an imperative norm, which implies a mandatory peaceful settlement procedure.

Of the 16 branch-level collective agreements in force, eight contain provisions referring to the mandatory peaceful settlement procedure before the APSLD, three provide for peaceful settlement of disputes before the Agency as an option, while two do not provide for peaceful settlement of disputes. It is interesting to note that collective agreements concluded before 2010 (when the APSLD was established) provide that the settlement of disputes arising in the process of concluding, implementing and amending a collective agreement is entrusted to the arbitral tribunal consisting of representatives of the parties to the dispute and a neutral member from among the experts in the field in which the dispute arose, who is the chairman of the arbitral tribunal. Currently, three such branch-level collective agreements are in force.

When it comes to the enterprise-level collective agreements, there are no precise data, because the obligation to register these collective agreements with the competent ministry exists only from 07/01/2020, when the new Labour Law came into force. Furthermore, the impossibility of provid-

ing accurate information is due to the fact that these collective agreements, unlike branch-level and the General Collective Agreement, are not published in the Official Gazette of Montenegro.

CONCLUSION

Collective bargaining in Montenegro is represented at three levels: at the national level, at the branch level and at the enterprise level. Collective agreements concluded at a certain level are valid for all employees and employers, regardless of their membership in a trade union or association of employers. On the other hand, there is no possibility of extending the effect of the collective agreement to other sectors, nor are there categories of employees who are excluded by law from collective bargaining. Collective agreements are mostly concluded for an indefinite period, with the possibility of termination and extension.

In Montenegro, collective bargaining at the bipartite level is not sufficiently represented. This is confirmed by the fact that there is no branch-level collective agreement nor a representative trade union in the field of commerce, while there are only 10 representative trade unions at the enterprise-level in this sector.

Pursuant to the principle of the greatest benefit for employees, collective agreements may provide for a larger scope of rights and more favourable conditions for their exercise in relation to the Labour Law. This principle also applies to collective agreements concluded at different levels. However, this possibility was not used in all cases referred to by the Labour Law, such as part-time institute; the possibility to provide working hours at the weekly level for less than 40 hours; the possibility of redistribution of working hours for up to 12 months; possibility to calculate the hours of overtime work at the level of the year (250 hours). On the other hand, all considered collective agreements contain the grounds for increasing the duration of annual leave, and most of them also contain the precise number of days for which the annual leave is increased on each of those grounds. All considered collective agreements, except for the Branch-level Collective Agreement for Road Traffic, also provide for cases in which employees are entitled to paid leave, as well as its duration. Besides that, only the Branch-level Collective Agreement for the field of education lists cases in which the employee is entitled to unpaid leave, while others refer to the application of the provisions of the General Collective Agreement.

None of the considered collective agreements was harmonized with the Labour Law within the stipulated deadline (until January 7, 2021). The new Labour Law stipulates that the coefficients for the calculation of salaries and the calculated value of the coefficient shall be determined by a collective agreement. The considered collective agreements contain coefficients for the calculation of salaries, but not the calculation value of the coefficient. Instead, the branch-level collective agreements refer to the conclusion of a special agreement, while the Branch-level collective agreement for Health Care in this part refers to the Government decree. In addition, some collective agreements contain terminology related to the determination of salaries, which is not known by the Labour Law (eg. 'minimum hourly salary'). Furthermore, none of the considered collective agreements regulates the method of work performance evaluation, but only provides guidelines for evaluation or refers to the application of the enterprise-level collective agreement. When it comes to the basis for increasing salaries, all considered branch-level collective agreements contain them, with the fact that the Branch-level Collective Agreement for Road Traffic in terms of increasing salaries based on work on public holidays (50%) provides for a less favourable solution compared to the General Collective Agreement (150%), which is contrary to the principle in favorem laboratoris.

None of the considered branch-level collective agreements contains provisions related to the minimum salary, and the provisions governing the right to severance pay in case of termination of the need for work are provided only by the Branch-level Collective Agreement for Education. Also, none of the considered collective agreements deals with the regulation of certain forms of employment contracts (teleworking, part-time work, fixed-term work, etc.). No bipartite dialogue has been developed in the field of safety and health at work, which is confirmed by the fact that none of the considered collective agreements contains provisions governing this issue, nor in terms of special protection at work, but only refers to the application of the Law and enterprise-level collective agreement.

Bipartite social dialogue has not been developed in terms of exercising collective labour rights either. Thus, the rights governing the relations between the employer and the trade union are only partially regulated. Consequently, branch-level collective agreements do not differentiate between informing and noticing trade unions, while the Branch-level Collective Agreement for Tourism and Catering and the Branch-level Collective Agreement for Road Traffic do not contain provisions governing these is-

sues. A special shortcoming of most branch-level collective agreements is the absence of provisions referring to the procedures of peaceful settlement of disputes - whether it is an interest collective dispute (in the collective bargaining procedure - regarding a new collective agreement or amendment of an existing one) or in connection with the application of a valid collective agreement, i.e. in the event of a legal collective dispute.

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Recent trends of collective bargaining in Croatia

Ivana GRGUREV*

1. INTRODUCTION

Features of collective bargaining and the role of collective agreements in the development of employment protection vary considerably from country to country. The purpose of this contribution is to analyse the system of collective bargaining in Croatia critically by explaining its history (section 2), the national regulatory framework (section 3), main features and trends of collective bargaining (section 4), the contents of collective agreements (section 5), the principle of favour and its derogations (section 6), the application of collective agreements (section 7), the relationship between collective agreements, laws and individual employment contracts (section 8), and the settlement of collective labour disputes (section 9). The final section will summarize the main issues of collective bargaining and legal regulation of collective agreements in Croatia.

2. FROM THE HISTORICAL BEGINNINGS OF COLLECTIVE BARGAINING IN CROATIA TO THE RECENT PUBLIC ATTITUDES TOWARDS COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS

Although collective agreements appeared in the late nineteenth century and in the 1930s they were widespread in Croatia,[1] collective bargaining does not have a long tradition in Croatia because its development was interrupted during the socialist era. The nationalization of private companies and the advent of workers' self-management made collective agreements redundant.[2] Given that there were no formal employers, employees had no one to negotiate with. Democratic changes in the early 1990s created conditions for collective bargaining, and the adoption of the Labour Act of 1995

* Professor at the University of Zagreb.

1. At that time, Croatia was not an independent state, but part of Yugoslavia.

2. For more details see: Grgurev (2021), 102-103.

established the legal framework for collective agreements.[3] Since then, there have been a few legislative amendments to the provisions on collective bargaining and collective agreements (notably related to the representativeness of parties to collective agreements, the after-effect of collective agreements, the extension of the application of collective agreements and the possibility to agree pecuniary rights in a larger amount by the collective agreement for union memebers)[4]. The relevant provisions of the Labour Act,[5] including the recent Amendment to the Labour Act of December 2022[6] and the Act on the Representativeness of Employers' Associations and Trade Unions[7] will be analysed in the following sections.

A recent survey has shown that the Croatian public has a positive attitude towards collective agreements and collective bargaining. The survey, conducted by one of the umbrella trade union associations in December 2021, showed that 91% of respondents believed that collective agreements were a useful tool for the regulation of relations with employers and 90% believed that the Government should encourage collective bargaining with its policies and laws.[8]

3. NATIONAL REGULATORY FRAMEWORK AND ITS FUNCTIONING

3.1. The Constitution of the Republic Croatia

The Constitution of the Republic Croatia[9] mentions collective agreements in just one provision, Article 57(1), which states: 'The right of employees

3. Ibid.
4. For more details see *infra*.
5. Labour Act (Official Gazette Nos 93/2014, 127/2017, 98/2019, 151/2022).
6. Amendment to the Labour Act (Official Gazette No 151/2022).
7. Act on Representativeness of Employers' Associations and Trade Unions (Official Gazette Nos 93/2014, 26/2015).
8. The survey included 1,000 respondents who make up a nationally representative sample of employed persons. Istraživanje SSSH o informiranosti i stavovima javnosti o kolektivnom pregovaranju i sindikalnom organiziranju (2021), (Union of Autonomous Trade Unions of Croatia's survey on the public awareness and attitudes about collective bargaining and unionization), http://www.sssh.hr/upload_data/site_files/istrazivanje-sssh-o-kolektivnim-ugovorima-i-sindikalnom-organiziranju.pdf (7.09.2022)
9. The Constitution of the Republic of Croatia (Official Gazette Nos 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014).

and their family members to social security and social insurance shall be regulated by law and collective agreements.'[10] However, this is an element peculiar to collective agreements in Croatia since the usual focus of collective bargaining is on reaching collective agreements which provide better working conditions than those guaranteed by law. Collective agreements in Croatia rarely regulate social security of employees in the sense that they guarantee them social rights financed by the employer.[11] For instance, collective agreements may provide that the employer should pay contributions for the employees' private health insurance or occupational pension schemes (the so-called third pillar of pension insurance). We can conclude that the initial idea of the constitution makers about the contents of the collective agreements has not taken root in practice; indeed, practice has taken a different direction.

3.2. Statutory law

The Labour Act of 2014 (amended in 2017, 2019 and in 2022) and the Act on Representativeness of Employers' Associations and Trade Unions of 2014 (amended in 2015) are two main pieces of legislation that regulate collective bargaining and collective agreements in Croatia. The Act on Representativeness of Employers' Associations and Trade Unions regulates the procedure that determines which union is representative for collective bargaining, i.e., which union is authorized to conclude collective agreements[12] and when collective agreements produce a valid legal effect (Arti-

10. It is worth mentioning that the right of employees to form trade unions and the right of employers to form their associations are constitutional rights (guaranteed by Article 43(1) and Article 60(1)-(3) of the Constitution of the Republic of Croatia).
11. For instance, the Collective Agreement for Construction Sector (Official Gazette Nos 115/2015, 26/2018, 93/2000, 104/2020, 115/2020) stipulates that an employee who falls ill abroad is obliged to contact the competent health institution or doctor, and the costs of health care - treatment, if the employees are not insured by a foreign health insurance carrier, are borne by the employer (Art. 17(2)).
12. Only a representative trade union can negotiate and conclude collective agreements. When more than one trade union operate at the level where the collective agreement is negotiated, all trade unions operating at that level may determine by written agreement which trade union they consider to be representative. When they fail to reach an agreement, the representativeness is deter-

cles 7 - 16 and 22 - 27).[13] Everything else related to collective agreements is regulated by the Labour Act (and relevant by-laws):[14] the subject-matter of collective agreements, the obligation to conduct collective bargaining in good faith, persons bound by collective agreements, the form of collective agreements, the obligation to act in good faith in performing obligations arising from collective agreements, the power of attorney for negotiating and concluding collective agreements, the duration of collective agreements, the after-effect of collective agreements, the cancellation of collective agreements, the submission of collective agreements to the competent body, the publication of collective agreements, the *erga omnes* effect of collective agreements/extension of the application of collective agreements, and the judicial protection of the rights arising from collective agreements (Articles 192 - 204).

The recert Amendment to the Labour Act was entered into force in 2023.[15] One of the novelties introduced by the Amendment to the Labour Act is that it provides trade union members with higher financial entitlements guaranteed by collective agreements as opposed to the employees who are not trade union members.[16]

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mined by the Commission for Determining Representativeness (Article 7 of the Act on Representativeness of Employers' Associations and Trade Unions). A statutory criterion used by the Commission to determine which trade union is representative requires a trade union to have at least 20% of the total number of unionized employees employed at the level at which representativeness is determined (Article 8(1) of the Act on Representativeness of Employers' Associations and Trade Unions).

13. A collective agreement is valid only if the trade unions that sign it count more than 50% of the total number of unionized employees with representative unions as their members (Article 26(1) of the Act on Representativeness of Employers' Associations and Trade Unions).
14. The Ordinance on the Manner of Publication of Collective Agreements (Official Gazette No 146/2014) and the Ordinance on Delivery Procedure and Method of Keeping Records of Collective Agreements (Official Gazette Nos 32/2015, 13/2020).
15. Government of the Republic of Croatia, Draft of the Amendment to the Labour Act, July 2022, https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=21184.
16. For more details see *infra*.

4. THE MAIN FEATURES AND TRENDS OF COLLECTIVE BARGAINING IN CROATIA

4.1. Fragmentation of unions

There are 630 trade unions (2016)[17] and three representative umbrella associations of trade unions in Croatia.[18] Based on the number of trade unions, one can conclude that the trade union movement in Croatia is heterogeneous and fragmented.[19] On the other hand, there is only one representative umbrella employers' association.[20] Another issue, apart from the fragmentation of unions,[21] is the ever-present latent dispute or open conflict between social partners.[22] On the other hand, there have been some positive developments in the drive to organize workers, notably the establishment of the digital workers' trade union.[23]

17. Bagić (2019), 95.
18. The representative umbrella associations of trade unions in Croatia are: Independent Trade Unions of Croatia, Union of Autonomous Trade Unions of Croatia and Association of Croatian Trade Unions. Decision of the Commission for the Determination of Representativeness, Class: 006-04/17-06/11, Ref.no.: 689/2-18-35, 7 June 2018. Rješenje Povjerenstva za utvrđivanje reprezentativnosti, Klasa: 006-04/17-06/11, Urbroj: 689/2-18-35, 7.06.2018, Official Gazette No 59/2018.
19. See more in: Grgurev and Vukorepa (2015), 387-408.
20. The only representative Croatian employers' umbrella association is the Croatian Employers' Association. Decision of the Commission for the Determination of Representativeness, Class: 007-03/18-03/01, Ref.no.: 689/2-18-3, 7 June 2018. Rješenje Povjerenstva za utvrđivanje reprezentativnosti, Klasa: 007-03/18-03/01, Urbroj: 689/2-18-3, 7.06.2018, Official Gazette No 59/2018.
21. Some trade unions are aware that the fragmentation of trade unions is an obstacle to the successful achievement of trade union goals. For instance, the Commercial Trade Union of Croatia published The Declaration on the Unification of Trade Unions in the Republic of Croatia in 2006. The Declaration states, *inter alia*, that fragmented trade unions in the Republic of Croatia cannot contend with the authorities and employers on an equal footing, and very often they attack each other and obstruct each other's actions, ignoring the fundamental principle of trade unionism - solidarity. https://www.sth.hr/deklaracija-o-objedinjavanju-sindikata-u-rh/ (13.9.2022).
22. Bagić (2019), 96.
23. https://www.sssh.hr/hr/vise/aktivnosti-75/novo-pojacanje-sssh-osnovan-prvi-sindikat-radnika-digitalnih-platformi-u-hrvatskoj-4857 (9.9.2022) The Amendment to the Labour Act of 2022 contains, *inter alia*, the mandatory contents of the em-

4.2. Trade union density

Although the trade union density is relatively high (26%), this is due to the highly unionised public sector.[24] On the contrary, in the private sector, the trade union density is lower, in particular in small companies where it is significantly below 10%.[25]

4.3. Coverage of collective agreements

According to the results of a survey conducted in December 2021, the coverage of workers by collective agreements has fallen in recent years: it now stands at 46.5%.[26] In comparison with other EU member states, the workers' coverage by collective agreements in Croatia is rather low.[27] It is not surprising that the collective agreement coverage is significantly higher in the public sector than in the private sector (35.5% in the private sector, compared to 88.3% in public administration and services).[28]

4.4. Levels of collective bargaining

Bargaining at national level is characteristic for the public sector. Branch (sector)-level bargaining is characteristic for public services[29] and some industry branches. In certain situations, an industry-level collective agreement is complemented by a company-level collective agreement. That is

ployment contracts of digital platform workers and the legal presumption of the employment relationship for those who work for digital platforms. However, these provisions will enter into force only in 2024.

24. Bagić (2019), 93.
25. Bagić (2019), 97.
26. The Government of the Republic of Croatia, Draft of the Amendment to the Labour Act, July 2022, https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=21184. For instance, 65% of employees in Croatia were covered by collective agreements in 2000 as opposed to 53% in 2016, as estimated. Bagić (2019), 93.
27. Eurofound, https://www.eurofound.europa.eu/topic/collective-bargaining (7.09.2022)
28. Data for 2014. Bagić (2019), 96.
29. Bargaining in the public sector is centralized to a much greater extent, and the employment protection of persons employed in public sector is regulated by the Basic Collective Agreement for Civil Servants and Employees in Public Services, and by a smaller number of sectoral collective agreements (e.g. in education, health, etc.). Bagić (2020), 17-32.

the case when branch collective agreements are concluded and then a series of company agreements are concluded in each branch. Many of them are concluded after the conclusion of the branch collective agreement. Such practice has positive consequences, i.e., a higher level of employment protection provided by the company agreement compared to the protection provided by the branch collective agreement, but it also has negative consequences. When two or more collective agreements are applied to the same employment relationship, this could lead to incomprehensibility and inconsistency.[30] However, there are few branch-level agreements, and the majority of collective agreements are concluded at the company-level.[31]

The economic crisis has not had any impact on the level of collective bargaining: there has been no decentralisation. Collective bargaining has been decentralised only in the retail sector where the industry-level collective agreement was cancelled in 2013[32] and replaced with company-level collective agreements. However, the reason for its cancellation was the fact that it was concluded in 1997 and therefore 'it was not in line with the trends and functioning of the modern retail sector', at least in the opinion of the Croatian Employers' Association.[33]

5. CONTENT OF COLLECTIVE AGREEMENTS

5.1. General remarks

The distinction between the obligatory and normative part of collective agreements which is recognized in legal theory has been accepted by the Croatian legislator as well.[34] According to Article 192(1) of the Labour Act

30. Grgurev and Potočnjak (2021), 64. Smokvina and Laleta also emphasise the complexity of the two-tier collective bargaining. For more details see: Smokvina and Laleta (2019), 202.
31. For more details about the levels of collective bargaining in Croatia see: Bagić (2019), 100-101.
32. Croatian Employers' Association, Collective Agreement, https://www.hup.hr/kolektivni-ugovor-24.aspx (20.09.2022).
33. *Ibid*.
34. According to Ravnić, the obligatory effect of collective agreement refers to the signatories of the collective agreement (this part of the collective agreement regulates their rights and obligations), and the normative effect refers to the parties to individual employment contracts, i.e., this part of the collective

'a collective agreement regulates the rights and obligations of the parties that have concluded it.'[35] This is the so-called obligatory part in which collective agreements are similar to any civil law contract. The same provision further states: 'It may also contain legal rules governing the conclusion, contents and termination of employment contracts, social security issues, and other issues arising from or related to employment.' This is the so-called normative part of collective agreement in which collective agreements are similar to legislation because they stipulate the rights and obligations of persons who are not the contracting parties of the collective agreement.

In domestic practice, the basic purpose of collective bargaining and collective agreements is to set the salaries and other working conditions. The secondary objectives of collective bargaining and collective agreements are to regulate the mutual relations of the parties to the agreement, to resolve collective disputes, to promote the participation of employees in the decision-making, etc.

Apart from regulating salaries, 75-80% of collective agreements in Croatia contain provisions on working time.[36] 25% of collective agreements in Croatia deal with the prevention of discrimination.[37] The anti-discrimination provisions and the provisions protecting the dignity of workers against harassment and sexual harassment have to be regulated, according to the Labour Act, either by employment regulations or by collective agreements.[38] Therefore, 50% of collective agreements contain provisions on protection against harassment.[39]

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agreement regulates the general working conditions, and this is the basis on which the employer and employee stipulate the specific, concrete and individual working conditions in the employment contract. Ravnić (2004), 500-501.

35. In this part of collective agreements, we find provisions on the duration of the collective agreements, amendments and renewals, and the provisions on the amicable resolution of collective labour disputes through mediation and arbitration. Sometimes the agreement contains the provision establishing a joint commission for the interpretation of the relevant collective agreement or a no-strike clause. However, there is no need to stipulate the no-strike clause expressly because they are considered implicitly stipulated. Grgurev (2021), 105.
36. Bagić (2019), 104-105.
37. Ibid.
38. It derives from Article 26(1) of the Labour Act. In my earlier work I advocated a more active role of the parties to collective agreement in combating discrimina-

Dynamism and adaptability, which are features of collective agreements, are not put to good use in Croatia when working conditions must be adapted to new circumstances. This has been amply proven during the COVID-19 pandemic. Contrary to expectations, no anti-COVID measures were introduced in the collective agreements in Croatia. Social partners did engage in a dialogue about anti-COVID measures at national level, but no such measures were introduced in the collective agreements; they were imposed by the Civil Protection Directorate and they were mandatory.[40]

5.2. (Minimum) Wage in collective agreements in Croatia

As mentioned before, most collective agreements regulate salaries and other financial entitlements (such as Christmas or Easter bonuses and annual leave bonus). Statutory minimum wage is regulated at national level.[41] According to Article 6(1) of the Minimum Wage Act of 2018 (as amended in 2021), the minimum wage for each calendar year is determined by a decree of the Government of the Republic of Croatia, at the proposal of the Minister of Labour. However, the parties to the collective agreement are allowed to set a higher or lower minimum wage than that prescribed by the decree of the Government of the Republic of Croatia.[42] When the amount is lower, it cannot be less than 95% of the amount prescribed by the decree of the Government of the Republic of Croatia.[43] Since the Directive of the European Parliament and of the Council on ade-

tion. The role of trade unions should be, *inter alia*, to insist that special preventive measures against sexual harassment be included in collective agreements for sectors and professions where the risk of sexual harassment is higher (health sector, social welfare sector, education sector and for all other jobs that include night work). Grgurev, I. (2021, II), 29-58. Gović Penić analysed the collective agreements in Croatia which contain anti-discrimination provisions. Gović Penić, I. (2020).

39. Bagić (2019), 104-105.
40. For more details see: Grgurev and Potočnjak (2021).
41. For more details about the regulation of minimum wages in Croatia see: Grgurev and Vukorepa (2013).
42. Article 8(1) of the Minimum Wage Act.
43. Article 8(2) of the Minimum Wage Act.

quate minimum wages in the European Union[44] is adopted, this provision of the Minimum Wage Act will have to be amended because it does not protect employees against unjustified or disproportionate deductions. Article 6(1) of the Directive stipulates that there should be a legitimate aim as a precondition for such deductions. More precisely, the deductions from statutory minimum wage will have to respect the principles of non-discrimination and proportionality.[45]

Based on the 2016 Bagić survey, there are three types of salary regulation in the collective agreements in Croatia, varying from partial to detailed regulation.[46] There are collective agreements in which the parties agree only about the basis for the calculation of the salary, and other elements of the salary are left to the employer's discretion. Then there are collective agreements where the basic salary ranges for main groups of jobs are defined in greater detail, and the employer determines the salary level for specific jobs within a group. Finally, there are collective agreements with very precise and detailed salary provisions which do not leave the employer any room for discretion in the way in which salary is calculated.[47]

Collective agreements are the primary legal source for the determination of the employees' salaries in the private sector. Employment regulations and employment contracts are subsidiary sources.[48] Similarly, collective bargaining in Croatia in the public sector is well developed and, therefore, has a significant impact on salaries in the public sector.[49]

In the context of the regulation of salaries by collective agreements in the public sector in financial crises one should recall that the ILO Committee of Experts on the Application of Conventions and Recommendations came to the conclusion that 'in the context of economic stabilization, priority should be given to collective bargaining as a means of determining the employment conditions of public servants, rather than adopting legislation to

44. Directive of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275, 25.10.2022, 33-47.
45. *Ibid*.
46. Bagić (2019), 103-104.
47. *Ibid*.
48. Grgurev (2021), 44.
49. Bagić (2020), p. 31. For more details about the determination of salaries in public sector see: Grgurev (2021), 44-45.

restrain wages in the public sector.'[50] In this context, one should mention that when the Committee of Ministers addressed a complaint (No. 116/2015, *Matica Hrvatskih Sindikata v. Croatia*), it found that there had been a violation of Article 6(2) of the European Social Charter of 1961.[51] More specifically, in the run-up to elections the Government tends to conclude collective agreements with a high level of financial entitlements for employees in the public sector, which are unsustainable in the long run due to the financial situation. When the Government faces the problem of meeting the obligations it took on by the collective agreements, it cancels them, but despite the cancellation, the provisions of the cancelled agreement remain in force for three months due to the statutory after-effect of collective agreements. Furthermore, in this case, even though the 2010 Basic Collective Agreement was cancelled, the branch collective agreements for some parts of the public sector remained in force and contained similar or identical provisions as the cancelled Basic Collective Agreement. The Act on Withdrawal of Certain Financial Entitlements of the Employed in Public Services was adopted to cancel these provisions.[52] The Committee of Ministers correctly found that the adoption of this Act represented an interference in the collective bargaining process. Although it was justified by the need to maintain the fiscal stability of the public service system, 'the Government has provided little information on the economic situation prevailing in Croatia at the time of the adoption of the legislation. Neither has it been documented that the intervention in collective bargaining was "necessary in a democratic society" for the pursuance of this purpose, i.e. that the restriction was proportionate to the legitimate aim pursued: there must be a reasonable relationship of proportionality between the restriction on the right and the legitimate aim(s) pursued.'[53] This case illustrates the problems with

50. ILO, Compilation of decisions of the Committee on Freedom of Association, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3948681,3. (20.09.2022).
51. https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-116-2015-matica-hrvatskih-sindikata-v-croatia?inheritRedirect=false (14.7.2022). See also: Grgurev (2021), 24-25.
52. The Act on Withdrawal of Certain Financial Entitlements of the Employed in Public Services (Official Gazette No. 143/2012).
53. https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-116-2015-matica-hrvatskih-sindikata-v-croatia?inheritRedirect=false (14.07.2022).

collective bargaining in the public sector in Croatia: the willingness of the Government to promise, through collective agreements, various rights that it cannot deliver in order to get votes in the pre-election period; the fact that collective agreements guaranteeing the same rights co-exist at different levels (despite the existence of the Basic Collective Agreement, branch collective agreements containing similar or identical provisions are also concluded); the fact that for the employer who faces difficulties in fulfilling the rights guaranteed by the collective agreement due to the unfavourable financial situation, the cancellation of collective agreement is not an adequate solution. The employer is still obliged to apply the collective agreement for another three months following the cancellation (Article 199 of the Labour Act). In both cases, i.e., when a collective agreement has been cancelled (and the cancelation period has expired) and when the period for which the collective agreement was concluded has expired, the normative part of collective agreement continues to apply, as part of previously concluded employment contracts, until a new collective agreement is concluded, within a period of three months. This period could be even longer if the parties to the collective agreement stipulate it (Article 199 of the Labour Act).

It has not been clarified in practice whether extraordinary termination of the collective agreement is possible (in *force majeure* situations such as the current pandemic) by invoking Article 369 of the Civil Obligations Act, which provides for the amendment or termination of civil law contracts due to a change in circumstances that could not be foreseen at the time of the conclusion of the contract. Therefore, this possibility should be clearly foreseen by the Labour Act as well, through opt-out clauses that would facilitate quick adjustment of the provisions of collective agreements to any changes in the circumstances.[54]

6. THE PRINCIPLE OF FAVOUR AND ITS DEROGATIONS

The principle *in favorem laboratoris* is contained in Article 9(3) of the Labour Act.[55] This provision makes it clear that the *in favorem laboratoris* le-

54. Grgurev and Potočnjak (2021), 68.

55. This provision states: 'Unless otherwise provided for by this Act or any other law, where a right arising from an employment relationship is differently regulated by the employment contract or working regulations, an agreement concluded between the works council and the employer, a collective agreement or by law, the most favourable right for the employee shall apply'.

gal standard will fail to operate if the legislator has explicitly excluded the possibility. The legislator has explicitly granted the parties to a collective agreement a certain level of flexibility, for instance, when defining the maximum overtime work,[56] employment protection of temporary agency workers[57] or deduction from statutory minimum wage, as provided by the Minimum Wage Act and as explained above. In such explicitly regulated situations, the parties to collective agreement are allowed to deviate from the mandatory legislation.

Due to the application of the *in favorem laboratoris* legal standard, it does not make sense to provide for less favourable terms in the company agreement than those provided for by the national-level collective agreement because at any rate, the more favourable terms for the employees will apply. Therefore, company collective agreements are sources of higher-level protection for employees, granting to employees better working conditions compared to the national level agreements.[58]

7. APPLICATION OF COLLECTIVE AGREEMENTS

7.1. Legal effects of collective agreements

The legal provisions contained in collective agreement are directly applicable and binding on all persons who are subject to the collective agreement (Article 192(2) of the Labour Act). A collective agreement is binding on all persons who have concluded it and on all persons who, at the time of the conclusion of such an agreement, were or subsequently became members of the association that is a party to the collective agreement (Article 194 of the Labour Act).

7.2. Principle of Application to all employees, unionized and non-unionized and its exception

The normative provisions in a collective agreement apply to all the employees working for an employer bound by the collective agreement in question, regardless of whether they are members of trade unions or not. If the normative provisions in the collective agreement are breached by the employer, both the trade union members and non-members are enti-

56. Article 65(4) of the Labour Act.

57. Article 46(7) of the Labour Act.

58. Similar: Bagić (2019), 101.

tled to bring a case before the courts to protect their rights stemming from the collective agreement. The trade unions oppose this interpretation. They managed to push through an amendment to the Labour Act compelling the employees who were not members of a trade union and who enjoyed the benefits of a collective agreement to pay a negotiation (solidarity) fee. The amendment was short-lived and was repealed as unconstitutional by the Constitutional Court in 2005.[59] The trade unions' attempts to push through legislative amendments which would stipulate different levels of rights for unionized and non-unionized employees bore fruit in the latest Amendment to the Labour Act. The 2022 Amendment to the Labour Act contains a provision guaranteeing a higher level of financial entitlements to union members. More precisely, according to Article 192(4) the Labour Act, collective agreements could provide for higher jubilee awards, Christmas bonuses, holiday pay, etc. for the employees who are trade union members, but not of all trade unions. These provisions would apply only to the members of the trade unions who negotiated the collective agreement. I find this provision highly problematic. Firstly, this provision puts small unions that are not representative for collective bargaining at a disadvantage. Who will join unions from which s/he cannot get financial benefits? Another problematic provision is the one on the financial entitlements which could be guaranteed to union members (Article 192(5). Namely, the parties to a collective agreement could agree on higher financial entitlements for union members who have negotiated a collective agreement, up to twice the amount of the average annual union membership fee. It is highly problematic from the aspect of the freedom of association which includes the freedom not to be a union member as decided by the Constitutional Court of the Republic of Croatia regarding the solidarity (negotiation) fee.[60] In certain comparative legal systems where such benefits for trade union members exist, they should be sym-

59. According to the position taken by the Constitutional Court, the imposition on the non-members of the trade unions of an obligation to finance the trade unions' activities is contrary to the freedom of association guaranteed by the Constitution (Decision of the Constitutional Court of the Republic of Croatia No. U-I-2766/2003 of 2005).
Grgurev (2021), 27.

60. Decision of the Constitutional Court of the Republic of Croatia no. U-I-2766/2003 of 2005.

bolic and cannot exceed the amount of the annual membership fee.[61] Higher benefits for trade union members would be construed as pressure on non-members to become union members, which would run counter to the freedom of association which, *inter alia*, includes the right not to be a member of union.

8. RELATIONSHIP BETWEEN COLLECTIVE AGREEMENTS, LAW, AND INDIVIDUAL EMPLOYMENT CONTRACTS

It is prescribed that the parties to a collective agreement could agree that members of the trade union that negotiated a collective agreement is more favourable for employees than what is stipulated by law. In this case, based on the principle *favor laboratoris*, the relevant provision of the collective agreement will apply. When analysing the relationship between collective agreements and laws, we should note the differences in approach to the regulation of working conditions in these legal sources. Statutory regulation of working conditions is general and abstract, while the collective contractual regulation of working conditions is specific and more concrete.[62]

61. Based on my unpublished survey carried out in May 2022 in which 19 European legal systems were analysed in terms of the application of collective agreements to non-unionized employees, it was established, *inter alia*, that in Belgium it is possible to grant a small pecuniary benefit in a collective agreement which is payable only to unionized employees. It can be, for example, same as the amount of the annual membership fee paid by the employees who are members of the trade union. Furthermore, in Switzerland, collective agreements apply only to trade union members but non-unionized employees of the employer who is a contracting party to a collective agreement may accede to the collective agreement with the consent of the contracting parties. The collective agreement may stipulate the rules governing such accession. Unreasonable conditions attaching to accession, such as unreasonable monetary contributions, may be declared void or reduced to an admissible level by the court. According to the legal doctrine and case law, it must be ensured that the solidarity fee is significantly lower than the union membership fee. Otherwise, the person concerned would be induced to join the association, which would represent a breach of the freedom of association. Here I would like to thank my colleagues – members of the European Centre of Expertise in the field of labour law, employment and labour market policy for providing me with the analysis of their legal systems.

62. Ravnić (2004), 535-544.

Provisions of collective agreements do not need to be incorporated into individual employment contracts. They are applied directly to the employees employed by the employer who is a contracting party to the collective agreement or to whom the application of collective agreement is extended[63] (this derives from Article 192(2) of the Labour Act).

The minimum level of working conditions is guaranteed by law. Parties to a collective agreement may deviate from the statutory guaranteed minimum level of working conditions only when they are explicitly entitled by law to regulate a right in a way which is less favourable than what the law provides (derogation *in pejus*). Individual employment contracts, although at the bottom of the hierarchy of labour law sources, have the potential for improving the working conditions by stipulating terms which are more favourable than what the collective agreements and laws provide.

9. SETTLEMENT OF COLLECTIVE LABOUR DISPUTES

9.1. Mediation

Collective agreement may contain rules related to the composition and methods of work of the bodies authorized to conduct amicable collective labour dispute resolution procedures (Article 192(3) of the Labour Act). The mediation procedure is regulated by the Labour Act and by the Mediation Act of 2011. In collective labour disputes, which could result in a strike or other industrial action, mediation is mandatory unless the parties to a dispute have reached an agreement on arbitration (derived from Article 206(1) of the Labour Act). In case of mandatory mediation, the parties to a dispute select a mediator from the list established by the Economic and Social Council (a tripartite body) or they can choose a mediator by mutual agreement (Article 206(2) of the Labour Act). Unless a longer period is agreed, mediation must be completed within five days following

63. If there is a matter of public interest, the minister of labour may, at the proposal of all parties to a collective agreement, extend the application of the representative collective agreement (concluded with an employers' association or a higher-level employers' association) to employers who are not members of an employers' association or a higher-level employers' association (Article 203 of the Labour Act). The application of the Collective agreement for the construction sector (Official Gazette No 115/2020), as well as the Collective agreement for the hospitality sector (Official Gazette No 58/2022) has been thus extended.

the date of the notification of the dispute to the Economic and Social Council or the competent administrative body, which, in the implementation of the mediation procedure in collective labour disputes, performs administrative tasks for the purposes of that procedure (Article 208 of the Labour Act). If the parties to a dispute related to the conclusion, amendment, or renewal of a collective agreement reach an agreement during the mediation procedure, such agreement has the legal force and effects of a collective agreement (Article 209(2) of the Labour Act).

9.2. Arbitration

The Arbitration Act of 2001 contains general provisions that apply *inter alia* to arbitration in labour disputes. The jurisdiction of the court of arbitration is determined by a written contract (Article 6(2) of the Arbitration Act).[64] However, the Labour Act provides for some specificities of the arbitration procedure in collective labour law disputes. As already mentioned, instead of a mediation procedure, the parties to a collective labour law dispute may entrust the resolution of their dispute to an individual arbiter or an arbitration body (Article 210(2) of the Labour Act). If the dispute concerns the application of laws and regulations or of the collective agreement, the arbitration body bases its decision on the relevant law, regulations or collective agreement (Article 212(1) of the Labour Act). On the other hand, if the dispute concerns the conclusion, amendment, or renewal of a collective agreement, the arbitration body will reach a fair decision (Article 212(2) of the Labour Act). No appeal is permitted against an arbitration award (Article 212(4) of the Labour Act). Same as when an agreement is reached in a mediation procedure, if a dispute concerns the conclusion, amendment or renewal of a collective agreement, the arbitration award has the legal force and effects of the collective agreement (Article 212(5) of the Labour Act).

10. CONCLUSION

Two features of collective agreements, dynamism and adaptability, are insufficiently used in Croatia when working conditions need to be adapted

64. There is an exception to this rule in so-called compulsory arbitration in case of disputes on the definition of tasks that must not be disrupted during a strike and lock-out (Article 214 of the Labour Act).

to new circumstances, as has been proven during the COVID-19 pandemic. Contrary to expectations, one cannot find any provisions on working conditions adapted to the COVID-19 pandemic in the collective agreements in Croatia.

One of the reasons collective agreements cannot easily be adapted to the times of crisis lies in the statutory regulation of their after-effect. The application of the normative part of collective agreement is mandatory even when the collective agreement is unilaterally terminated by the employer because their financial situation is so difficult that they cannot honour the employees' rights guaranteed by the collective agreement. It has not been clarified in practice whether extraordinary termination of collective agreements is possible (in *force majeure* situations such as the current pandemic) by invoking Article 369 of the Civil Obligations Act. This article provides for the amendment or termination of civil law contracts due to a change in circumstances that could not be foreseen at the time of the conclusion of the contract. The extraordinary unilateral termination of collective agreements in limited, justified situations (*rebus sic stantibus*) should be clearly foreseen by the Labour Act. The conclusion is that neither the social partners nor the legislator have reacted in a timely manner and adapted the working conditions to the crisis.

Furthermore, the deduction of statutory minimum wage by a collective agreement allowed by the Minimum Wage Act is not adequately prescribed because the parties can agree to it without any objective justification which is contrary to Article 6(1) of the Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wage in the European Union. Therefore, it should be amended in order to comply whit this Directive.

The 2022 Amendment to the Labour Act contains a provision guaranteeing higher financial entitlements to employees who are members of the union that negotiated the collective agreement. It is possible for a collective agreement to stipulate that employees who are members of the trade unions that negotiated the collective agreement (and only those trade unions) to receive higher jubilee awards, Christmas bonuses, holiday pay, etc. The provision is highly problematic because it treats members of different trade unions differently. Another problematic aspect of the proposed provision concerns the financial entitlements guaranteed to union members. It is presented that the parties to a collective agreement could agree that members of the trade union that negotiated a collective agreement may

receive higher financial entitlements, up to double the amount of the average annual union membership fee. It is problematic from the aspect of the freedom of association which includes, *inter alia*, the freedom not to be a union member. The benefits paid to union members should not be so high as to encourage the non-unionized employees to join the union in question. Such benefits may only be symbolic. Otherwise, this provision should be considered as being in breach of the freedom of association, i.e., a breach of the freedom not to be a union member.

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Recent trends of collective bargaining in North Macedonia

Aleksandar RISTOVSKI*

INTRODUCTION

The legal framework that regulates the freedom of association and the right to collective bargaining in North Macedonia consists of the ratified ILO Conventions[1] and the key domestic sources of labour law, the most significant ones being the Constitution of the Republic of North Macedonia[2] and the Labour Relations Law[3]. The Labour Relations Law from 2005 is the basic and most essential regulation which governs the legal framework of collective bargaining in North Macedonia. With more than 15 years since its adoption and almost 40 amendments to the existing law, North Macedonia is about to adopt a new Labour Relations Law which is in the process of drafting and consonance by the social partners. The new Law is expected to address several important issues related to the freedom of association and the right to collective bargaining that have been producing dilemmas in practice and have been drawing the attention of the expert community in the country. Such are, for example, the issues about: regulation of the structure (levels) of organizing workers and employers; legal subjectivity of trade unions; clarification of the functional and personal scope of application of the collective agreements; extension of the validity of the collective agreements concluded at the level of a

* Associate Professor at the Ss. Cyril and Methodius' in Skopje (North Macedonia).

1. North Macedonia has ratified the two fundamental ILO conventions on freedom of association and protection of the right to organize (Convention No. 87) and protection of the right to organize and collective bargaining (Convention No. 98) as well as the other relevant standards in the field of freedom of association and collective bargaining (Collective Bargaining Convention No. 154, Workers' Representatives Convention No. 135, Labour Relations (Public Service Convention) No. 151).
2. Constitution of the Republic of North Macedonia (Official Gazette of the Republic of Macedonia, No. 52/1991).
3. Labour Relations Law (Official Gazette of the Republic of Macedonia, No. 62/2005).

branch, i.e. section; duration, automatic renewal and termination of collective agreements, etc.

1. THE MAIN TRENDS OF COLLECTIVE BARGAINING IN NORTH MACEDONIA

After North Macedonia (at that time Republic of Macedonia) gained its independence from former SFRY in 1991, the trends concerning the industrial relations in the country were more or less the same compared to other former communist and socialist countries from Central and Eastern Europe. At least at the outset of establishing political pluralism and market economy, all of these countries witnessed a tremendous decline of trade union membership and density rates as a result of several significant factors, chief among them being: privatization of state-owned or socially owned undertakings, restructuring of socialist-era enterprises, growth of the service sector and others.[4] Against such a background, North Macedonia started building the new legal framework for regulating industrial relations. The specifics of the industrial relations in North Macedonia may be divided into two developmental stages: *first stage* (encompassing the period from the adoption of the first Labour Relations Law of 1993[5] until the adoption of the second Labour Relations Law of 2005) and *second stage* (encompassing the period from the adoption of the second Labour Relations Law of 2005 to date).

Industrial relations in the Labour Relations Law of 1993 were regulated in a superficial way. Such a regulatory framework, on the one hand, left wide room for autonomous development of different segments of collective labour relations (e.g. establishment, organization, functioning and competencies of trade unions and employer's associations, collective bargaining, etc.), but on the other, it created uncertainty and legal gaps that generated problems in the functioning of industrial relations and social dialogue. Labour legislation did not regulate tripartite social dialogue at all, or more precisely, didn't envisage any provisions on the establishment, functioning and competencies of the Economic and Social Council. It also did not adequately stipulate the structure of trade unions and employers' associations and their forms of organizing at a higher level. At the expense

4. Bagić.D, *Industriski odnosi u Hrvatskoj – Druśtvena integracija ili trźišni sukob*, TIM press, Zagreb (2010), 71.
5. *Official Gazette of the Republic of Macedonia*, No. 80/93.

of clear and objective criteria for determining the representativeness of the workers' and employers' organizations, the 1993 Law on Labour Relations provided for a "majority" model of representation, based on which the "majority" union and employers' organizations had the right to enter into collective bargaining and to conclude collective agreements.[6] On the workers' side there were two trade union confederations: the Federation of Trade Unions of Macedonia (SSM) and the Union of Independent and Autonomous Trade Unions of Macedonia (UNASM).[7] As for the organization of the employers, they were represented by the Economic Chamber of Macedonia. This type of representation was rather a consequence of the lack of an adequate regulatory framework for establishing specialized employers' organizations aimed at protecting and representing the interests of employers in social dialogue and collective bargaining, than a real need for affiliated employers to be represented by the Economic Chamber which required a mandatory membership and whose competencies were primarily focused on promotion of companies' business and commercial interests.[8] In fact, the absence of statutory provisions and procedures for establishing and registering employers' organizations was also noted by the ILO supervisory bodies, which in 2001 required from the Government to act upon the complaint of the Organization of Employers of Macedonia (ORM) and to create the conditions necessary for the effective exercise of the freedom of association in accordance with Convention No. 87 on Freedom of Association and Protection of the Right to Organize.[9] Taking

6. See: Kalamatiev.T and A.Ristovski, *Trade union pluralism – progression or regression in the protection of workers' rights in the Republic of Macedonia?* SEER Journal for Labour and Social Affairs in Eastern Europe, Volume 15, (2012), 396.
7. See: Kalamatiev.T and A.Ristovski, The Law on Labour Relations and the Pluralisation of Trade Unionism - an advantage or disadvantage of modern social dialogue, Business Law, (2012), 144-145.
8. See: L.Hristova, A.Majhosev, *Former Yugoslav Republic of Macedonia (FYROM): Industrial Relations Profile*, EUROFOND (2012), 5.
9. In the complain submitted to the ILO on June 11, 2001, the Organization of Employers of Macedonia (ORM) outlined the legal obstacles that hindered its registration and thus the recruitment of new members, opening a bank account, use of its proper stamp and collection of membership fees. ORM (formally established as a civil society association in 1998) noted that the industrial relations legislation in North Macedonia only regulates the procedure for registration of trade unions, but not the employers' associations. See: Case *No. 2133 (North*

into consideration the regulatory framework in the first stage of the development of North Macedonia's industrial relations, it may be concluded that in the effectuation of collective labour relations "monism" prevailed over "pluralism".

The second stage of development of the industrial relations in North Macedonia began with the adoption of the *Labour Relations Law of 2005* (hereinafter LRL) which is still in force. Considering the numerous amendments and modifications to the LRL of 2005 (39 in total) that significantly altered the original industrial relations regulations, the second stage can be divided into two sub-stages: *first sub-stage* (from the adoption of the basic text of the LRL of 2005 to the amendments and modifications to the LRL of 2009) and *second sub-stage* (from the adoption of the 2009 amendments and modifications to the LRL to date).

The basic text of the LRL of 2005 (and thus the *first sub-stage*) created a more comprehensive statutory framework of industrial relations and managed to improve some of the shortcomings of the previous Law of 1993. In this respect, the LRL of 2005 established a procedure for registering and obtaining legal personality status of trade unions and employers' associations as well as of their organizations at a higher level, improved the protection against anti-union discrimination of workers and union representatives, and inaugurated the Economic and Social Council as a body of tripartite social dialogue. Of particular importance is the introduction of new criteria and conditions for representativeness of the social partners for participation in collective bargaining and concluding collective agreements, i.e. the introduction of "representativeness" (minimum threshold of 33% of employees) at the expense of the "majority" clause (minimum half of the employees). Thus, according to the labour legislation of that time, a prerequisite for acquiring representativeness of trade unions and employers' associations was to meet a minimum threshold of 33% of the members, depending on the level of organization and collective bargaining. However, given the fact that North Macedonia's industrial actors were still in a phase of "post-transition agony", even such a reduced representational threshold (from at least 50% to minimum 33%) has also appeared to be problematic in terms of establishing pluralism in industrial relations. Additionally, industrial relations legislation in the period from 2005 to 2009, had not yet developed a comprehensive and coherent system of le-

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Macedonia) - Complaint date: 01-JUN-01.

gal conditions for acquiring representativeness of the social partners for the purpose of participating in tripartite social dialogue. While SSM and ORM emerged as the main representatives of workers and employers and signatory parties to the General Collective Agreement for the private sector of the economy in 2006[10] and then in 2009[11], new industrial actors on both the workers (Confederation of Free Trade Unions of Macedonia – KSS) and employers' (Business Confederation of Macedonia – BKM) side appeared. KSS acquired a representativeness status for the public sector which enabled the conclusion of the first General Collective Agreement for the public sector of 2008.[12] BKM never met the requirements to obtain representativeness. Problems with the conditions and criteria for acquiring representativeness of the workers and employers' organizations were also highlighted in the Observation of the Committee of Experts on the Application of the ILO Conventions and Recommendations of 2006. In the Observation, the Committee requested the Government *to modify the requirement to collective bargaining that a trade union and the employers (or the organization of employers) must represent 33 per cent of employees (for all levels) and to introduce fair determination of the representativeness of the highest level based on objective and pre-established criteria and for the composition of the negotiation board when no trade union organization represents 33 per cent of employees or no employers' organization meets the same requirement*.[13] It was only in 2009 when the Government complied with the requests of the ILO on the identified segments of the industrial relations legislation.

The *amendments to the Labour Relations Law of 2009*[14] (*second substage*) have introduced four types of representativeness of trade unions and employers' associations for tripartite and bipartite social dialogue.[15] While the first type of representativeness (or representativeness at na-

10. *Official Gazette of the Republic of Macedonia, No. 76/2006*.
11. *Official Gazette of the Republic of Macedonia*, *No. 88/2009*.
12. *Official Gazette of the Republic of Macedonia, No. 10/08*.
13. See: Observation (CEACR) – adopted 2006, published 96th ILC Session (2007).
14. Law on amending and supplementing the LRL, Official Gazette of the Republic of Macedonia, No. 130/09.
15. See: Kalamatiev.T and A.Ristovski, Collective bargaining in the public sector of the Republic of Macedonia with a particular review of the collective bargaining in the health care, Business Law, (2013), 266.

tional level) presupposes stipulating conditions for the institutionalization of tripartite social dialogue, the other three types of representativeness (at the level of private or public sector; at branch, that is section level and at the level of an employer) are directed solely towards bipartite social dialogue, ie collective bargaining at different levels. The minimum threshold *for representativeness of trade unions for the territory of North Macedonia (i.e. at national level)* shall be at least 10% of the total number of employees in North Macedonia paying union membership fee. In addition to this requirement, trade unions must meet other cumulative requirements as well, such as: to be registered in the register of trade unions kept by the ministry responsible for issues in the field of labour; to associate at least three unions at a national level from different branches, that is, sections, which are registered in the register of trade unions kept by the ministry responsible for issues in the field of labour; to act at a national level and to have members registered in at least 1/5 of the municipalities in the Republic of North Macedonia; to act in accordance with its statute and its democratic principles and to have membership of trade unions that have signed or acceded to at least three collective agreements at a branch, that is, section level. Identical criteria for acquiring representativeness at a national level are stipulated for *employers' associations*, with the difference that the minimum representativeness threshold at a national level should be at least 5% of the total number of employers in the private sector or the employers members of the association should employ at least 5% of the total number of employees in the private sector of the country. As regards the minimum threshold for representativeness of trade unions for the purpose of participating in collective bargaining at the level of *private/public sector, branch, that is section level or at the level of an employer*, the 2009 amendments to the LRL require at least 20% of the employees employed at any level respectively to be members and pay membership fees. Employers' associations obtain representativeness status at a level of private sector in the economy or at a branch that is section level, if at least 10% of the total number of employers in the private sector are members or employ at least 10% of the total number of employees in the private sector. What is also worth mentioning is that in 2012 a controversial amendment to the LRL concerning the conditions for registration and obtaining legal personality status of trade unions was enacted.[16] The

16. See: Law on amending and suplementing the Labour Relations Law, Official Ga-

amendment has given exclusive right to obtaining legal personality status only to higher-level trade unions (i.e. organized at a branch level – federations or at a national level – confederations), but not to trade union organizations organized at an employer-level. Such a situation is considered to be contrary to Article 37, paragraph 1 of the Constitution of the Republic of North Macedonia as well as to Art.7 of the ILO Convention No. 87, because it limits the workers' freedom of trade union association.[17]

The improved legal framework for the representativeness of social partners had a positive impact on the development of trade union pluralism, which resulted in the adoption of the new 2010 Agreement on the establishing of the Economic and Social Council and led to increased dynamics of collective bargaining and conclusion of collective agreements.[18] However, from 2016 there has been a setback in the dynamics of collective bargaining in the private sector, considering the fact that neither a new collective agreement at a branch level in the private sector has been concluded, nor have the existing ones been extended or amended. The possible reasons for this state of affairs can be attributed to the lethargy of the

zette of the Republic of Macedonia, No. 11/2012.

17. See: Kalamatiev.T and A.Ristovski, *Industrial Relations in North Macedonia 30 Years After the Fall of the Berlin Wall – Key Challenges Faced by Industrial Actors*, Iustinianus Primus Law Review, (2019), 12-13.

18. In the period from 2005 to 2016, a total of 16 collective agreements have been concluded, including 14 branch-level, i.e. specific collective agreements such as: *CA for the Health Sector* (Official Gazette, No. 60, 2006); *CA for the Public Utilities of Macedonia* (Official Gazette, No. 107, 2006); *CA for the Hospitality Sector of Macedonia* (Official Gazette, No. 2. 2008); *Collective Agreement for the Primary Education in the Republic of Macedonia* (Official Gazette, No. 24, 2009); *Collective Agreement for the Secondary Education in the Republic of Macedonia* (Official Gazette, No. 24, 2009); *CA for the Employees in the Tobacco Industry* (Official Gazette, No. 135, 2009); *CA of Companies of Other Monetary Intermediation and the Activity of Intermediation in Operations with Securities and Commodity Contracts* (Official Gazette, No. 97, 2011); *CA for the Chemical Industry* (Official Gazette, No. 10, 2013); *CA for the Protective Associations of Macedonia* (Official Gazette, No. 151, 2014); *CA for Leather and Footwear Industry of the Republic of Macedonia* (Official Gazette, No. 220, 2015); The *CA for the Textile Industry of the Republic of Macedonia* (Official Gazette, No. 220, 2015); *CA for the Employees of the Agriculture and Food Industry* (Offical Gazette, No. 175/15); *CA of the Independent Regulatory Bodies* (Offical Gazette, No. 74, 2015) and *CA for the Energy Sector* (Official Gazette, No. 47, 2016).

parties involved in the collective bargaining, and lack of willingness to find mutually acceptable solutions in conditions of collective bargaining. The inertia in the approach to collective bargaining is sometimes a result of the fact that many collective agreements are concluded for an indefinite period or contain clauses for automatic extension of their validity, which in some cases has a deterrent effect on the dynamics of collective bargaining. The parties to collective bargaining often highlight the protracted adoption of the new Labour Relations Law as a reason for the reduced dynamics in collective bargaining. A true picture of the state of collective bargaining in the country is also revealed by the data on the representativeness threshold of trade unions (only 6%) and employers' associations (only 11.15%) in the private sector, as well as the union density (which at a rate of 17, 29% is lower than the EU average rate of 23%). The dynamics of collective bargaining in the public sector is significantly better compared to the private sector[19], but in this sector as well, no new collective agreement has been concluded at the national level for more than a decade now.

2. COLLECTIVE BARGAINING ISSUES

The material scope (i.e. subject and content) of collective bargaining in North Macedonia is determined indirectly through the Labour Relations Law.[20] The subject and content of the collective agreements make reference to two significant groups of provisions (obligatory and normative), through which the content of collective bargaining is expressed.

The first group of provisions covers the *rights and obligations* which bind the contracting parties (usually the trade union and the employer, i.e. the employers' association). These provisions make up the so-called

19. In the period from 2016 to date, a total of 5 branch-level collective agreements in the public sector have been concluded: *CA for the Social Protection* (Official Gazette, No. 249, 2019); *CA for the Public Institutions for Children in the Activity for Care and Education of Children from Preschool Age and the Activity for Holiday and Recreation of Children* (Official Gazette, No. 133, 2019); *CA for the Culture* (Official Gazette, No. 10, 2020); *CA for the State Administration Bodies* (Official Gazette, No. 51, 2021); *CA for the Higher Education and Science* (Official Gazette, No. 102, 2021).
20. See: LRL, article 206, paragraph 1.

"obligatory part" of the collective agreement. The second group of provisions covers the *conclusion, content and termination of the employment relationship and other issues in the sphere of, or in relation to, the employment relationship*, or the so-called "normative part" of the collective agreement. Thus determined, the subject and content of collective agreements are narrowed down to a range of issues through which the freedom of bargaining of the parties is expressed.[21]

The *obligatory part* of collective agreements in North Macedonia consists of the obligations and rights that apply to and bind the contracting parties (e.g. *conditions and procedures for amending and supplementing, procedures for amicable settlement of collective labour disputes, monitoring and interpretation, cancellation of the collective agreement, etc.*). Collective agreements in North Macedonia also contain provisions that regulate issues concerning relations between employers and workers (e.g. *certain aspects of participation, i.e. information and consultation of workers*; *procedures for protection of individual employment rights of workers*) as well as issues concerning relations between employers and their organizations and trade unions (e.g. *protection against anti-union discrimination* and *support of trade union activities*). In North Macedonia's labour law literature, these provisions of the collective agreements are usually considered provisions of an obligatory nature[22]. Yet, considering that they indirectly have a normative effect on the working and employment conditions of workers, certain approaches of comparative labour law consider these types of provisions as special, i.e. normative provisions of a collective nature.[23]

The *normative part* of the collective agreements in North Macedonia covers issues that are part of all essential stages of the existence of an employment relationship (conclusion, content and termination). These issues commonly regulate working conditions (e.g. *wages, including their structure and composition; working time, holidays and leave*) and employment conditions (e.g. *prohibition of discrimination; special cases of unilateral deployment of workers by the employer; probation and internships; vocational training and education; certain aspects of dismissals, etc.*).

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21. See: Ristovski.A, *Collective Bargaining in North Macedonia – an analysis*, ILO, (2022), 13.
22. See: Starova.G, *Labour Law*, (2009), 68.
23. See: Engels.C and L.Salas, *Collective Bargaining in Belgium: Collective Bargaining in Europe*, Collecion Informes y Estudios, Num.70, (2005).

In practice, the most important issues for collective bargaining are related to the wages, certain aspects of the working time, leave and absences from work, as well as issues related to the termination of employment contracts by dismissal on the initiative of the employer. In this regard, the provisions contained in the collective agreements are more specific than the provisions provided in the Law.

Concerning the *wages*, collective agreements usually regulate the following issues: wage payment system and methodology; the amount of the lowest wage and the job groups based on their degree of complexity, which are used to determine the lowest basic wage for a specific job; criteria and measures for determining performance-related payments; the amount of wage supplements for special working conditions at the workplace or arrangement of working hours; the amount of allowances for work-related costs; the amount of other allowances and benefits; the amount of allowances for leave of absence from work and so on.[24] However, the determination of one of the most important components of remuneration (the amount of the national minimum base wage) is subject to tripartite social dialogue and statutory regulation, not collective bargaining. The importance of the national minimum wage is reflected not only in the protection of the existential minimum threshold of all workers in the country (whether or not they are covered by a collective agreement), but also in the cases where workers are covered by a collective agreement, in its contribution in establishing the lowest base salary for different jobs depending on the group in which the jobs are ranked and the coefficient of complexity assigned to them. In the past ten years, the national minimum net wage has soared by more than 100% (i.e. 130 EUR in 2012 to 18,000 MKD, i.e. 292 EUR as of April, 2022). However, the increase in the national minimum wage has not been reflected in a symmetrical, spiral increase in other wages regulated by collective agreements. The reasons for that, to a certain extent, can be attributed to the fact that the lowest sectoral wage (as a calculation value for determining the other wages for higher-ranked jobs) in several branch-level, i.e. Specific collective agreements, is set at a lower amount than the national minimum wage. In other collective agreements, the amount of the lowest sectoral wage is not determined at all. All this shows that at the expense of substantial regulation of the

24. See: Petreski.M and A.Ristovski, *Country review on the setting of wages through collective bargaining in North Macedonia*, ILO, (2020), 12-19.

amount of base wages, in collective bargaining in North Macedonia, more attention is paid to certain, additional quantitative aspects of remuneration (for example, of wage supplements for overtime work, night work, holidays' work, etc.), which, despite having undoubted importance in determining the overall salary of workers, are of secondary importance in relation to the base wage.

Despite the explicit possibility to reduce the duration of the statutory full-time *working hours* with a collective agreement prescribed by the LLR, none of the collective agreements stipulates a provision that introduces a collective reduction of working hours shorter than the standard 40 hours per week. However, they usually regulate the manner of introducing overtime work. In relation to *annual leave*, collective agreements lay down specific provisions regarding the criteria for determining the days for annual leave. In relation to a *leave of absence*, the specific character of the collective agreements, when compared to the Labour Relations Law, is reflected, above all, in the regulation of the grounds (cases) for exercising the right to paid leave of absence due to personal and family circumstances and the right to unpaid leave of absence.

Collective agreements (specific collective agreements, in particular) also regulate the termination of an employment relationship by *dismissal*. In this regard, collective agreements contain important provisions for further regulation of the established reasons (cases) and the procedure for cancellation of employment contracts at the initiative of the employer.

The negotiations for new, innovative content in collective agreements, such as the introduction of certain forms of flexible working time organization or work-family balance policies oriented towards the needs of workers, or the prevention and protection against harassment and sexual harassment in the workplace, are still far from the focus of trade unions and employers' associations in collective bargaining. Unfortunately, in conditions of a Covid-19 pandemic, a significant issue which, despite its great application in practice, still remains unregulated both within the Law and by collective agreement, is telework.[25] Collective bargaining was initiated between the representative trade unions and employers' associations for regulating telework through the General collective agreement for the

25. See: Kalamatiev.T and A.Ristovski, *COVID-19 and its impact on labour relations in North Macedonia – a critical review of measures used to protect workers during the pandemic*, Intersentia, (2021), 429.

private sector, but due to opposing views on certain issues (such as the organization of working hours and the operationalization of the OSH liabilities of the employers) failed to find agreement.[26]

3. THE LEVEL OF COLLECTIVE BARGAINING

Collective bargaining in North Macedonia, takes place at three levels: *at a state level* (i.e. national level), *at a branch, that is section level* according to the National Classification of Activities (NCA) and *at an employer level*. The system of collective bargaining is based on a sectoral, i.e. industrial-based vertical approach. North Macedonia's industrial relations legislation does not recognize collective bargaining for a particular area, i.e. territory (municipality, region, etc.).

The highest level of collective bargaining, i.e. collective bargaining at the *national level* is conducted for the conclusion of the so-called General collective agreement (hereinafter GCA). The GCA is concluded for the private sector in the field of economy and for the public sector. According to the Labour Relations Law, the parties to the GCA for the private sector are the representative association of employers and the representative trade union for the private sector in the field of economy, while the parties to the GCA for the public sector are the representative trade union in the public sector and the minister with competencies in the field of labour, with prior authorization by the Government of North Macedonia.[27] The LRL explicitly defines only the functional area of collective bargaining in the public sector. In this regard, the public sector GCA covers *state government bodies and other state bodies, bodies of local self-government units, institutions, public enterprises, institutes, agencies, funds and other legal entities that perform activities in the public interes*t.[28] The functional area of the GCA for the private sector is determined in a "residual" manner. Thus, the private sector GCA covers those activities and applies to those employers and employees who are not covered by the public sector GCA. Although at first glance it seems that there is a clear distinction between the functional scope of the private and public sectors, in practice there are several "borderline" subjects or activities, for which it is problem-

26. See: Ristovski.A and C.Mihes, Legal Analysis on Regulation and Implementation of "telework" in the Macedonian Labour Legal Context, ILO (2020), 6.

27. See: LLR, article 216.

28. See: LLR, article 204, paragraph 2.

atic or debatable, which one of the two GCAs will apply. This particularly refers to the legal entities that perform activities of public interest that could be also private institutions (e.g. private kindergartens, schools and universities, hospitals, nursing homes, etc.) or to independent performers of activities of public interest (enforcement agents, notaries and the like).

When determining the functional area of application of the general collective agreements for the private and public sector, the classification of activities enumerated in the national classification of activities (NCA) should also be considered. Having in mind the NCA, it becomes evident that the term sector in the NCA and the term sector in the Labour Relations Law are completely different terms.[29] Collective bargaining in the private sector or in the public sector, according to the LRL, primarily means collective bargaining which, by its function (type of work, i.e. activities), covers all sectors, sections, groups and classes of the NCA, differentiated on the basis of their affiliation to the "private" or "public" sector. Hence, collective bargaining at the national level can also be defined as collective bargaining at an "inter-sectoral" or "multi-sectoral" level within the private and public sector.[30]

The middle level of collective bargaining, i.e. the collective bargaining at the *branch, that is section level* according to the national classification of activities, is conducted for concluding the so-called Specific collective

29. The NCA categorizes activities into 4 fields (starting from the most general, to the most specific activities). The most general field of activities according to NCA are "sectors", followed by "sections", then "groups" and finally "classes" (e.g. Sector C/B – Manufacturing; Section 13 – Manufacture of textiles; Group 13.9 – Manufacture of other textiles and Class 13.93 – Manufacture of carpets and rugs).

30. For example, according to the NCA, in the functional scope of application of the **GCA for the private sector** the following sectors could be listed (A – Agriculture, forestry and fisheries, B – Mining and quarrying, C – Manufacturing, D – Electricity, gas, steam and air conditioning supply, F – Construction, G – Trade and so on). Although the activities covered in the aforementioned sectors belong predominantly to the private sector, this does not preclude the fact that the activities listed in some sections, groups or classes may also fall within the functional scope of the GCA for the public sector (for example: Sector A, Section 02 – Forestry and Forest Utilization; Sector D, Section 35.1 – generation, transmission and distribution of electricity, etc.). On the other hand, in the functional scope of application of the **GCA for the public sector,** the following sectors could be listed (O - Public Administration and Defense; Compulsory Social Insurance; R – Education; Q – Health and Social Protection Activities, etc.).

agreements (hereinafter SCAs). Although the legal framework limits branch collective bargaining to the level of "*section*"[31] (as the second field, by scope, in the NCA), in practice, SCAs are concluded at the level of *several sections within the same sector* according to the NCA,[32] at the level of *several sections within different sectors* according to the NCA,[33] at *the level of a group within the same section* according to the NCA,[34] at the level of *several groups within different sections* according to the NCA,[35] and even at *sectoral level*, as the highest field, by scope, in the NCA.[36] Finally, as part of the collective bargaining at the level of branch, i.e. section, there are SCAs which, according to their functional scope, bear more resemblance to being concluded at the *level of profession (occupation) with a horizontal applicability*[37] than at the level of sector, section or group according to the NCA, with a vertical applicability.

Collective bargaining at an employer level is conducted for concluding the so-called Individual collective agreements (ICAs). The ICA is concluded at the level of private or public sector employers. Dilemmas related to the proper determination of the parties of the ICAs also exist in relation to the trade union party. Keeping in mind the legal framework that regulates the issue of obtaining legal capacity of trade unions whereby only higher-level trade unions can acquire the status of legal entities (for example, at the level of branch – federation, or at national level – confederation), it is questionable whether a trade union organization established at an employer level can occur as a party to an individual collective agreement, and if so, in what capacity.

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31. Specific collective agreements, concluded at the level of one "section" according to the NCA, are: CA for the leather and shoe industry, CA for the tobacco industry, CA for the healthcare, CA for social protection.
32. For example: CA for the textile industry, CA for the hospitality sector, CA for the chemical industry, CA for culture and so on.
33. For example: CA for employees of the agriculture and food processing.
34. For example: CA for higher education and science, CA for secondary education, CA for primary education.
35. For example: CA of companies of other monetary intermediation and the activity of intermediation in operations with securities and commodity contracts.
36. For example: CA for the energy sector, CA for public utilities.
37. For example: CA for independent regulatory bodies and CA for the protective associations.

4. THE PRINCIPLE OF FAVOUR

North Macedonia's labour legislation provides for the principle of "favour" in labour relations, which assumes that in the hierarchical scale of labour law sources, lower sources must not contradict the higher ones.[38] Collective agreements and individual employment contracts may only provide for more favourable rights and working conditions for workers. Consequently, they cannot provide for less favourable rights and working conditions than the minimum rights guaranteed by law. Although not explicitly prescribed in law, in practice, the "favourability principle" also applies among the different types of collective agreements, as well as among the collective agreements and (individual) employment contracts. In cases when the rights stipulated in a lower source (for example, employment contract or collective agreement) are less favourable, i.e. contrary to the identical rights governed by a higher source (for example, higher-level collective agreement or law), such rights are invalid and the rights prescribed in the immediate higher source apply. On the other hand, North Macedonia's labour legislation (i.e. the Law on Labour Relations) does not explicitly provide for the principle of derogation "in peius" which would allow parties of collective agreements to derogate the imperative norms set by law and introduce less favourable rights for employees, even in a situation when a company faces financial hardship. However, in practice, there are cases when certain rights set out in the collective agreements are formally or quantitatively less favourable for workers and therefore differ from the provisions of the LRL.[39]

38. See LLR, Art.12, para.2 and 3.

39. For example, the GCA for the private sector provides for the possibility of temporary reduction of the minimum basic wage of workers of up to a maximum of 20 per cent and for no longer than 6 months, whereby the employer is required to pay the reduced amount within 6 months after overcoming the difficulties in operation (article 18), without having an appropriate legal basis. Another example are the provisions of the Collective Agreements for the leather and shoe industry (article 71, paragraph 1) and the textile industry (article 71, paragraph 1), which prescribe that the duration of the temporary forced leave/furlough that the employee may be referred to is maximum 6 months, despite of the fact that for the same grounds, the Labour Relations Law provides for termination of the work process for a maximum of 3 months (article 112, paragraph 7 of the Labour Relations Law).

The possibility of derogation, operationalized through the principle of "favourability", however, is not absolute. The margins of freedom of collective bargaining in North Macedonia are determined by the *absolutely imperative* (inderogable) provisions determined by law (i.e. the cogent rules of public order) and the *relatively imperative* (inderogable) legal provisions that determine the lowest and highest limits (days, deadlines, etc.), unless otherwise specified by law or collective agreement. Thus, for example, absolutely imperative provisions that could not be subject to derogation are legal provisions that regulate issues related to: payroll taxes; minimum age for employment; protection of occupational safety and health; mandatory pregnancy and maternity leave and the like. Similarly, relatively imperative provisions that could not be subject to derogation by collective agreements (even if more favourable to workers) are, for example, legal provisions setting forth the maximum age of employment; statutory minimum and maximum notice periods; rest breaks at work, etc.

When determining certain rights, the Labour Relations Law unnecessarily and unjustifiably sets upper limits which, taking into consideration the principle of inderogability of the relatively imperative provisions, would be regarded as rights that cannot be regulated otherwise by a collective agreement, even when more favourable to workers. Examples include the upper limits set by the Law in relation to annual leave (at least 20 working days which can be extended to up to 26 working days) or paid leave of absence due to personal and family circumstances (which, according to the Law, cannot be more than seven working days). Despite their relatively imperative nature, these limits are in practice subject to derogation by collective bargaining.

5. APPLICATION OF COLLECTIVE AGREEMENTS

The Labour Relations Law establishes a combined system for the application of collective agreements which depends on the level of collective bargaining, i.e. the type of collective agreement concluded. In that sense, general collective agreements are directly applicable to and are mandatory for all employers and employees in the private or public sector (depending on the sector for which the general collective agreement is concluded),[40] and individual collective agreements apply to the signatories to

40. See: LRL, article 205, paragraph 1 and paragraph 2.

the collective agreement, binding all workers at the employer level, including workers who are not members of the trade union.[41]

While the legal effect of GCAs and ICAs is *erga omnes*, the Labour Relations Law defines a limited application of specific collective agreements. The application of collective agreements is regulated in two separate articles of the Law (application and validity of collective agreements[42] and persons bound by the collective agreement[43]). However, the aforementioned articles do not provide clear rules regarding the personal scope of application and do not distinguish the terms "party" and "person" of a specific collective agreement. In principle, it is considered that the Law limits the application of the SCAs primarily in regards to the obligatory part of their content to the *parties* (trade unions and employers' associations signatories and trade unions and employers' associations that additionally accessed the concluded collective agreements) while normative contents of the SCAs only apply to *persons* (employees and employers) who are members of the signatory parties or of the parties that additionally accessed the concluded collective agreement. In order for a trade union or employers' association to be able to accede to a collective agreement, it should submit a statement of accession to the collective agreement to all parties, signatories of the collective agreement, and to parties that additionally acceded to the collective agreement.[44] However, LRL does not condition the accession to the concluded collective agreement with fulfilment of additional material requirements or obligations (certain threshold of representativeness, payment of an accession fee and so on) that would have to be fulfilled by the party that submitted the accession statement, nor does it refer to regulating such requirements or obligations in the collective agreement. In practice, parties use different ways to regulate the issue related to the application and accession to the concluded specific collective agreement. Certain collective agreements stipulate that their provisions "*apply to all workers and employers in the respective branch, i.e. section*" for which the collective agreement has been concluded.[45] The provisions of these collective agreements providing *erga*

41. See: LRL, article 208, paragraph 3.

42. See: LRL, article 205, paragraph 3.

43. See: LRL, article 208, paragraphs (1) and (2).

44. See: LRL, article 233, paragraph 2.

45. See: CA for the energy sector, article 3; CA for public utilities, article 3; CA for the

omnes legal effect without having an appropriate legal ground are inapplicable. Such an interpretation is implicitly confirmed by the Constitutional Court of North Macedonia, which, acting on the initiative to assess the constitutionality and legality of the provisions on the personal scope of application of several specific collective agreements in the public sector, has stated that "*the established rights and obligations in the branch collective agreements cover and apply to the members of the signatory unions*".[46] Other collective agreements provide the possibility for "*additional accession to the collective agreement of employers who are not members of the association of employers – signatory to the collective agreement, by joining the association*".[47] A third group of collective agreements provide the possibility for "*additional accession by unions that are not signatories to the collective agreement, based on prior written notification and consent obtained for accession by the signatories to the collective agreement*".[48] The collective agreements of this group do not specify the conditions for giving consent for accession to the collective agreement, which can be problematic in terms of the unlimited discretion attributed to the signatory parties in deciding whether to approve the accession to the collective agreement of the interested party.

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hospitality sector, article 3; CA for the healthcare sector, article 4.

46. See: Decision of the Constitutional Court of the Republic of Macedonia, У.бр.74/2018 from 21 November 2018, Skopje. In the present case, the Constitutional Court was faced with the challenge to act on an initiative to assess the constitutionality and legality of the provisions in several specific collective agreements (article 3, paragraph 2 of the CA for public institutions for care and education of children and institutions of recreation of children; articles 3 and 99 of the CA for elementary education and article 3 of the CA for secondary education). The applicants (group of workers members of the Independent Union of Education and Science) challenged the said collective agreements precisely in their personal scope of application. They stated that the collective agreements only apply to workers who are members of the trade union party to the concluded collective agreements (Autonomous Trade Union for Education, Science and Culture – SONK), but not to workers who are members of other trade unions, or are not members of any trade union.
47. See: CA for the textile industry, article 2; CA for the leather and shoe industry, article 2.
48. See: CA for primary education, article 1, paragraph 3; CA for secondary education, article 1, paragraph 3; CA for higher education, article 3.

Labour legislation and collective agreements do not provide answers to the question of whether SCAs binding a certain employer will apply to all of its employees, or only to unionized workers. In practice, employers usually apply the normative part of the applicable SCA also to workers who are not members of a trade union. This situation is the result of the implicit application of the constitutional and legal provisions which prohibit discrimination on any grounds, including membership, i.e. non-membership in a trade union.[49]

6. ENFORCEMENT OF COLLECTIVE AGREEMENTS

First steps to ensuring enforcement of the concluded collective agreements, include their submission for *registration* to the ministry responsible for issues in the field of labour[50] and their *public announcement*.[51] GCAs and SCAs, i.e. each of their modifications (amendments, cancellations or accessions) must be submitted for registration to the ministry. Concerning the ICAs, bargaining parties are only required to notify the competent ministry regarding the conclusion of the collective agreement and the time for which it is concluded. After their registration, collective agreements must be announced publicly. While GCAs and SCAs and their modifications are published in the "Official Gazette of the Republic of North Macedonia", ICAs are announced in the manner determined by the signatory parties in the Agreement (usually on the company and/or union website, on a bulletin board, etc.). The registration, i.e. deposit of a collective agreement with the labour administration, primarily serves for the purpose of reviewing that its provisions do not contradict minimum standards (absolutely and relatively imperative statutory provisions). However, in practice, one gets the impression that this purpose of registration seems to have negligible significance, because the ministry does not have any special competencies to initiate a judicial procedure for annulment of the disputed provisions of the collective agreement which are contrary to the law, nor to exercise any significant control over the content of the collective agreement prior to its registration and public announcement. The registration of collective agreements is also a means for the public authorities

49. See: Kalamatiev.T and A.Ristovski, Unio*n Security Clauses versus Freedom of Trade Union Association*, Faculty of Law, University of Niš, (2017), 74.

50. See: LRL, Art. 231.

51. See: LRL, Art. 232.

to be better prepared to deal with disputes arising from the non-application or interpretation of a collective agreement.

An important principle for the enforcement of collective agreements is that the parties to the collective agreements and the persons to whom they apply are obliged to implement their provisions.[52] However, during collective bargaining and in the enforcement (application and interpretation) of collective agreements, a dispute may arise between the contracting parties. Collective labour disputes are defined in the Law on Amicable Settlement of Labour Disputes (hereinafter LASLD), and they refer to disputes over the concluding, amendment, supplementation or application of a collective agreement, exercising the rights to trade union organization and strike.[53] LASLD implicitly distinguishes between *collective "interests" disputes* (as disputes concerning the concluding, amending or supplementing the collective agreement) and *collective "rights" disputes* (as disputes concerning the application of the collective agreement)[54]. It also provides for selective labour disputes concerning the *exercising of the right to trade union organization* (for instance, freedom of association, including prohibition of unlawful interference or supervision)[55] and *to strike* (as a collective labour dispute that can be initiated both for reasons that are "interest" and "rights" related).

An important issue in the course of the validity of the collective agreement is the issue of admissibility of *industrial (social) peace clauses*. Neither North Macedonia's labour legislation nor the current collective bargaining practice recognize industrial (social) peace clauses, i.e. the possibility to restrict or prohibit industrial action (primarily strike) by mutual agreement and for the duration of the concluded collective agreement. This situation does not necessarily mean that the parties to the collective bargaining have an *en bloc* ban on negotiating industrial peace clauses, but still, considering the constitutional guarantee of the right to strike,[56] we believe that the odds for such clauses to be declared invalid are high.

52. See: LRL, article 223.
53. See: LASLD, article 2 paragraph (1).
54. See: ILO, *Collective Bargaining – Policy Guide*, (2015), 57.
55. See: LRL, article 197 (judicial protection of the right to association) and article 195 (activities of the trade union, i.e. the association of employers, and prohibition of supervision over the other party).
56. See: Constitution of the Republic of North Macedonia, article 37.

The enforcement of collective agreements through a *judicial protection* before regular, competent courts is rarely tested. The Labour Relations Law provides for the possibility of obtaining *judicial protection of the rights arising from a collective agreement*, where one of the parties to the collective agreement may file a lawsuit before the competent court to request protection of those rights.[57] In principle, the intention of the legislator is to enable the protection of the rights arising from a collective agreement through initiating a collective "rights" dispute, while any dispute related to conclusion or modification of a collective agreement (collective "interest" dispute) should be resolved extra-judicially. A precondition for initiating a collective labour dispute to seek judicial protection of the rights arising from the collective agreement is the party that initiates the dispute to have the capacity of a party in the procedure (litigation capacity) in accordance with the regulations of the procedural law.[58] Considering the rules on the legal capacity of trade unions (i.e. the acquisition of the legal personality status) regulated in the existing labour legislation, only a trade union established at a higher level shall qualify as a party to a collective dispute.[59] In principle, a party to a collective agreement may seek judicial protection of the rights arising from the *obligatory part* of the collective agreement, including protection against anti-union discrimination and support of trade union activities, information and consultation of workers, etc. There is no legal impediment to seek judicial protection of the rights arising from the normative part of the content of a collective agreement (working and employment conditions) if the other party to a collective agreement or the person to whom a collective agreement applies (for example, a certain employer) fails to fulfil the rights of all or a larger group of workers stipulated in the collective agreement. However, a common practice for protection of the individual rights of workers arising from an employment relationship, including the normative provisions of a collective agreement, is protection by initiating an individual labour dispute.

Labour inspectors in North Macedonia also play an important role in securing the enforcement of the normative parts of collective agreements. They have the authority to monitor and supervise the enforcement of applicable collective agreements (among other labour law

57. See: LRL, article 234.

58. See: Law on Civil Procedure, article 70.

59. See: LRL, article 189.

sources), and order the employers, to eliminate the ascertained violations and deficiencies.[60]

7. AMICABLE SETTLEMENT OF LABOUR DISPUTES

Amicable settlement of collective labour disputes is a way to quickly, efficiently and effectively resolve disputes that arise in collective bargaining (interest disputes) and in relation to the application and interpretation of concluded collective agreements (rights disputes). Amicable settlement is also a way to encourage and maintain the initiative and dynamics of collective bargaining. The system of amicable settlement of labour disputes in North Macedonia is being built for more than a decade now. A key role in this process is played by the Law on Amicable Settlement of Labour Disputes, which establishes the necessary normative basis for providing an easier and financially more cost-effective way for the peaceful settlement of collective labour disputes through *conciliation*. North Macedonia's legislation, in addition to conciliation regulated by LASLD, provides for a special legal regime (i.e. Law on Mediation[61]) for out-of-court settlement of disputes over different kinds of legal relationships, including employment relationships. In practice, these two laws compete with one another, often to the detriment of the coherence of the legal framework for peaceful settlement of labour disputes (collective labour disputes included) through conciliation and the purposefulness of "external" assistance to parties during voluntary collective bargaining. However, the LASLD is of paramount importance and relevance as it prescribes the procedure and the participation of the conciliator in the collective bargaining process (with the purpose of providing assistance and preventing the occurrence of a dispute) and in the collective labour dispute (with the purpose of providing assistance in resolving the dispute). In addition to the procedure regulated by Law, the amicable settlement of collective labour disputes through conciliation, is subject to regulation with collective agreements. Collective agreements usually provide for a conciliation procedure that takes place before a conciliation council composed of representatives of each of the parties to the dispute and a jointly elected conciliator who chairs the conciliation council and helps the parties in finding a solution to the dispute. In fact, collective agreements establish another, additional "channel" of

60. See: LRL, article 256.

61. *Official Gazette of Republic of Macedonia,* No.188, 2013.

conciliation, different from the conciliation provided for in the LASLD.[62] Whether the basis for conciliation is a collective agreement or the law, conciliation is envisaged as a voluntary manner of resolving collective labour disputes. Compulsory conciliation is foreseen only in the case of a strike, including a strike or a dispute within the activities of general interest.[63]

In addition to resolving collective labour disputes through conciliation, collective agreements usually provide for procedures for *consonance* and *arbitration*. Consonance is usually applied when amending or supplementing a collective agreement, when the other party does not accept or pronounce itself on the proposal to amend or supplement the collective agreement within the prescribed period. Although consonance is formally a separate procedure intended for the joint settlement of the parties to the dispute and which occurs before the start of the peaceful resolution of the "interest" collective labour dispute through conciliation, there is no essential difference between this procedure and conciliation. Collective agreements may also provide for a procedure for resolving collective labour disputes through arbitration. Arbitration is voluntary, and collective agreements stipulate that it can be applied either as an alternative to conciliation, or more commonly, as a procedure for peaceful settlement of a collective dispute after a failed conciliation. Collective agreements that contain provisions for arbitration usually regulate the procedure that is usually carried out before an arbitration council.[64]

CONCLUSION

The successfulness of collective bargaining in North Macedonia depends on a number of different factors. Some of these factors are external to the parties involved in the collective bargaining (workers' and employers' organizations), and despite the political and economic conditions and the level of democracy in society, they largely relate to the legal framework governing

62. The only collective agreement which explicitly refers to the selection of conciliators from the Register of conciliators of the Ministry of labour and social policy, according to the Law on Amicable Settlement of Labour Disputes is the collective agreement for agriculture and food industry (article 106, paragraph 3).
63. See: LRL, article 236 (paragraph 3) and LASLD, article 18 (paragraph 1 and paragraph 2).
64. See: GCA for the private sector, article 51; GCA for the public sector, article 32.

the industrial relations. Others, primarily refer to the internal capacities of the workers' and employers' organizations, the size and diffusion of their membership, the culture and dynamics of the social dialogue, etc.

North Macedonia's legal framework establishes the optimal conditions for proper development of social dialogue and collective bargaining. Yet, the *perspectives* of collective bargaining largely depend on the manner of future regulation of several important issues such as the: regulation of the structure (levels) of organizing workers and employers; legal subjectivity of trade unions; clarification of the functional and personal scope of application of the collective agreements; extension of the validity of the collective agreements concluded at the level of a branch, i.e. section; duration, automatic renewal and termination of collective agreements, etc.

Although the legal framework provides a broad *material scope of issues* that may be the subject of collective bargaining, the parties to the collective bargaining do not sufficiently use of the opportunity for thorough and substantive collective bargaining. The normative part (i.e. the working and employment conditions) of the content of the collective agreements is usually reduced to issues that are regulated by the Labour Relations Law either in the form of minimum standards, or by explicitly referring to the collective agreement for their further regulation. In rare cases, collective agreements regulate other labour relations issues, or other issues related to labour relations that are not regulated by law, and therefore they have the character of primary normative provisions. The situation is similar when it comes to the collective agreement hierarchy – the lower-ranking vis-à-vis the higher-ranking collective agreements. Most of the collective agreements are copying each other, without adequately reflecting the specific sectoral interests and needs of workers and employers. Moreover, in certain sectors that employ a large number of workers (trade, transport, construction) and which were significantly affected by the crisis caused by the COVID-19 pandemic, no collective bargaining, i.e. no specific collective agreement has been concluded.

North Macedonia's collective bargaining system recognizes *the principle of favour* in labour relations. However, in practice there are certain ambiguities regarding its implementation in the context of the hierarchically different levels of labour law sources.

The collective bargaining system in North Macedonia is based on a sectoral, i.e. vertical approach. In principle, there is collective bargaining in the private and public sectors which takes place at three *levels* (national, branch,

i.e. section and employer) and may result in the conclusion of a General collective agreement for the private or public sector, Specific collective agreements for certain branches, i.e. sections belonging to the private sector or to certain public enterprises or institutions and Individual collective agreements with private employers or public sector employers. In order to differentiate collective bargaining in the public versus the private sector, the Labour Relations Law determines the functional scope of application of the General Collective Agreement for the public sector. Among other entities (state bodies, local self-government units, institutions, public enterprises), the Law stipulates that collective bargaining in the public sector includes legal entities that perform activities of public interest. Such an ill-suited formulation leads to an unrealistic situation, where, formally, the GCA for the public sector would be applied to certain private institutions that perform activities of public interest (e.g. private kindergartens, schools and universities, hospitals, nursing homes, etc.) or, at least, it would be unclear, whether collective bargaining in the said private institutions falls within the functional scope of the public or private sector collective bargaining. Similar dilemmas are faced by the collective bargaining with the independent performers of activities of public interest (enforcement agents, notaries and so forth), as well as in several economic activities (energy, communal activities, transport, etc.) operated by employers who by their functional characteristics belong to both the private and the public sector. The new Labour Relations Law is expected to address these dilemmas by introducing more adequate criteria for distinguishing between collective bargaining in the public versus the private sector (for example, whether an enterprise is in majority state or private ownership or whether is financed from state budget funds or self-financed).

North Macedonia's labour legislation establishes a solid legal framework for extra-judicial (out-of-court) amicable settlement of collective labour disputes through conciliation, mediation and voluntary arbitration. Despite the parallel existence of diverse "channels" for amicable settlement of collective labour disputes, parties rarely entrust "external" facilitators (conciliators or arbitrators) with the resolution of such disputes. In the absence of any official data, anecdotal evidence shows that the number of successfully resolved collective disputes by conciliation in North Macedonia is in single digits. The reasons for this situation could be sought in the lack of will, information and trust of the parties involved in the collective labour disputes in the legal mechanism for peaceful settlement of la-

bour disputes and impartial and professional conciliation. In the future, additional efforts are needed, both in informing and educating workers' and employers' organizations about the benefits and significance of conciliation in the overall development of social dialogue, and in strengthening the capacity of professional conciliators and arbitrators in resolving labour disputes.

Recent trends of collective bargaining in Türkiye

Kübra DOĞAN YENISEY*

1. LEGAL DEVELOPMENT OF COLLECTIVE LABOUR RIGHTS

1.1. Historical trends of collective bargaining

Under Turkish law, though the freedom of association was recognized by the first Constitution of 1924, there had been many restrictions and prohibitions in terms of the establishment of trade unions and strikes. It was only after the Second World War that unions achieved a clear legal status with a specific act. Act No. 5018 was adopted in 1947; nevertheless, restrictions in respect of the right of workers to establish and join trade unions have always been part of the statutory regulations[1].

The Constitution of 1961 guaranteed trade union rights, in today's context, for the first time. It was in July 1963, special acts (Act No. 274 on Trade Unions and Act No. 275 on Collective Agreement, Strike and Lock-out) which governed trade unions, collective bargaining and the right to strike and lock-out were adopted by the Parliament. The legal and sociological reasons behind this development are explained as follows: "*Among the major factors facilitating the introduction of the new industrial relations system, one could cite the impact of external forces, such as ILO Conventions and Recommendations, as well as softening government attitudes towards organized labour, the emerging belief that collective bargaining with the right to strike was an indispensable component of pluralistic democracy, and the threats triggered by the gradual growth of left-wing ideologies in Turkish society. The adoption of a decentralized decision-making system in industrial relations was viewed as an urgent matter despite the resistance of certain anti-union forces. But the most salient feature was the fact that these new rights, for which workers in the West had striven for almost a*

* Professor of Labor and Social Security Law at Istanbul Bilgi University, Faculty of Law.

1. See T. Esener/Y. Bozkurt Gümrükçüoglu, 2017, Sendika Hukuku, 2. ed., Istanbul, pp. 15-19.

century, were granted rather abruptly from above. Despite the sporadic demands of Türk-CF for the right to strike during the late 1950s, the new legislation could not be viewed as an outcome of continued pressures by workers from below."[2] During the 1960s and 1970s, trade unions expanded, and Türkiye witnessed the most vivid and controversial industrial relations in its history.

The interventionist approach which brought democracy in the 1960s was the cause for its restrictions in 1982. The basic allegation was that trade unions did not exercise their liberties in a due manner. Following the military intervention, the Constitution of 1982 recognized one more time trade union freedoms with lots of restrictions. Acts No. 2821 on Trade Unions of 1982 and Act No. 2822 on Collective Agreement, Strike and Lock-Out which were passed in 1982 received harsh criticisms from the ILO's supervisory bodies[3]. Some of these restrictions have been removed by different constitutional amendments in 1995, 2001 and 2010. Act No. 6356 on Trade Unions and Collective Bargaining, which replaced Act No. 2821 and Act No. 2822 in 2012, maintains the main structure of repealed acts with some improvements in terms of compliance with the ILO principles.

The historical development of collective labour rights thus reveals a paternalistic model rather than self-evaluated industrial relations system. The Constitution empowers the legislator to regulate the conditions and procedures to be applied in exercising trade union rights. Up until the end of the 1990s, the State was the largest employer in the manufacturing sector as a result of the Keynesian policies of the 1930s. Those working in public enterprises have been recruited with an employment contract and subjected to the same legal framework as those recruited in the private sector. Nevertheless, unionisation has always been less challenging in public enterprises compared to private ones. Therefore, the union density and coverage of collective bargaining have always been higher in the public sector. The State has always been the biggest actor both as a designer of the system, as well as an employer.

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2. T. Dereli, 2013, Labor Law and Industrial Relations in Türkiye, Kluwer Law International, no. 34, p. 36.
3. K. Dogan Yenisey, 2006, "On the Way to Attain a Free Exercise of Trade Union Rights and Free Collective Bargaining", in An Era of Human Rights, International Legal Essays in Honour of Jo Carby-Hall, (ed. D. Ryland), Barmarick Publications, pp. 215-249.

As of July 2022, there exist more than 200 trade unions in Türkiye. 60 out of 200 unions reach the required legislative threshold for signing collective bargaining, and more than 90 % of these trade unions are affiliated with three main confederations, named Türk-İş (central), Hak-İş (right wing), and DISK (left wing) by their political views[4]. It should be underlined that one of the characteristics of Turkish unionism is the intra-union rivalry between unions affiliated with different confederations[5].

1.2. Constitutional guarantees of collective labour rights

The Constitution of 1982 guarantees the right of workers and employers to establish and join trade unions (art. 51), the right to bargain collectively (art. 53) and the right to strike, and the lock-out (art. 54).

According to Article 51 of the Constitution, workers and employers are free to establish unions, as well as upper-level organizations to protect and promote their economic and social rights and interests in labour relations. The right to unionise has been recognized only for workers for a long time. Following the ratification of ILO Conventions Nos. 87 and 151 in 1993, public servants' right to establish and join unions, as well as the right to collective bargaining were recognized and guaranteed by Article 53 of the Constitution. Accordingly, Law No. 4688 on Public Servants Trade Unions and Collective Bargaining was adopted in 2001.

Article 53 of the Turkish Constitution provides that employees and employers have the right to conclude collective agreements in order to regulate reciprocally their economic and social position and conditions of work. The autonomy of collective agreement is also guaranteed, even in an implicit manner, by the Constitution. The word "union" denotes both employees' and employers' organizations in Turkish legislation.

Trade unions have a monopoly on representing workers in the workplace. *De facto* workers' groups have no rights as regards collective negotiation. The right to information and consultation in undertakings or establishments does not exist under Turkish law. The only example for workers' representatives may be found in Article 20 of Act no. 6331 on Occupa-

4. For a closer look at three confederations see A. Birelma, 2018, Trade Unions in Türkiye 2018, Friedrich Ebert Stiftung, pp. 16-21.
5. B. Uçkan, 2002, Türkiye'de Sendikalar Arası Rekabet, Selüloz İş Sendikası Yayını, pp. 123et seq.

tional Health and Safety, which was inspired by Directive 89/391/EEC. As a whole, social dialogue mechanisms are quite weak under Turkish law[6].

2. MAIN FEATURES OF TURKISH MODEL

2.1. Industrial unionism

Under the Turkish system, only industry-level unions could be established. In order to strengthen trade unions, the Parliament sought to establish a centralized union model in 1982. Therefore, the sole organizational principle was "national-industrial unionism". Thus, workplace and craft unions were prohibited (art. 3/3 of Act No. 2822). Though the prohibition was removed, the new Act No. 6356 maintained the same principle, industrial unionism, while giving a definition to the term "trade union". According to Article 1/ğ of Act No. 6356, a trade union is "the organizations having legal personality to carry out activities in a branch of activity established by the association of at least seven workers or employers in order to protect and promote their common economic and social rights and interests in labour relations"[7]. Therefore, industrial unionism is still the main organising model under Turkish law[8].

It is a model of pluralism in the sense that employees and employers are free to form different unions in the same branch of industry. Industries in which unions could be established are also determined by Act. There exist twenty industries in that unions could be organized (art. 4 and Annex of Act no. 6356): (1) Hunting and fisheries, agriculture and forestry; (2) Food industry; (3) Mining and stone quarries; (4) Petroleum, chemicals, rubber, plastic and medicine; (5) Textile, ready-made clothing and leather; (6) Wood and paper; (7) Communication; (8) Printed and published materials and journalism; (9) Banking, finance and insurance; (10) Commerce, office, education and fine arts; (11) Cement, clay and glass; (12) Metal; (13)

6. G. Burcu Yıldız, 2021, "Türkiye: Enhancing social partners' capacity and social dialog in the new world of work", in *The New World of Work,* Edward Elgar Publishing, pp. 493-495.
7. For a translation of Act No. 6356 on Trade Union and Collective Agreements see https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/91814/106961/F2018685492/TUR91814%20Eng.pdf
8. See K. Doğan Yenisey, 2013, "Sendikal Örgütlenmede İşkolu Esası ve İşkolunun Belirlenmesi", Çalışma ve Toplum Der., 39, p. 46; Esener/Bozkurt Gümrükçüoğlu, 2017, pp. 99-103; F. Şahlanan, 2022, Toplu İş Hukuku, Istanbul, pp. 35-44.

Construction; (14) Energy ; (15) Transport ; (16) Shipbuilding and maritime transportation, warehouse and storage; (17) Health and social services ; (18) Accommodation and entertainment ; (19) Defence and security ; (20) General affairs.

2.2. Collective bargaining: Decentralized structure

2.2.1. The level of collective bargaining: Workplace

In Turkish law, a collective agreement may be concluded at one level: workplace (establishment). The industry-level collective bargaining does not exist in the system. Due to the complexities arising from a multilevel collective agreement model, the legislator adopted a simpler, one-level collective bargaining model in 1982.

There exist three types of collective agreements: workplace, enterprise and group agreements. The principal bargaining unit is the workplace. Nevertheless, if an employer has several workplaces in the same branch of industry, only one collective agreement named enterprise agreement shall be made (art. 34/2 of Act No. 6356). Thus, the enterprise has a specific definition for the purpose of collective bargaining. It should be noted that the scope of an enterprise agreement may be different from the scope of the company agreement, while a company may have workplaces established in various industries. Under Turkish law, the workplace, and enterprise in the sense of composing many workplaces established in the same industry, are compulsory bargaining units. Thus, social partners have no discretionary power in the designation of the bargaining unit.

A group collective agreement is concluded between a labour union and an employers' union to cover the workplaces and enterprises in the same branch of industry belonging to more than one employer (Art. 34/3 of Act No. 6356). The necessity for an industry-wide collective agreement is offset by the multi-employer group agreement. The parties to a group collective agreement are the labour union organized in the workplaces and the employers' union whose members are employers who own workplaces. Unlike workplace and enterprise agreements, group agreements are not held compulsory by the legislation. Therefore, the parties may opt for several workplace and enterprise agreements or a group agreement. The metal industry is the most known branch of activity for multi-employer group agreements.

Act No. 6356 provides a new agreement named framework agreement. A framework agreement is concluded between a labour union and an employers' union affiliated with confederations represented in the Economic and Social Council (art. 2/1, b of Act No. 6356). Framework agreements may cover topics concerning vocational training, health and safety at work, social responsibility and employment policies (art. 33/3 of Act No. 6356). Though its legal nature is debated, the framework agreement is not legally binding and has no direct and mandatory effect[9]. The social partners are enabled to create policies, therefore the framework agreement has the potential to recover the absence of social dialogue mechanisms in Türkiye[10]. Nevertheless, the ten years of experience with Act No. 6356 have not met expectations.

One may argue for the active use of extension mechanisms to recover the absence of industry-wide collective agreements. According to Article 40/I of Act No. 6356, at the request of any of the workers'' or employers' unions or any of the employers within a branch of activity, or the request of the Minister of Labour and Social Security, the President of the Republic may extend a collective agreement. Only collective agreements concluded by a trade union representing the largest number of members in the branch of the industry may be extended in whole, or part or after making the necessary changes. It should be noted that there exist very few extensions in practice. Trade unions avoid, in general, requesting the extension due to intra-union rivalry. Moreover, small and medium-sized enterprises have a considerable place in the economy, and the extension of collective agreements concluded for the workplaces owned by big companies requires detailed adjustments[11].

9. Those who argue that framework agreements cannot be qualified as collective agreement see T. Canbolat, 2013, Toplu İş Sözleşmesinin Düzeyi ve Türleri, Istanbul, pp. 149-150; Şahlanan, 2022, p. 342; those who argue that framework agreements are legally deemed *sui generis* collective agreement see C. Tuncay/F. B. Savaş Kutsal, 2019, Toplu İş Hukuku, 7. ed., Istanbul, pp. 248-249; M. Sur, 2022, İş Hukuku, Toplu İlişkiler, 10. ed. Ankara, pp. 301-302; see also Ş. Kılıç, 2019, Türk Hukukunda Grup Toplu İş Sözleşmeleri ve Çerçeve Sözleşmeleri, Istanbul, pp. 352-359.
10. Sur, 2022, pp. 301-310.
11. See G. Baycık, 2019, Avrupa Birliği Üye Devletlerinde Teşmil Uygulaması ve Türkiye İçin Öneriler, ILO, Ankara, pp. 40-48.

The framework agreement for public collective agreements is another new tool implemented by supplementary article 2 of Act No. 6356. According to this new article, the government, public employers' unions, and confederations for workers' unions are also entitled to make a framework agreement for public collective agreements. These framework agreements, unlike the one cited above, are legally binding for public institutions and trade unions affiliated with the confederation that is a party to the agreement. Since only trade unions have the legal capacity to conclude binding collective agreements in Türkiye, admitting confederations as a party to an agreement is an exception in the collective bargaining system. Even if the legal regulation is widely criticized[12], framework agreements enable social partners to bargain working conditions on the sectoral level in the public sector[13] and such a tool enables more employees to enjoy collective bargaining.

2.2.2. Parties to a collective agreement

Although Turkish labour law is very much influenced by Swiss and German labour laws, the collective bargaining structure is shaped upon the North-American bargaining model. The principle of exclusive representation is the distinguishing feature of this model. Under this principle, the representative union has the authority to represent all employees in the bargaining unit, regardless of their trade union membership or consent; moreover, the designation of a trade union as representative is determined by the majority of employees working in the bargaining unit.

A collective agreement shall be concluded between two competent parties: a labour union and an employers' union or an employer not affiliated with a union. Confederations do not have the legal authority to conclude binding agreements. The competency of the labour union is dependent on whether it has the majority in the bargaining unit. Under Turkish law, only one collective agreement may be concluded for the collective bargaining unit.

12. Ö. Ekmekçi, 2019, Toplu İş Hukuku Dersleri, 2. ed., Istanbul, p. 255-260.

13. B. Uçkan Hekimler, "Türkiye Kamu Sektöründe Yeni Bir Endüstri İlişkileri Sistemine Geçişin Habercisi: Kamu Kesimi Toplu İş Sözleşmesi Çerçeve Anlaşma Protokolleri", 2019, Çalışma ve Toplum Der., p. 911-914; Şahlanan, 2020, pp. 345-346.

Act No. 6356 provides two preconditions to recognize the competence of a labour union to be the sole signatory to a collective agreement (art. 41 of Act No. 6356): first, the labour union must have as members a minimum of one per cent of workers engaged in the industry where the union is active. Nevertheless, since certain industries are merged, and the number of industries is reduced by Act No. 6356, a requirement of one per cent of general representation is still relatively high for many labour unions.

To determine the representation of one per cent of employees in the branch of activity, the statistics published by the Ministry of Labor and Social Security in January and July of each year are to be used. The membership figures of statistics are valid until the next statistics are published. Any interested party may challenge the accuracy of the statistics and bring an action before the court within 15 days of their publication (art. 41/5 of Act No. 6356).

The labour union which satisfies the first precondition should also represent members of more than half of the workers in the workplace. All employees, including sales personnel in the field, and those employed on a part-time, on-call, temporary or seasonal basis, are taken into account while determining the majority status of the labour union. The employees of subcontractors are not counted among this group[14].

If an enterprise agreement is intended, the trade union should represent 40 per cent of the workers on the basis of all workplaces, regardless of the number of its members in each workplace. If there exists more than one labour union which represents as members 40 per cent or more in the enterprise, the labour union which has the largest number of members shall have the competency to conclude a collective agreement. As regards a group agreement, wherein different workplaces belonging to different employers are concerned, the labour union must meet the majority condition in each workplace owned by different employers separately.

This detailed system requires a competent authority to verify whether the preconditions are satisfied. It should be noted that the Ministry for Labour and Social Security has no right to determine the competent labour union for collective bargaining. Nevertheless, one should admit the important intervention of the Ministry of Labour in the competency process.

The recognition process starts with the application of a trade union to the Ministry of Labour and Social Security, requesting to recognize its

14. Şahlanan, 2022, pp. 378-379.

competency. The Ministry shall take into account the notifications to the Social Security Institution while determining the exact numbers of workers in the branch of industry. If the Ministry determines the trade union competent in terms of representing the required number of workers in the concerned workplace, as well as the in the branch of industry, the Ministry shall communicate the application, within six working days, to other workers' trade unions active in the same branch of activity and the employers' trade union or the employers (art. 42/1, 2 of Act No. 6356).

If the representativeness of a trade union is challenged, which is often the case, it is up to the labour courts to resolve the dispute. All addressees of such communication, any workers' or employers' union, as well as employer receiving such communication, may apply to the competent court within six working days after the receipt of such communication, disputing the competence of either one or both of the parties or claiming that as a trade union, they have the required majority in the workplace or enterprise (art. 43 of Act No. 6356). Such an objection has the effect of suspending the competency procedure (art. 43/5 of Act No. 6356). These lawsuits, in most cases, take a long time to be resolved. The representativeness of a union is recognised in accordance with its members out of the total number of workers recruited at the date of application. Therefore, even if some of the union's members are dismissed during the litigation does not affect the representativity of the union. Nevertheless, there exist cases where the competency of the union was recognized, however, the union lost all its members in the concerned company during the long-lasting legal litigation[15].

2.3. Bargaining procedure: Detailed legal regulation

Both parties have an obligation to bargain after a collective bargaining invitation is issued. The labour union will lose its competency if it does not show up for the first meeting within 30 days of the invitation date (art. 47/2 of Act No. 6356). Therefore, the loss of competency is the sanction for the labour union's absence. Act No. 6356 sets a 60-day time restriction on negotiations in order to compel the invited party to engage in negotiations. 60 days begin as of the date of first meeting (art. 47/3 of Act No. 6356).

One of the parties must notify the competent labour authority (competent administrative body) in writing of the situation within six working

15. For problems arising from the competency procedure see M. Özveri, 2013, *Türkiye'de Toplu İş Sözleşmesi Yetki Sistemi ve Sendikasızlaştırma (1963-2009),* Ankara.

days if the parties were unable to reach an agreement or if the 60-day window for collective bargaining expires without one. The meditation should be started (art. 50 of Act No. 6356).

The competent labour authority runs the mediation process. The mediator may be chosen by the parties to the collective bargaining if the mediator's name is on the official mediators' list. The parties lack the power to select a mediator from outside the list. If the parties were unable to agree on a candidate, upon the request of the parties, the competent authority designates the mediator from the official list within six working days with the cooperation of at least one party. If no party shows up, the mediator is assigned immediately by the labour authority (art. 50/1 of Act No. 6356).

The mediator's mandate is valid for 15 days beginning with the notice. This time may be extended by the parties for a total of six working days. The mediator shall use all reasonable efforts to mediate a resolution between the parties. All information and documents that the mediator requests from the parties in the dispute must be provided. However, the mediator must submit his report to the competent labour authority together with his recommendations and proposals if the parties are unable to reach an agreement by the extension of the time frame designated for mediation (art. 50/5 of Act No. 6356).

2.4. The nature and the derogations of collective agreements

The provisions of the collective agreement are divided into two parts: normative clauses and obligatory clauses. Normative clauses regulate the conclusion, content and termination of individual employment contracts. The wages and wage supplements, such as overtime pay, premiums, bonuses, and monetary and non-monetary fringe benefits are typically deemed as the core component of a collective agreement. Additionally, frequent topics covered by the collective agreement include working hours, paid time off, health and safety, disciplinary panels, grievance procedure and shop stewards' rights. It is hard to give an exact picture of collective autonomy, while it is difficult to access to the content of collective agreements because of union rivalry. In the public sector, the framework agreement protocol for collective agreements mainly provides the wage level and the appointment of subcontractor workers to permanent positions[16].

16. https://www.turkis.org.tr/o5ralustcgku-pdf/;https://www.csgb.gov.tr/media/84760/c-erc-eve_ 20210811.pdf.

The normative clauses of a collective agreement have a direct and automatic effect on individual employment contracts. The principle of favour is the main principle, which operates the relationship between statutory rules and collective agreement. Therefore, collective agreements may include clauses that are more advantageous to employees than the current legislative provisions. There exist a limited number of absolute mandatory statutory provisions, which cannot be derogated even in favour of the employee. The ceiling of the severance indemnity and the amounts of indemnities that would be due in case of the non-reinstatement of the employee by the employer are examples related to the individual employment relationship (art. 14 of Labour Act No. 1475 and art 21 of Labour Act No. 4857). Except for these two absolute mandatory provisions, the parties to a collective agreement have, in principle, the authority to improve working conditions in the bargaining unit. In terms of wages, the minimum wage is valid for all employees in all sectors. The social partners have no authority to reduce the amount of statutory minimum wage. Nevertheless, they may fix a higher minimum wage valid for the bargaining unit.

Under Turkish law, flexibility became a controversial topic in the 1990s. Labour Act No. 4857 enables, in a very limited number of provisions, social partners to derogate statutory rules, such as trial period (art. 15 of LA No. 4857) and balancing period opportunity on the model of EU Directive 93/104. Therefore, clauses which bring flexibility in the employer's favour are excluded from the collective bargaining practice.

The financial and economic choices of a company are often considered among the managerial prerogatives of an employer in Türkiye and are not covered by a collective agreement. Many collective agreements, however, impose restrictions on employers' ability to hire, transfer, and promote workers by requiring the consent of the signatory union. The example of the most extended employer's prerogatives addressed by the collective agreement is related to subcontracting issues.

When there is an economic downturn, the parties to a collective agreement may decide to reduce some financial benefits and working hours through a procedure that alters the collective agreement[17]. Nevertheless, it is hard to consider collective agreement as a generic tool to ad-

17. P. Soyer, 2002, "İktisadi Kriz Döneminde Toplu İş Sözleşmesinin Taraf İradelerine Göre Uyarlanması", Ekonomik Krizin İş Hukuku Uygulamasına Etkisi, pp. 155-169; M. Engin, 2009, "Toplu İş Sözleşmesinni Normatif Hükümlerinin Taraflarca Değiştirilmesi", Sicil, Mart 2009,13, pp. 142-147.

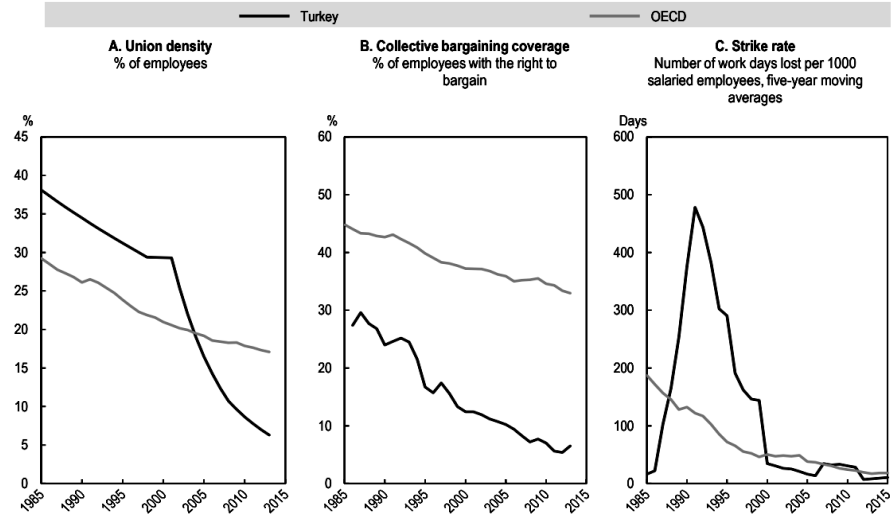
dress economic issues. Since collective agreements are concluded at the workplace level, social partners take responsibility for finding solutions to financial problems occurring at the company level.

3. OUTLOOK OF COLLECTIVE LABOUR RIGHTS IN PRACTICE

3.1. Slight increase in union density and collective agreement coverage

Trade unions were powerful enough to coordinate waves of strikes throughout the nation by the first half of the 1990s. The graphics show the trends in industrial relations in Türkiye between 1985 and 2015; a consistent decrease in union density, the coverage of collective agreements and strikes[18]. If not the only reason, extended privatisation and outsourcing practices are among the most prominent reasons behind these decreases.

Figure 1: Union density, Collective bargaining coverage, Strike rate (1985-2015).



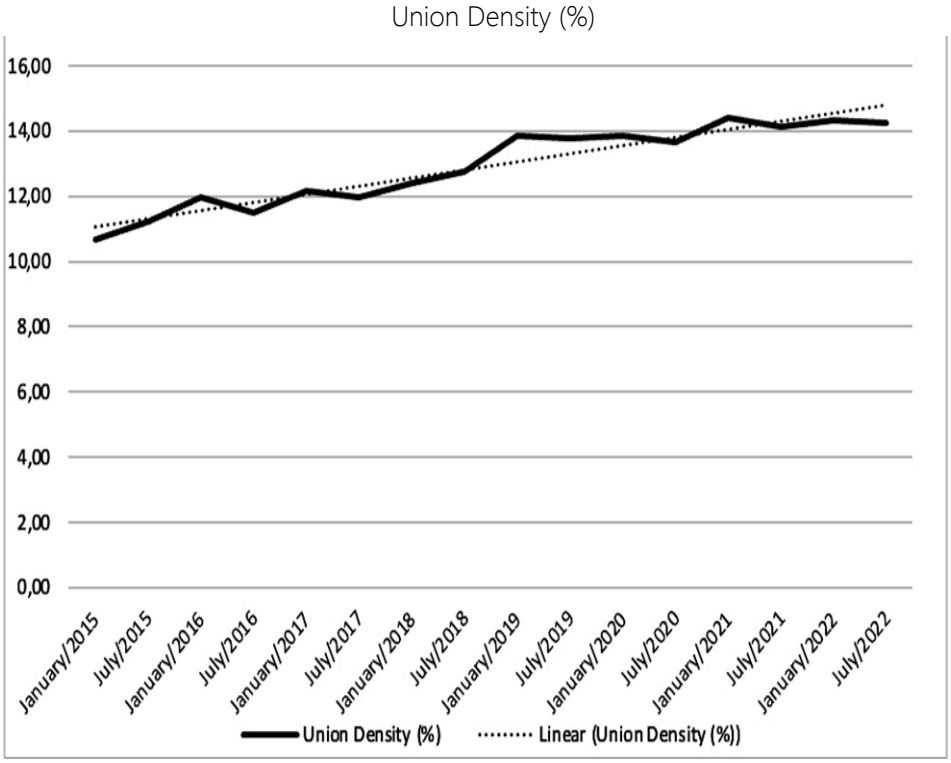
Source: OECD, Collective bargaining in OECD and accession countries: Turkey.

Nevertheless, a slight increase has been observed in recent years. According to the official data released by the Ministry of Labour and Social Security, 14.26 per cent of the total workforce is unionized as of July

18. https://www.oecd.org/employment/emp/collective-bargaining-Türkiye.pdf.

2022[19]. A recent survey on unionization carried out by DISKAR (DISK's research centre) shows the unionisation rate of about 13 per cent[20]. The reason for the variation finds in the informal economy. It should be noted that the informal sector still accounts for about a third of economic activity, and the number of informal workers is taken into account in the later ratio.

Figure 2: Union density in Turkey 2015-2022



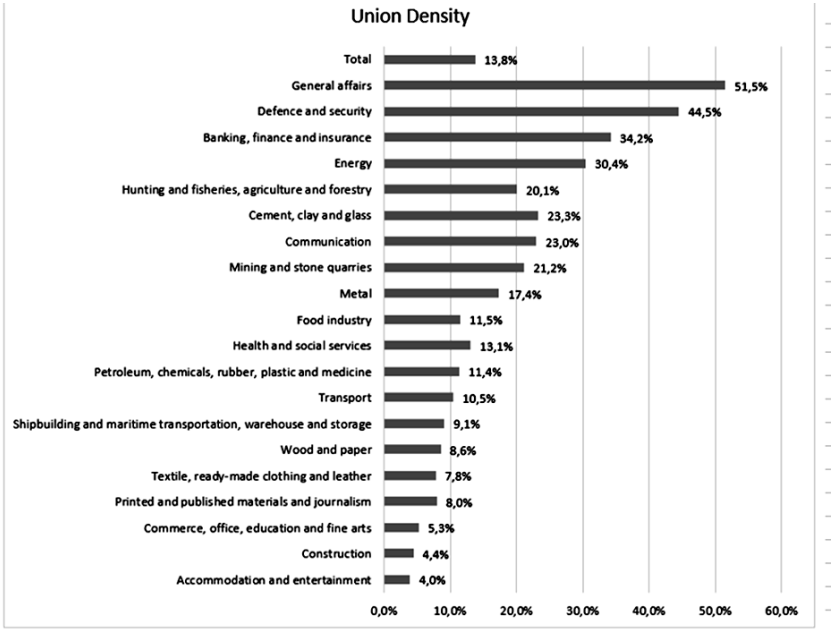
Source: Ministry of Labour and Social Security statistics available at https://www.csgb.gov.tr/istatistikler/calisma-hayati-istatistikleri/sendikal-istatistikler/isci-sayilari-ve-sendikalarin-uye-sayilari-hakkinda-tebligler/

Graphic 2 above displays a slight rise in terms of union density in recent years. Such an increase is expressed by the number of employees recruited by subcontractors operating in the public sector. Since the late

19. https://www.csgb.gov.tr/media/89445/temmuz-2022-isci.pdf.
20. DISKAR, Araştırma Bülteni, 21 Nisan 2022, https://arastirma.DISK.org.tr/wp-content/uploads/2022/04/Salgin-Doneminde-Isciler-Toplu-Is-Sozlesmesinden-Yoksun-Arastirma-Bulteni-1.pdf.

1980s, subcontracting has been a widespread practice in the public sector, and it has always been more difficult for subcontractors' employees to unionise compared to employees in public institutions. Labour Act No. 4857 has brought restrictions to subcontracting practices in the private sector, nevertheless, in 2017, about one-fifth of all public employees were subcontracted. According to a State of emergency decree no. 696 issued on 24 December 2017, subcontracted workers in the public service were given the right to become permanent staff of public bodies for which they are working under subcontractors' payrolls. And about 900.000 subcontractor employees were offered permanent staff positions at public institutions and municipalities. Their unionisation is the main reason for the slight increase in unionisation during recent years[21].

Figure 3. Union density in branches of activity.

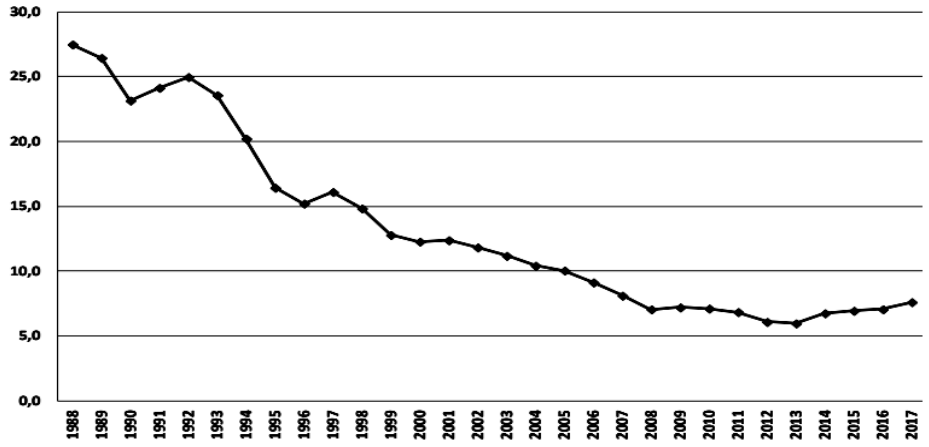


Source: DISKAR, Covid 19 Salgını Günlerinde Türkiye'de Sendikalaşmanın Durumu Araştırması, Istanbul 2020, Graphic 6.

21. Birelma, 2018, p. 6; for a survey on this issue see M. Önder/Ü. N. Zengin, 2018, "Türkiye'de Sendikalaşmayı Etkileyen Faktörler", Sağlık ve Sosyal Politikalara Bakış Dergisi, Güz 2018, pp. 86 et seq.; see also, A. Birelma, 2017, "Subcontracted Employment and The Labour Movement's Response in Turkey", Uncertain Times, Anthropological Approaches to Labor in a Neoliberal World, University Press of Colorado, 261-286.

The graphic above displays the unionisation rate in twenty branches of activities. The top three industries with the highest union density are general affairs (51,5 %), defence and security (44,5 %) and banking, finance and insurance (34,2 %). In all three sectors, the share of the public sector is much higher than the one of the private sector. The following three sectors are energy (30,4 %), cement, clay and glass (23,3 %) and communication (23 %) have a large number of companies privatised and still have an unionised core of employees. The highest union density in the private sector is in the metal industry (17,4 %)[22].

Figure 4: Collective bargaining coverage 1989-2017.



Source: DISKAR, Covid 19 Salgını ünlerinde Türkiye'de Sendikalaşmanın Durumu Araştırması, Istanbul 2020, Graphic 6.

As regards the coverage of collective bargaining, though there is no actual official data; 9,5 per cent of employees are estimated to be under the cover of a collective agreement, and only 5,5 per cent of them is in the private sector[23]. Since the main bargaining unit is the workplace, the coverage of collective agreement is always less than the union density. To increase the scope of collective bargaining, Turkish unions, like those in the

22. Birelma, 2018, p. 14.

23. DISKAR, Araştırma Bülteni, 21 Nisan 2022, https://arastirma.DISK.org.tr/wp-content/uploads/2022/04/Salgin-Doneminde-Isciler-Toplu-Is-Sozlesmesinden-Yoksun-Arastirma-Bulteni-1.pdf

US and the UK, must organize workplace by workplace[24]. According to the statistics of the Ministry of Labour, the number of collective agreements in the public sector is more than the number of those in the private sector.

To conclude, unions face considerable difficulties while organizing in the private sector. In our view, in contrast to the multi-employer bargaining model, the single-employer bargaining model creates strong incentives for employers to pursue anti-union policies. Workplace bargaining brings welfare only to employees working in this unit and increases the costs of the employer. In certain countries with industry-level bargaining models, there is a default wage structure. However, as in the UK and USA, the alternative to negotiated wage setting is the non-unionized market. Thus, there is hardly a need to explain why employers strongly resist unionization[25].

It should also be noted the long and difficult process of recognition of a union's representativeness complicates the unionisation efforts. Research which examined the legal competency system and its effects on the de-unionisation in these workplaces shows that the long period between the union's application for the certificate and the issue of a certificate of competence enables union-busting practices[26].

The general assumption is that decentralized collective bargaining models give more flexibility to the firm than branch-level collective bargaining. Whether this model has brought flexibility to the system, the Turkish experience shows that decentralization does not bring flexibility *per se*. One-level, single-employer bargaining model with a majority condition and union rivalry in small bargaining units leads unions to adopt a rigid attitude towards flexible working conditions[27].

24. Birelma, 2018, p. 4.

25. K. Doğan Yenisey/B. C. Ataman, 2018, "Decentralized Collective Bargaining: A Solution to Economic Crisis? –The Case of Türkiye", in Collective Bargaining in Times of Crisis, (ed. S. Laulom), Bulletin of Comparative Labour Relations, 99, pp. 184-185.

26. Özveri, 2012, pp. 327 et seq.; Birelma, 2018, pp. 4-6.

27. Doğan Yenisey/Ataman, 2018, pp. 169-186.

3.2. Settlement of collective labour disputes: Mediation perceived as a perfunctory step

The parties consider the mediation process as a legislative burden to overcome before the strike. Recent research[28] points out that in more than 50 per cent of cases, the parties meet only once during the mediation period, proving they consider mediation a perfunctory step. Interestingly, the success rate of mediation on the group level, particularly in the metal sector, is higher than on the enterprise level. Also, the affiliated workers' confederation seems to affect the outcome of the mediation mechanism.

It should be noted that the Turkish industrial relation system has a conflict-based nature without a tradition of social dialogue; this tradition also affects the success rate of mediation. In addition, the restricted power of parties in the mediation process, such as choosing the mediator, the time limits, etc., prevents the mediation from being effective[29].

3.3. Narrowing down bargaining agendas

Even if unions are organized at the industry level, they have no legal tools to regulate working conditions on the upper levels, sectoral or national. Framework agreements, except agreements for public collective agreements, are not binding. Therefore, social partners play a role in the formation of social policies and legislative acts, but they lack binding regulatory devices. Issues such as migration, and young or old employees do hardly find a place in collective agreements. This result confirms the observation that countries with narrow or narrowing down bargaining agendas are also those with weak multilevel and coordinated bargaining systems[30].

28. Ş. Baştürk / S. Yıldızbağdoğan / İ. Kılkış, 2018, "Türkiye'de Toplu İş Uyuşmazlıklarında Arabuluculuk Sisteminin Etkinliği Üzerine Bir Analiz", *SGD,* 2018, Vol. 8, No. 1, pp. 33-66.
29. Şahlanan, 2020, pp. 525-526; Sur, 2022, p. 428.
30. Eurofound (2015), *Collective bargaining in Europe in the 21st century,* Publications Office of the European Union, pp. 36-37.

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Main trends of collective bargaining in Romania

Raluca DIMITRIU*

1. HISTORICAL TRENDS

Although some embryonic trade unions were formed during the 19th century, the first law governing them was only passed in 1920. The collective bargaining agreement was expressly regulated for the first time by the 1929 Collective Bargaining Act.

But free collective bargaining took place in Romania for a short time. During the communist period, although formally collective agreements continued to exist, they did not represent the expression of the real will of the employees, deprived of the possibility of association in free trade unions. The regulation of labour was done by law, not by collective bargaining, and even today some effects of this approach can be felt, as well as a certain expectation on the part of workers to be protected in detail by legal norms, not by negotiated norms.

Indeed, in Romania until 1990 there were practically no social partners (neither employers but, in fact, no unions, in the proper sense and in terms of their fundamental objectives) - so the social dialogue began by being rather the result the application of legal norms, rather than a social reality that the law should only put on the page. Against the background of the non-existence of social dialogue, the role of the law was to create it, and not, as has happened in most other European systems, to regulate a dialogue that is already taking place.

After 1990, successive regulations on collective bargaining were adopted, in application of the constitutional provisions on collective bargaining.

According to Article 51 (5) of the Constitution, "the right to collective bargaining in labour matters and the binding nature of collective agreements shall be guaranteed". By this provision, Romania meets its obligations arising from the ratification of International Labour Organization

* Professor Faculty of Law, Bucharest University of Economic Studies.

Conventions (especially Convention no. 87/1948 on Freedom of Association and Protection of the Right to Organise and Convention no. 98/1949 concerning the Right to Organize and Collective Bargaining).

The initial law of 1991 was an embryo of legal norms governing collective bargaining and collective bargaining. It was followed by the much broader Law no. 130/1996, which introduced, under the influence of German law, the concept of "collective disputes" (conflicts of interests), which could be triggered in the event of the failure of collective bargaining. Currently, collective labour relations are governed by the Social Dialogue Law no. 62/2011[1], a piece of legislation perceived as representing a step back in the regulation of collective bargaining and social dialogue, especially through the excessive conditions imposed for the acquisition of representativeness by the social partners.

2. CURRENT LEGISLATION (2022)

The click in terms of collective bargaining, the trigger for an entire decade of weakening social dialogue was represented by the Social Dialogue Law no. 62/2011, which has been conceived in the context of the economic crisis.

There are many debates on the role of the legislator in relation to social dialogue. Essentially, when it intervene in the space of social dialogue, legislation may in some cases *allow* the social partners to build their own legal constructions and in other cases may *stimulate* the creativity of social partners, encouraging self-regulation. Basically, in Romania the legislation does neither. But it created a 'fatal cocktail' of measures that competed to discourage collective bargaining, at all levels, by:

– imposing extremely demanding, difficult or even impossible conditions to be met by trade unions in order to represent employees in collective bargaining. Currently, in Romania, the union's representativeness is conditional upon the existence of at least half plus one of the total number of employees in the company. The new bargaining threshold (a change from the previous threshold of one third of workers) is extremely difficult to achieve in practice. In some

1. Published in the Official Gazette of Romania no. 322 of 10 May 2011. This regulation has replaced the previous Trade Union Law no. 53/2003, the Law no. 356/2001 of the employers' associations, the Law on the collective labour agreements no. 130/1996 and the Law on Resolving Labour Conflicts no. 168/1999.

views, it does not meet the requirements of the ILO's Committee on Freedom of Association. As a result of this change, unions which traditionally represented employees in collective bargaining could not do it anymore because they no longer fulfilled the new representativeness criteria;

- diminishing the role of the non-representative unions, which have left, in the current architecture of the labour legislation, with a minuscule role;
- encouraging the negotiation and conclusion of collective agreements at company level not by the unions, but by the employees' representatives.[2] Indeed, collective bargaining can also be carried out by non-unionized employees' representatives. This option is the one often embraced in practice, given that the conditions of union representation are, as we have shown, very difficult to fulfil: today, over 90% of collective agreements concluded at company level are negotiated by employees' representatives.[3]
- detailed regulation of labour relations. The more detailed regulations are, the less room is left for collective bargaining. When the legislator takes over the reins of governing labour relations, down to the smallest detail, it would seem at first sight that employees are more protected than in the case of a negotiated regulation. In reality, legal norms can never have the nuances of collective labour agreements and cannot be tailored to meet the specific needs of certain industrial realities. This is why European directives applicable to employment relationships often refer to the options of the social partners, allowing them to derogate, detail or negotiate the rules of application[4].

2. Art. 221 (1) of the Labour Code stipulates: 'For employers with more than 20 employees and no representative trade union organizations established by law, the interests of employees may be promoted and defended by their representatives, elected and mandated especially for this purpose'.
3. S Guga, C. Cincan, C. Constantin, *Reconstruction of employee rights in Romania*, Friedrich-Ebert-Stiftung, București, 2016, p. 32.
4. See also, R. Dimitriu, *Recent Challenges to Collective Bargaining in Romania*, în "Liber amicorum Wilfried Rauws", Eds: Koen Nevens, Kristof Salomez, Evelien Timbermont, Guido Van Limberghen, Ed. Intersentia, Belgium, 2021, p. 585-596

3. CHALLENGES OF THE CURRENT ROMANIAN TRADE UNIONISM

Although there are no concrete public data on the unionization rate in Romania at present, most estimates place this rate at 20%,[5] below the European average. This decrease was determined, among other things, by the current Law on Social Dialogue, which amputated some of the rights of trade unions.

Indeed, unionization is difficult, and the legal condition of a minimum number of 15 members (from the same company) for setting up a union, makes organisation impossible in small companies, prevalent in Romania. The too high threshold required by law for the acquisition of representativeness, or the excessive legal obstacles to trigger a strike can be added here, to find a legislative reality that is hostile to trade union organization.

Compared to the first decade of the twenty-first century, trade unions have experienced a massive decrease in membership in Romania : -37.0%. "While such decreases were almost inevitable in the CEE countries in the post-millennium decade, given the abandonment of 'compulsory' membership in the 1990s – a 'relict' of the communist past –, this trend has not been reversed but continues today"[6].

In the 1990s, trade unions in Romania were considered among the strongest in Eastern Europe, in terms of trade union density and their influence on labour law, before the outbreak of the economic crisis[7]. But with the economic crisis, the unemployment rate has risen, many employees have left the formal economy, moving to the informal one, a number of companies have closed their doors, all these phenomena having certain impact on the trade union movement and the number of members attracted. Not without effects in terms of public image were the violations of the principle of political independence, through alliances concluded with

5. For instance, 21.4%, according to OECD and AIAS (2021), Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts, OECD Publishing, Paris, https://www.oecd.org/employment/collective-bargaining-database-romania.pdf, p. 2.
6. Kurt Vandaele, *Bleak prospects: mapping trade union membership in Europe since 2000*, ETUI, 2019, p. 12.
7. Carley, M, Weiler, A. and Newell, H. (2007) *Industrial relations developments in Europe 2006*, EIRO http://www.eurofound.europa.eu/publications/htmlfiles/ef0734.htm. See also R. Dimitriu, *Labour Law. Anxieties of the present*, Rentrop and Straton, Bucharest, 2016, p. 251 ff.

political parties and the acceptance of parliamentary mandates by some of the trade union leaders. But, as I metioned, the main event with an impact on Romanian trade unionism recently was the adoption of the Law on Social Dialogue no. 62/2011. This may lead to the conclusion that the decline of the trade union movement is not necessarily a natural and inevitable process, but the result of discouraging legislative measures[8].

Indeed, the pivotal role of a trade union body is the negotiation of the collective labour agreement. However, currently, in Romania, the acquisition of representativeness, on which depends the right to carry out collective bargaining at the unit level, is in turn conditional upon the existence of a number of members representing at least half plus one of the total number of employees in the negotiating unit. Also, at higher levels, the acquisition of representativeness has become difficult, one of the reasons being the way the negotiating sectors are established.

The Law on Social Dialogue has amplified the role and rights of non-unionised employee representatives as an alternative to trade union organization. This was unfortunate, especially for a country where there are no works council, and the non-unionized workers' representatives have not yet proved to be very active. Romanian legislation today allows and even favours non-union collective bargaining, and this approach may discourage unionization. Why would we form a trade union if most of the rights of the union can be exercised by the employees' representatives? However, the alternative of non-union collective bargaining is in fact less favourable to employees. In addition, the practice has already proved the poor use of the institution of the employees' representatives, who rarely shown the demanding force of the trade unions. The diminishing of the rights and powers of the unions to increase the rights and powers of the non-unionised employees can only lead to diminished voice of employees in general.

According to Article 134, introduced by Law no. 1/2016[9], at the collective bargaining, employees are represented by the trade union who obtained representativeness. If the union is not representative, but it is affili-

8. L. Chivu, C. Ciutacu, R. Dimitriu, T. Ţiclea, ILO, Decent Work Technical Support Team and Country office for Central and Eastern Europe in Industrial and Employment Relations Department, (2013), The Impact of Legislative Reforms on Industrial Relations in Romania.

9. Published in the Official Gazette of Romania no. 26 from 14 January 2016.

ated to a representative federation, employees will be represented by that federation. If there is no union, the employees will be represented by employee representatives. Therefore, the employees will be represented not by the union set up at the unit level, which failed to obtain their representation, but by the federation to which it is affiliated.

Besides, somehow contrary to the recommendations of the ILO's Committee on Freedom of Association, the Romanian legislation allocates a minor role to the unrepresentative union. This situation, in the context where the acquisition of representativeness is difficult, as we have seen, has the effect of diminishing the role of trade unions in general.

4. IMPACT OF GLOBALIZATION OF THE ECONOMY

Postmodern reality is one of diversity, renunciation of uniformity, which is directly reflected in the variety of contracts under which work is performed. The tendency to widen contractual diversity is opposed to another trend, which equally reflects the time we are going through: globalisation, accompanied by the abandonment of certain elements of local, cultural or traditional specificity. Indeed, in parallel with the *diversification* of contractual arrangements, we are also witnessing the opposite tendency in the *standardised* hiring arrangements. Often, hiring arrangements are imposed by companies that control national subsidiaries. This is a trend imposed by international economic entities that sometimes disregard the specificity of each country.

The paradox of this situation is that both tendencies – although seemingly in opposition – appear to disadvantage the same contractual parties, namely the ones carrying out the work (i.e. employees).

Globalization has a significant impact on collective bargaining. Relocation of large industries in other countries has (in addition to the loss of jobs) the consequence of leaving an important gap in the trade union movement[10]. Moreover, employers can resist union pressure much better in conditions of globalization, as they can easily relocate businesses in other regions of the world. And even when they do not follow on this threat, remaining in the original country, the very existence of this possibility at any time distorts the conduct of collective bargaining. Confronted with the threat of relocation, unions are sometimes reluctant to impose

10. Stone, K., Cummings, S., (2013), *Labour Activism in Local Politics*, în „The Idea of Labour Law", coord: G. Davidov, B. Langille, Oxford University Press, p. 275.

their demands, something that reinforces the public perception of their inefficiency.

5. COLLECTIVE BARGAINING IN ROMANIA

According to Romanian legislation, the aim of collective bargaining is to conclude a collective labour contract and its procedure is set out in Law on Social Dialogue. The object of collective bargaining is wages and working conditions in the broadest sense of the word (remuneration and introduction of new payment methods, daily and weekly work schedules, holiday arrangements, training, job security, provisions relating to informing and consulting workers, etc.). Regardless of the level at which they are concluded, collective agreements are legally binding and are enforceable in court. Their conclusion is independent of any government intervention.

However, in Romania, one cannot but notice that collective bargaining takes place increasingly more timid and in rather marginal areas. Its results cover a smaller and smaller number of employees.

5.1. Coverage

Unlike the regime previous to the Law on Social Dialogue, the collective labour contract concluded at the level of group of companies and at the sector level shall apply only to those who have concluded them, the contracts no longer have *erga omnes* applicability. Since the collective agreements concluded at the level of the company are few, most employees are currently under no collective labour contracts.

After the entry into force of Social Dialogue Law no. 62/2011 and the elimination of the national level of collective bargaining, the coverage rate of collective bargaining agreements fell sharply from over 90% before 2011 to about a third in 2012. The downward trend continued, reaching 23% in 2016[11] and 20%[12] in 2017. There are no yet official data on the current collective bargaining coverage.

11. J. Visser, ICTWSS Database. version 6.1. Amsterdam: Amsterdam Institute for Advanced Labour Studies (AIAS), University of Amsterdam. November 2019.

12. Estimates. PAN-EUROPEAN TRADE UNION COUNCIL Meeting. ITUC, Bucharest, 12 April 2018, Workers rights in the post-austerity period in Romania.

5.2. Levels

Collective labour agreements are currently concluded at three levels: company, group of companies, and sector. To note that the Law on Social Dialogue changed the levels of negotiation: it removed the national level and replaced the branch level with the sector level.

At each level, the collective labour agreement must comply with the collective labour agreements concluded at a higher level, and all collective contracts, regardless of their level, must comply with the law. Employment contracts must comply with collective agreements and the law.

The law therefore establishes the general labour relations framework; collective agreements substantiate and develop the statutory provisions, and employment contracts materialize the provisions of the collective agreement at company level for each employee. The absence of a collective contract at a certain level entails in principle the applicability of the collective agreement concluded at the higher level.

At each level, there can be several trade unions or employers' organizations, but only one collective labour agreement. This is bargained and concluded exclusively by the representative trade union and employers' organization. Other trade unions and employers' organizations cannot take part in negotiations[13].

5.3. National level

For a time, Romania used to have the unique collective labour contract concluded at the national level, that had to be renegotiated every 4 years, and imposed a unique regime for all employees, it was applicable *erga omnes* and practically dubbed the provisions of the Labour Code. The collective labour agreement concluded at national level regulated in detail, in addition to the legal provisions, the rights of all employees in the country.

The provisions of this agreement were negotiated "at a central level", imposing often excessive conditions for small companies. They did not feel represented in such national negotiations and did not perceive this type of regulation as self-regulation, but rather as coming from outside, very much like a law. The level of detail of national regulation often de-

13. This provision has been declared constitutional by the Decision of the Constitutional Court no 24/2013, published in the Official Gazette of Romania no. 82 of 7 February 2013.

prived collective bargaining at lower levels of its purpose. The social partners had little to add or innovate to what was already mandatory.

Despite these criticisms, the removal of the national level from among the levels of collective bargaining in Romania, which intervened in the beginning of 2011 through the Social Dialogue Law, was met with mixed feelings. Many perceived this situation as a restriction of the principle of free and voluntary collective bargaining, provided for by Article 4 of ILO Convention No. 98, ratified by Romania[14].

The last such general collective agreement applicable at the level of the country was concluded for 2007-2010; the Law on Social Dialogue removed later on the possibility of collective negotiation at the national level.

5.4. Sector level

Government Decision no. 1260/2011 regarding the activity sectors[15] established the 29 activity sectors in which collective labour agreements can be concluded. Subsequently, Law no. 1/2016 for the amendment and completion of the Social Dialogue Law no. 62/2011[16], added that, for the future, the activity sectors will be established by the Tripartite National Council, following the approval by Government decision.

The collective labour agreements at sector level are negotiated by the representative trade union and employer federations. The trade union federations set up at sector level obtain representativeness and therefore the right to negotiate the collective labour agreement if they accumulate a number of members of at least 7% of the employees of the respective activity sector. Similarly, employers' federations are representative if they have as members employers whose units comprise at least 10% of the workforce, except for employees in the budget sector. The nationally representative trade union confederations can participate in the negotiation of collective labour agreements at the level of the sectors of activity in which they have member federations, at the request and based on their mandate.

14. For developments, see R. Dimitriu, *Recent Challenges to Collective Bargaining in Romania*, in "Liber amicorum Wilfried Rauws", Eds.: Koen Nevens, Kristof Salomez, Evelien Timbermont, Guido Van Limberghen, Ed. Intersentia, Belgium, 2021.

15. Published in the Official Gazette of Romania no. 933 of 29 December 2011.

16. Published in the Official Gazette of Romania no. 26 of 14 January 2016.

Currently, the number of collective bargaining agreements concluded at sector level is very small. Indeed, under the law, the course of collective bargaining is dependent upon the extent to which both social partners previously acquired representativeness at this level. Therefore, if the employer organizations do not apply for and do not acquire representativeness, the trade union organizations – even representative – have no one to negotiate with[17].

At higher levels, there is no obligation to initiate collective bargaining, so it will be up to the parties whether or not it will take place. [18] And all these obstacles to collective bargaining at sector level have led to the situation where only two collective bargaining agreements at sector level are currently in force, both in the public sector. Besides, the extension of collective labour contracts, although possible according to Article 143 (5) of the Law on Social Dialogue, was never used.

5.5. Level of group of companies

Representative trade union federations at the level of activity sectors can participate in the negotiation of collective labour agreements at the level of groups of units in which they have affiliated unions, at the request and based on their mandate.

Collective labour agreements concluded at this level are only applicable to employees in the signatory units (no *erga omnes* applicability)

5.6. Company level

At the unit level, the employer negotiates with:

– the representative union. The union's representativeness is conditional upon the existence of at least half plus one of the total number of employees in the company;

17. L. Chivu, C. Ciutacu, R. Dimitriu, T. Ţiclea, ILO, Decent Work Technical Support Team and Country office for Central and Eastern Europe in Industrial and Employment Relations Department, (2013), The Impact of Legislative Reforms on Industrial Relations in Romania.

18. S. Guga, C. Cincan, C. Constantin, *Reconstruction of employee rights in Romania*, Friedrich-Ebert-Stiftung, București (2016), p. 30: 'With few exceptions, workers can currently rely only on their individual bargaining power for individual employment contracts and on the protection afforded by collective bargaining agreements concluded at company level, where they exist'.

- in the absence of a representative union, with a non-representative union, affiliated to a representative federation, together with the employees' representatives;
- with the employees' representatives, if there is no trade union, or if, although it exists, it is unrepresentative and unaffiliated. The employees' representatives are appointed by the general vote of employees in the unit.

If there is no representative trade union at company level, the collective agreement shall be concluded by the representatives elected directly by the employees. Non-representative trade unions can take part in this negotiation provided that they are affiliated to representative federations.

Bipartite collective bargaining in Romania is mandatory for all enterprises with more than 21 employees, according to Article 129 (1) of Law on Social Dialogue. Bargaining is, however, not compulsory at higher levels than that of the enterprise. Even though this obligation is not unique in Europe, it has to be said that to a certain extent the ILO has reservations about the legal provisions establishing the compulsory nature of bargaining. The Committee on Freedom of Association has repeatedly shown that voluntary bargaining of collective labour agreements and therefore the autonomy of the social partners during bargaining constitutes a fundamental principle of union freedom. In order to be efficient, collective bargaining needs to be voluntary and should not resort to constraining measures that might alter this voluntary character.

In fact, as already shown by the Committee on Freedom of Association, no provision of Article 4 of Convention 98 imposes on any government the obligation to resort to constraining measures in order to force the parties to bargain with a certain organization, measures that would clearly change the character of bargaining.

Failure to comply with the obligation to negotiate constitutes a contravention and is sanctioned with a fine from 5,000 lei to 10,000 lei (Article 217 (1) letter b) of the Law on Social Dialogue). However, according to the law, the employer must have the initiative to start collective bargaining 45 days before the end of the previous collective agreement. In other words, if there is no applicable collective bargaining agreement in the unit, the employer is not bound by any time limit for starting collective bargaining.

Certainly, the obligation to bargain does not constitute an obligation to reach an agreement, which would contravene the principle of contractual freedom.

The conditions of representativeness required by the Social Dialogue Law have made it difficult or even impossible to negotiate collectively at the level of the sector of activity, and also very few collective agreements have been concluded at the level of group of units. So the collective bargaining ended by being de facto only manageable at the level of the unit. Collective bargaining is still possible in the absence of representative trade union at the unit level. To note however that "the institution of employees' representatives never worked efficiently, and so taking over certain attributes from the negotiation prerogatives, until now specific only to unions, causes a part of the workers to lose representation"[19].

5.7. Descentralisation of collective bargaining

As traditional expression of the solidarity among workers, collective bargaining – while this solidarity displays signs of dissolution – has diminished its strength and shows a centrifugal, decentralising tendency. The tendency of decentralization is generally associated with the economic crisis, and Romania is not the only case in which the decentralization of collective bargaining has been legally supported, especially in the Eastern and Central European countries.

Apparently, through the disappearance of the Collective Labour Agreement at the national level, the Social Dialogue Law from 2011 privileges the collective bargaining at company level. Under these circumstances, the legislator would have been expected to encourage, by any means, at least this last resort of the collective bargaining – the one at the level of unit. However, the Social Dialogue Law did exactly the opposite: imposed almost impossible conditions for union representation, diminished its powers, and removed the obligation of annual collective bargaining.

Besides, lowering the centre of gravity of collective bargaining from higher levels to company level has made the work of trade union federations and confederations less important than it used to be. As a result, some company-level unions, collecting contributions from members, dispute the distribution of these revenues to higher organizations. They consider themselves entitled to retain a higher percentage of these revenues,

19. L. Chivu, C. Ciutacu, R. Dimitriu, T. Ţiclea, ILO, Decent Work Technical Support Team and Country office for Central and Eastern Europe in Industrial and Employment Relations Department, (2013), The Impact of Legislative Reforms on Industrial Relations in Romania.

since collective bargaining at this level seems to be the most important in the current pyramid of collective bargaining. This causes some financial deficiencies to federations and confederations causing (as a vicious circle) even greater difficulties in their pursuit of the proposed objectives.

6. COLLECTIVE BARGAINING ISSUES

There are many causes of the slowdown in social coagulation and collective bargaining in Romania; some of them are shared with the whole of Central and Eastern Europe. The general tendency to emphasize the individual Labour law, to the detriment of the collective Labour law, a certain fatigue of the trade union movement, the digitalization and withdrawal of the worker in the solitude of telework, the diminution of solidarity - as a state of mind - are just some of the causes commonly cited when it is the traditional springs of collective bargaining have lost their power. But in Romania we are also facing a set of special causes, which have added to the tension of collective labour relations and made the construction of a lasting social peace utterly unlikely. In the following I will refer especially to these causes, which give the Romanian system certain specificity. Because if the difficulties of collective bargaining are in many parts of the world attributed to the clumsiness of the social partners, it is not very common for them to be determined by the legislation itself.

6.1. Minimum wage

The level of the minimum wage is not established by agreement between the social partners. Moreover, such an agreement could not have even been possible in recent years, as their position is divergent on the subject of the minimum wage.

According to Article 164 (1) of the Labour Code, the national minimum salary, corresponding to the normal work schedule, is established by Government decision, after consulting the unions and employers. The consultation is carried out within the Tripartite National Council, consisting of governmental representatives and the social partners. Thus, according to Article 78 a) of the Social Dialogue Law No. 62/2011, the Tripartite National Council provides the consultation framework for establishing the minimum wage guaranteed in payment.

Despite the existence of the legislative framework for conducting these consultations, the social partners sometimes point to their formal nature.

The point of view of the social partners is not binding on the Government, which ultimately sets the level of the minimum wage unilaterally. The concrete manner of conducting the consultations, their timing and the extent to which the Government takes into account the views of the social partners is not provided by the law and differs from year to year.

Although, there are rounds of negotiations with the social partners, prior to the determination of the minimum wage, the mechanism itself for minimum wage-setting is established by the Government. Currently, the minimum gross salary in the country is 2,550 lei per month, starting with 1st January 2022, according to Governmental Decision no. 1071/2021, an increase of 10.9% compared to the level of 2021. Collective agreements often include a minimum higher than the legal one, but the poor coverage of employees through collective agreements means that, in fact, most employees negotiate the employment contract starting from this level.

Besides, in the budgetary sector the collective bargaining of salaries is limited: clauses regarding wages, other than those provided by the legislation in force for the respective category of personnel cannot be negotiated or included (Article 138 of the Social Dialogue Law no. 62/2011). If the salary rights are established by special laws between minimum and maximum limits, the concrete salary rights can be determined by collective bargaining, but only within these limits.

6.2. Covid 19 crisis

During the pandemic, collective labour law was on standby, alongside the production capacities themselves (against a background that includes blocking collective bargaining: all collective bargaining agreements were automatically extended, and collective bargaining did not take place during the pandemic).

In many ways, the Covid 19 crisis has served as a litmus test of the shortcomings of collective bargaining. In Romania, each of the problems that had been, manifestly or discreetly, identified during the 10 years of application of the Law on Social Dialogue became obvious. If collective bargaining has been difficult in the last decade, during the pandemic it did not take place almost at all. According to Article 20 of Law 55/2020 on some measures to prevent and combat the effects of the Covid-19 pandemic,[20] the validity of collective labour agreements was extended during

20. Published in the Official Monitor of Romania, no 396 of 15 May 2020.

the state of alert, as well as for a period of 90 days from its termination. So, normally, even if they should have expired in the meantime, the collective labour agreements remained valid until the state of alert ordered by successive normative acts ceased. Although the negotiation of new collective agreements remained possible (especially through virtual meetings, allowing parties to negotiate remotely), very rarely did it actually take place. The last state of alert ended at 8 March 2022.

Law No. 55/2020 also provided that collective disputes were prohibited in companies that provide essential services. In reality, collective conflicts cannot be triggered in the other sectors of activity either, until collective bargaining will take place again. Because according to Romanian law, the collective labour dispute can be triggered only on the occasion of the failure of a collective bargaining.

The state intervened through measures to reduce the losses of companies, in parallel with maintaining jobs. On a large scale, employees went into 'technical unemployment', a suspension of the employment contract during which they received 75% of their salary. In the context of the generalized economic crisis, we notice that in Romania the solutions - as many as they were - were not the result of a negotiation, nor were they the fruits of collective actions, but were fully provided by legislative instruments.

6.3. Telework

In Law no. 81/2018, *telework* is defined as the form of work arrangement through which the employee, regularly and voluntarily, fulfils his/her duties elsewhere than at the workplace organized by the employer, using technology information and communications. The teleworker does not work necessarily from home.

Regarding the working conditions of teleworkers, in theory they can be checked by the union or by labour inspectors. However, such controls have not been carried out in the last years, due to the pandemic. Some collective bargaining agreements contain express provisions according to which such checks can only be made during the working hours. The agreement of the teleworker is necessary anyway. But there is another obstacle: by Government Emergency Ordinance no. 36/2021, any reference to the workplace was removed from the telework contract. As a result, it may remain unknown to the employer, the trade union and the labour inspector, unless the employee himself chooses to inform them. As the telework contract does not include the place where the work is performed, the verification of the working conditions becomes difficult.

The crisis has affected collective bargaining all over the world, even where it has not been prohibited, and it may be assumed that such effects will be maintained for a significant period. The separation between employees, meant to ensure their social distance, as well as telework, has led to a visible decrease in the workers' concrete possibility of organization and action. We are witnessing a certain 'return to the individual', sometimes also reflected in the legislation. The physical distance from colleagues, a pre-existing phenomenon, but undoubtedly amplified by the Covid 19 crisis, contemporary management methods, directed towards autonomy, as well as the increasingly direct relationship with the client, turned the worker into a lone wolf, who obtains his resources in a universally competitive context and is expected to have a rather entrepreneurial attitude. Just as Netflix replaced cinemas, so did individual work, in front of one's own computer, replace the experience of collective work. Teams of workers have been replaced by virtual teams, often made up of colleagues who have never even met.[21]

How can we hope, in this new context, for the recovery of the solidarity on which collective bargaining is based, in the conditions of legislation and a social practice that, even before the Covid crisis 19, had been lacking robustness?

6.4. Detailed legislation

One could say that in Romania collective labour agreements are less significant than in other legal systems because the extremely detailed statutory provisions do not leave much room for bargaining between the social partners. In fact, many of the collective labour agreements reproduce provisions already included in the law and add only supplementary specifications referring to minimum wages or length of holidays.

Indeed, often there is a direct relationship between the maturity and vigour of the social partners and the degree of detail of the legal regulations. When social partners diminish their force, one of the first social reactions is (over) legalization. If employees and their unions do not have enough power to directly impose the recognition of certain interests on

21. See also, R. Dimitriu, *The worker within the new paradigm of labour law: between solidarity and loneliness*, in E.v. Adamovich, M. Zernikow (eds), "Philosophical and Sociological Reflections on Labour Law in Times of Crisis", Cambridge Scholars Publishing (2022), p. 357.

the employer, the law can do that directly. But the opposite may be also true: the more detailed regulations are, the less room is left for collective bargaining, especially in a system that does not allow derogation from the law unless it benefits the employees.

In most cases, the text of the law can not *de plano* achieve the depths of a collective agreement, specifically tailored to the interests of those who have negotiated it. Additionally, the assumption in the law of the rules laid down in a collective agreement is most likely incomplete. (And the most significant example is precisely the Collective Agreement at national level. Its clauses have only been partially taken up by legislation, at the moment when it was eliminated).

Limiting collective bargaining – for example, only to certain issues, or excluding wage negotiations – for the budgetary sector – diminishes the role of the social partners. Further, limiting the strike by imposing very restrictive conditions may have a role to play in limiting the position of trade unions. The more the law limits the scope of trade union action, the less their social importance. Consequently, in a vicious circle, they may no longer be able to provide the union services for which the employees would become members. The consequences of these changes – of which I have listed only a few – have deeply affected the trade unions and the Romanian unionism in general.

Thus, detailed regulation may have two opposite results: sometimes it fosters the social dialogue, stimulates collective bargaining and strengthens social partners (for example, by prohibiting the dismissal of trade union leaders, the prohibition of discrimination, etc.).

However, sometimes - as it seems to have happened in Romania – it can weaken them.

7. APPLICATION OF COLLECTIVE AGREEMENTS

7.1. Legal effects of collective agreements

Once conducted, collective bargaining can have two types of outcome: a happy ending, which consists in concluding the collective agreement, and an unhappy ending, which creates the premises for a possible triggering of a collective labour dispute. The latter can degenerate into a strike. Indeed, in Romania, the only time a collective labour dispute can be triggered is when the collective bargaining agreement is negotiated. Whether there is a collective agreement or not - but no collective bargaining has been initiated - any stoppage of work is an illegal strike.

Thus, for example, conflicts arising from non-compliance with the existing collective bargaining agreement are not collective, but individual. If the employer does not comply with a certain provision of the collective agreement, regarding any of the employees, their action in court will not be collective, but will be a combination of individual actions, each employee initiating the action regarding non-compliance collective agreement in relation to one's own person.

There is therefore a very narrow window on the legality of the strike: it can only be legally triggered by collective bargaining, if the parties have not reached an agreement and a collective dispute has broken out. Consequently, the narrower the scope of collective bargaining, the more restricted is the possibility of exercising the (otherwise constitutional) right to strike. Indeed, as long as the exercise of the right to strike is strictly limited to the stage of collective bargaining, any restriction on the possibility of such negotiation is tantamount to a restriction on the freedom of the strike itself.

But even if the collective bargaining will have a happy ending, consisting in concluding the collective agreement, only some of the employees will benefit from it. The rule of general applicability of collective bargaining agreements has been partially abandoned. It currently applies exclusively at the unit level. At unit or sector group level, a collective agreement is applicable only to those who have been effectively represented in its negotiation. As a result, some of the employees in the economy (even the majority) may not be "covered" by any collective bargaining agreement, as the national one no longer exists and the higher ones no longer produce general effects.

In other words, what the law of social dialogue achieved was not only the obstruction of collective bargaining, which is now more difficult than ever, but also the diminution of its effects, whether it is finalized by an agreement or not.

The collective labour agreement shall be concluded for a fixed term, between 12- 24 months. The parties can decide upon prolongation of the applicability of the collective labour agreement, under the law, but only once, with 12 months the longest period. If the unit has no collective labour agreement, the parties can agree upon negotiation of such agreement at any time.

The collective labour agreement has binding force; any employee, individually, or the union or the representatives of the employees, on their

behalf, may file an action against the employer regarding the non-compliance regarding any of the contractual provisions.

Collective conflicts (which could lead to a strike) cannot be triggered at all as long as a collective agreement is in place.

7.2. The principle of favour

Essential for Romanian collective bargaining is that it cannot take place *in pejus*, but must start from the statutory provisions or the provisions of the collective labour agreement concluded at the next higher level, as the minimum standard for workers' rights. The same strict perspective applies to the relation between the law and the collective labour agreement, the latter being allowed to derogate from the law, exclusively to the employees' advantage.

What is 'to the employee's advantage' and what is not? The Romanian system does not opt for a global analysis or examine whether bargaining places employees in an advantaged position or not, even at the cost of certain concessions. The law simply forbids any particular waiving. It does not provide the evaluation of the result of each bargaining process, but only forbids waiving the rights provided by law or in the applicable higher contract.

The clauses contained in the collective labour agreements that are negotiated in violation of the principle of favour are null and void, based on the decision of the competent courts, at the request of the interested party. The clauses of a collective labour agreement are considered *de jure* (automatically) integrated within employment contracts, without an express provision within the collective labour agreement in this regard and without allowing the social partners to exclude certain provisions from this automatic insertion. Failure to observe a provision within the collective labour agreement may be opposed by both the union and any individual employee, because it also constitutes a breach of employment contract provisions.

There are no exceptions from the favourability principle. Besides, according to Article 38 of the Labour Code, employees are prohibited from waiving of any of their rights, whether individually or collectively. This is one of the basic principles in Romanian labour law, and not even Covid 19 crisis did not change that.

7.3. *Erga omnes* effect

The clauses of the collective labour agreements entail effects as follows:

(a) for all employees in the company, in case of collective labour agreements concluded at this level;

(b) for all the employees in companies that are part of the group of units for which the collective labour contract was concluded;

(c) for all the employees in the companies belonging to the sector for which the collective labour contract was concluded and which are part of the employers' organizations that are signatories in the agreement.

Therefore, the Law on Social Dialogue diminished the rule of *erga omnes* applicability of all collective labour agreements, a rule which had been fundamental before 2011 for the collective labour law in Romania.

7.4. Enforcement of collective agreements

According to Article 145 from the Law on Social Dialogue, the Ministry of Labour or, as the case may be, the labour inspectorates, shall register the collective labour contracts only after checking if they meet the requirements stipulated under the law. If these requirements are met, the collective labour agreements shall be returned to the signatories so that they fulfil the legal requirements.

The interested parties can contest in court the refusal to register the collective labour agreements, under the Law of administrative litigations no 554/2004, with further modifications and completions. Such a litigation is not a labour conflict. It shall be solved by an administrative court, not by a labour law court. Consequently, the judges shall not necessarily specialized in labour law.

8. The settlement of labour disputes

Collective conflicts, called by the previous law – maybe more compliant with – 'conflicts of interest', can be initiated exclusively during the bargaining of the collective labour contract (before the termination of the negotiation).

8.1. Conciliation

Conciliation is regulated by the Law on social dialogue as a compulsory stage in the settlement of a collective conflict. If there has been no attempt to conciliate the conflict, the parties will be unable to demand arbitration or mediation and employees will not be able to call a strike.

The binding nature of conciliation, as a preliminary stage of exercising the right to strike, does not infringe on the provisions of ILO Convention

no. 98 (1949) on the Right to Organize and Collective Bargaining, ratified by Romania.

If no agreement has been reached, the parties' agreement becomes compulsory as a consequence of performing the procedure of conciliation and becomes an integral part of the collective labour contract.

If after discussions a complete agreement has been reached regarding the settlement of the formulated claims, the parties will finalize the collective labour agreement, thus ending the collective conflict. From this time onwards, it is forbidden to call a strike, or submit the conflict to the arbitration commission. Any other conflict that might arise between the parties concerning the matters that have been the object of conciliation will constitute an individual conflict, not a collective conflict.

It has to be mentioned that, here, conciliation is not a means of alternative dispute resolution, as it may be in case of an individual conflict. Indeed, bringing the case in before the court would be not possible anyway, so conciliation is not an alternative, but the only possible peaceful way of solving the conflict.

8.2. Mediation

Mediation if optional and can take place only when the conciliation organized by the Ministry of Labour has been unsuccessful. In such cases the parties can opt, by consensus, to initiate mediation procedure.

However, in practice, mediation is rarely used. In fact, once the parties have decided not to agree during the conciliation, a strike appears to be very possible.

8.3. Arbitration

In the field of labour relations arbitration is exclusively optional in the settlement of collective conflict, whereas individual conflicts cannot be settled by arbitration.

The optional character of arbitration corresponds to the stand of the ILO's Freedom of Association Committee, which has repeatedly stated that the imposition of compulsory arbitration is acceptable only in the case of essential services, in the strict meaning of the term, as well as in cases of acute national crisis.

The arbitration of collective conflicts is an optional procedure. By resorting to arbitration, the parties terminate a dispute that would have oth-

erwise have ended only at considerable expense and possibly by means of pressure, such as a strike.

9. CONCLUSIONS

The difficulties that collective bargaining goes through are, in part, difficulties of the general social dialogue. One could say that the solidarity that characterized for a long time relations between workers, appears to be increasingly diminished.

In Romania, even more than in other states, there is a deep crisis of collective labour relations, to which both the legislation and the clumsiness of the social partners have contributed, and which has been further amplified by the recent pandemic. Invigorating collective bargaining and increasing the number of employees covered by collective bargaining agreements (an objective however never expressly enshrined in public policies in Romania) will require a significant effort of social solidarity.

But probably the most important difficulties facing the social partners in Romania today stem from the legislator's own unwillingness to create a framework conducive to this negotiation. It is an obstacle that can only be overcome by coherent and sustained action by the social partners - and first and foremost by the trade unions.

The particularity of labour law compared to other branches of law is that, along with legal sources, it has negotiated sources. The latter is not the result of the manifestation of the will of the legislator, but of collective bargaining meant to lead to an agreement of wills between the social partners. It is about contracts and collective agreements – contractual sources of collective labour law – as results of collective bargaining. The dual nature of the source of labour law is the one which always shaped the identity of this branch of law. It would seem, however, that we are witnessing a return of labour law to the "individual", an abandonment of the collective (and collectivist) underpinning of labour law with a direct and unfortunate impact on collective bargaining.

Indeed, globalization, digitalization, competitive relations between workers, pressure from consumers, the increasingly significant image deficit experienced by unions (traditional exponents of employees in collective bargaining), the dissolution of solidarity between workers at national but also European level – led to a contraction (collapse) of collective bargaining to disturbing levels.

CONCLUSIONS

Ioannis KOUKIADIS*

A. PREAMBLE

1. The time has come we drew the conclusions on this important conference on the contemporary trends of collective bargaining in the Balkans and Eastern Europe, hosted at the Teloglion Foundation. This Foundation is a branch of the Aristotle University of Thessaloniki and an important cultural institution. It hosts permanent exhibitions, it organizes international exhibitions, and I think, it is worth to visit.

I would also like to thank the President of O.ME.D., Professor Costas Papadimitriou, for the honor he gave me to formulate the conclusions of the Conference, which is a particularly delicate task.

But, before proceeding to the presentation of the conclusions, allow me to say that I am considerably touched from the fact that Mrs. Krassimira Sredkova, Professor at the University of Sofia, remembered the close cooperation between the Law school of Thessaloniki and the Law school of Sofia in the era of "real socialism". At that time, we both participated in the exchanges of students and Professors between the two Law schools.

2. I would also consider it useful, before moving to the national reports, to make a reference to O.ME.D., which organized this conference at the basis of its autonomy recognized by all social partners in Greece. The positive role it has played for decades in the resolution of collective labor disputes is a valuable experience for the other Balkan countries as well. The closer inter-Balkan cooperation sought by O.ME.D. on labor relations issues in the Balkans can contribute to their approximation and modernization. O.ME.D is perhaps the first Organization of public law, which operates under the full responsibility of the social partners, subsidized by the state and through contributions of the social partners. I lay importance to this observation, because only through autonomous organisations of mediation and arbitration

* Em. Professor, Aristotle University of Thessaloniki.

could the implementation of an essential mechanism for free negotiations and resolution of collective labor disputes be facilitated.

The inherent difficulties in bringing closer and harmonizing, as far as possible, the Balkan labor relations with the labor relations of the other European Union countries, within the framework of the basic principles of the International Labor Organization (trade union freedoms and limitation of state intervention), is a one-way road to the rapprochement policy of these countries with the European Union. These difficulties are large in number and require research from other branches of science besides law.

3. Considering the presented national reports, it is no coincidence that the main problem in the labor relations of the Balkan countries is still the mistrust in the development of a system of free collective bargaining and of free collective disputes. On this point, the financial crisis years notwithstanding, Greece, compared to the other Balkan countries, made a significant step forwards with the law 1876/1990. The financial crisis years' regression is being gradually confronted with some difficulties, which are to be seen in other European countries as well.

B. CONCLUSIONS BASED ON THE NATIONAL REPORTS

After these observations, we can focus on the main conclusions that emerge from the national reports. Many interesting issues have been raised, but I will focus my attention on some structural issues, which are of general importance for all countries. Any misunderstandings from me will be due to the fact that I have attended the reports through the interpretation process.

4. A common feature of all reports, except from the report of Cyprus, is that they all directly or indirectly highlight the **mistrust** of the industrial relations systems on the autonomy of the social partners to find common solutions through common agreements and, thus, on the autonomy of collective labor dispute resolution systems. This is a legacy of the culture that was formed during the era of "real socialism" within the framework of the centralized state. However, the whole problem should be also partly connected with the level of development of these economies. At the same time, there is one more reason supporting the mistrust that characterizes the development of a broad dialogue, and applying today to other countries of the European Union as well; the current inability of traditional trade unionism to come in grips with the new forms of the labor market.

5. Considering Serbia, the general impression I got, is the continuation of the difficulties for the complete liberalization of collective bargaining, together with the related limitation of the autonomy of the social partners. There are problems in recognizing the full capacity of trade unions to negotiate, with the state agencies expressing strong mistrust about trade unions' choices/options. It is striking that **preventive mediation** is the predominating model of mediation. It is not the institution of preventive mediation that should create reservations, but the consequence associated with it, which is the restriction of the right to strike and, indirectly, of free negotiations. History shows that collective dispute resolution systems accompanied by strike bans are unreliable. Today, the dialogue that makes collective labor relations systems reliable is recognized by all partners. It was pointed out that, despite the transition to a free market system, autonomous collective labor relations in the private sector in Serbia are still hybrid, while the main feature is difficulty in advancing negotiations, largely due to the withering representativeness of trade unions. Besides, the content of any agreements is of limited importance, and there is a lack of interest in combining traditional claims with new issues imposed by the organization of companies.

Inter-professional summit collective bargaining, as in most other countries, is not foreseen. The role ofcompany collective bargaining is also controversial.

6. From the report on Turkey, I want to stress out that this country is dominated by a centralized system of collective bargaining. This remark notwithstanding, I have not formed a complete picture of how this system works. If I'm not mistaken, this whole system also provides for the possibility of public authority intervention inthe content of bargaining, which is a falsification of the principle of free negotiations. In addition, another factor which limits free negotiations is the connection of mediation with the limitation of strikes.

7. Regarding Montenegro, I have to note that the classic categories of collective labor agreements are provided for, but they do not seem to cover, the trade sector. It is interesting that Montenegro recognizes the national inter-professional negotiation, which also applies in Greece, a particularly positive regulation, because it ensures the general minimum protection rules for all workers. The principle of the most favorable regulation is also in question here. The possibility to cover non-union members is useful, but the terms of covering need to be clearly defined. Similar ar-

rangements, like the provision of the obligation to negotiate, are positive when they are made in terms that respect the principle of trade union freedom. Especially the obligation to negotiate is a useful provision, which is also found in other countries, such as Greece and France. But the crucial element is the determination of the consequences in case of failure to comply with this obligation. The same ambiguities concern the collective bargaining monitoring system.

8. In the Bulgarian report, it was also pointed out the reduction of the representativeness of the trade unions, as well as of their influence, which leads to a weakening of their role as negotiators. There also seem to be areas of activity that are not covered by collective labor agreements. In Bulgaria, too, there is an obligation to negotiate, for which the comments I mentioned above also apply. It was also pointed out that the content of collective agreements does not only refer to the working conditions, but also to social security issues, but with less interest in them. The possibility of regulating social security issues by collective agreements is also provided for in Greece, with the exception of pensions. In Greece the application of such clauses was also limited. But this regulation became became interesting for the consolidation of professional social security systems, which, as in other European countries, is increasingly of greater interest.

It was also pointed out that special importance is given to company collective agreements, a regulation that is part of the general trend of other European Union countries, which is to strengthen decentralized negotiation systems. But the crucial point is the definition of the terms of any more less favorable regulations, which is the subject of the current debates and legislative interventions of all the countries of the European Union. Indeed, less favorable arrangements mean concessions and the question is to determine the extent and terms of these concessions. In relation to collective disputes, mediation seems to have a strong position here as well, which, if I understood the interpretation correctly, is linked again to the prohibition of the strike. Issues of unilateral recourse to arbitration do not seem to be of particular interest.

9. In Romania, there are various types of collective agreements including, of course, company collective agreements, but there are no national collective labor agreements which concern general inter-professional bargaining. Representativeness is an essential term for the conclusion of collective labor agreements, but it is defined in different terms on a case-by-case basis. Arbitration does not seem to be of particular interest to Roma-

nia. In Romania, the position on the small importance of negotiations in the private sector as opposed to negotiations in the public sector is interesting.

10. In the Montenegrin system, the guarantee of the principle of the most favorable regulation seems also to be missing. In collective disputes, as in other Balkan countries, mediation plays an important role, which is mandatory but linked to a strike ban. As we have pointed, such an arrangement is not compatible with the principles of trade union freedom and the corresponding positions of the International Labor Organization. As far as the workers' councils are concerned, the issue is the determination of the terms of conciliation with the collective labor agreements.

11. The Cypriot industrial relations system differs from all other corresponding Balkan systems. Rooted in the heritage of Anglo-Saxon law, it is the most liberal with the least state interference. The recognised trade union freedoms now include the right to collective bargaining and the right to strike. This means in practice the avoidance of prohibitions except for certain marginal restrictions, which are necessary mainly to essential services. Not only is the conclusion of collective labor agreements formally guaranteed, but also the obligation of the state to facilitate collective disputes by imposing on the employer the obligation to recognize the representativeness of trade unions in order to conduct negotiations with them. The right of these organizations to enter into collective agreements is indirectly recognized in practice. In case of refusal by the employers, a special investigation is conducted by a department of the Ministry of Labour.

Collective agreements are concluded in sectors and companies without any hierarchy among them, with the aim of negotiating all working conditions. A critical element that must be mentioned is that the representativeness of the trade unions is quite increased, thus resulting in credibility for collective negotiations. The right to strike is exercised without many restrictions except for some restrictions to maintain essential public services. These restrictions are narrowly construed.

For collective interest disputes, which is of interest to this conference, the so-called out-of-court settlement provided by the Industrial Relations Code, means settlement by negotiation and mediation by the department of labor relations of the ministry of labor with a basic orientation to find a common solution agreed by the parties. Instead of establishing arbitration, the emphasis is on public inquiry for some difficult cases, without particular application in practice. Mediation, after the complete failure of

negotiations, is part of the whole mechanism of collective disputes, always in the spirit of finding a common solution.

12. The reports for Croatia and North Macedonia were very interesting. For Croatia, I would like to point out the preventive mediation linked to the restriction of the right to strike, a regulation which also applies in other countries and which, in my opinion, distorts trade union freedoms.

For North Macedonia, I highlight the important role given to representative organizations and the possibility of conclusion of a collective agreement valid erga omnes. The role of workers' councils is of interest, but in this regard we need clarifications on the relationship with the trade unions and the possible degradation of their role. Besides that, the possibility of less favorable regulations is foreseen, but again the issue of the existence or not of limiting conditions is raised. On the top that, in this country, no possibility of unilateral recourse to arbitration is foreseen.

13. I left Greece for the end, because the Greek system of collective labor relations is less interventionist than the corresponding systems of the other Balkan countries and less liberal than the Cypriot system.

In Greece, there is a national general collective labor agreement concluded by the leading trade unions of workers and employers. It may determine the general minimum wage and other working conditions for all workers regardless of whether they are members of trade unions or not. This ensures a general minimum level of protection. Its regulations override by all types of collective labor agreements, which only more favorable regulations may provide for.

The MOU laws of caused a breach in these arrangements. With them, the statutory general minimum wage was provided, which is regulated by the state through a special procedure. But, there is the possibility of provision of a national minimum wage which only applies to workers who are members of trade unions, who are bound by the national general collective labor agreement. Essentially, we may have two types of general minimum wage.

All types of collective agreements are provided, such as the validity of the most favorable regulation. At this point, the memorandum laws allowed the possibility of conclusion of more unfavorable arrangements. This solution generated strong general reaction. A recent regulation preserved the possibility of conclusion of less favorable regulations, under specific conditions linked to the financial difficulty of a company. Therefore, the possibility of conclusion of less favorable terms applies with limi-

tations. The Greek system provides for the possibility of the validity of a collective agreement erga omnes, which is provided by a ministerial decision. As far as collective disputes are concerned, a key element for their resolution is mediation.

In Greece, the institution of unilateral recourse to arbitration remains a central issue, and some clarifications are needed in order to understand its current role. Until the 1876/1990 law, unilateral recourse to the arbitration of state origin prevailed. Employers and employees agreed on its abolition. With the law 1876/1990, O.ME.D. was founded, which is governed equally by representatives of employers and employees, and a president chosen by both of them. This arrangement ensured its autonomy and its credibility. Thus the possibility of recourse to arbitration as a last resort was accepted by both parties. This provision has been applied successfully: most collective disputes have been settled through direct negotiations and mediation. At the beginning weaker trade unions resorted unilaterally to arbitration. But then, unilateral recourse to arbitration became more and more widespread, mainly from the workers' side. The memorandum laws abolished unilateral recourse to arbitration, but the Supreme Administrative Court found this abolition to be contrary to the Constitution, on the grounds that it provides for unilateral recourse to arbitration if negotiations fail. Thus, with a new regulation, the institution of unilateral recourse to arbitration was reinstated, but the law defined in strict terms the meaning of the failure of negotiations. The result of this arrangement is that unilateral recourse from a legal point of view is particularly difficult, with a direct consequence the small number of arbitral awards.

What we must keep is that, paradoxical as it may seem, the advocates of unilateral recourse to arbitration are the labor unions.

C. OBSERVATIONS OF MORE GENERAL IMPORTANCE

14. I would like to close these remarks with some references to the general problems associated with the system of collective bargaining and, by extension, the settlement of collective labor disputes. These remarks are essentially the issues that should be the subject of continuous discussions at the level of the Balkan countries. Such discussions will facilitate to bring the Balkan labor relations systems closer to the corresponding systems of the European Union countries, which is necessary for economic, social and political reasons. This approach must be addressed from two points of view. On the one hand, it concerns the need to improve the Balkan labor

relations systems in the spirit of development of trade union freedoms, for which, despite any retreats, the countries of the European Union have shown serious signs of respect. On the other hand, it concerns critical new issues linked to the need to review traditional systems and address the new problems posed by the globalization and the digital economy.

15. I will start with the general position that in all countries, under the influence of these developments and with the political cover of neoliberal ideologies, the reorganization of the labor market was attempted recognizing the flexibility as a new basic principle of labor relations. This flexibility mainly concerns individual labor relations, but it also extends to certain issues of collective bargaining, such as the abolition of the principle of the most favorable provision. But the most important consequence is the apparent weakening of the roles of trade unions for many reasons, some of which are presented with strong characteristics in the Balkan countries, and the impossibility of effectively exercising collective rights (weaker participation in trade unions, prohibition of strikes, limitation of role of collective agreements).

16. I will continue with a finding that characterizes all Balkan countries, but the other countries of the European Union as well. Initially the prevalence of neoliberal ideology was the starting point for legislative arrangements, known as deregulation, in the hope that a more competitive labor market would be created. At the same time, the problems of globalization arose and, then, the problem of transforming the systems in order to deal with the new standards set by the digital economy. The trade unions were not ready for these developments, because they could not overcome their traditional role, which was limited to simply improving working conditions, and, thus, denied their organizational role.

The work flexibility that became a dominant value, is also linked to the weakening of the role of collective rights, which are, however, the great legacy of the modern legal culture that runs throughout the twentieth century.

Collective rights constituted the major innovation of civil legal orders. Their added value is that, alongside individual interest, individual responsibility and individual differences, collective interest, collective responsibility and collective activity were recognized.

At this point it is worth referring to the International Labor Organization, with its clear declaration: "trust the labor institutions".

Their value was confirmed by the failure of neoliberal politics, now recognized by all. The failure of this policy with the observed significant increase in inequalities is an opportunity to upgrade the role of collective labor rights. The contribution of collective bargaining to finding a balance between individual and collective interests is undeniable and historically confirmed.

Thus, the approach of collective rights as a contribution to find balance between individual and collective interests seems to be strengthened. This trend is becoming more and more evident. Nevertheless, we face many difficulties in finding effective new solutions. There are certain problems, common to all countries, which the social partners are primarily called upon to deal with. Such problems are, first of all, the inability of the trade unions to reliably represent the new forms of work and the working class, which is divided into individual interests. We have seen that all the Balkan countries make reference to representativeness, but this concept should not only be linked to the low number of participants, but also to the ability of the trade unions to find common reliable solutions face to the often conflicting labor interests. The example of a company, in which a significant number of workers are not part of it, but they work with temporary agency employment contracts, contracts of independent services or platforms work contracts, demonstrates, on its own, how difficult is the role of the bargaining power of a trade union.

Secondly, in all countries, especially the Balkan ones, trade unions are oriented towards traditional claims, which constitute undoubtedly their main mission, but they have difficulty to find their new role, which is usually expressed by the term **organizational role.** With this term, it is suggested that the trade unions must include in their interests, alongside the traditional type of claims, issues of business reorganization, business modernization, dealing with their digital transformation, issues related to the future of employment. Against the policy of deregulation that promises more employment, the policy of linking employment with the respect of the dignity of the worker must be projected, which means that the main issue is not only the volume of employment but also its quality. Labor law today is not only the law regulating working conditions, but also the law of employment.

17. Another issue that concerns all modern systems of collective labor relations is the priority given by the various countries to the decentralized negotiation systems, strengthening, thus, the role of the company collec-

tive agreements, but at the same time providing the right to come up with less favorable clauses than these of the sectoral collective agreements. The abolition of the principle of more favorable regulation, imposed in Greece at the time of Memorandums, may be provided for a reason, when it is linked to specific financial problems of a company, but it should not be imposed without limitations. For the success of a balanced system, it is necessary, in order to avoid unilateral solutions, the trade unions to recognize the importance of their organizational role, which will broaden the content of the bargaining issues. Employers' organizations must also adopt a similar approach, because they must understand that the particularly complex, modern problems of competitiveness, cannot be confronted unilaterally.

18. All the above developments also leave their mark on the collective labor dispute settlement system. These developments should strengthen the soft methods of resolving collective disputes, such as conciliation and mediation, without providing any prohibitions. State intervention should be limited, so that the social partners continue to maintain the main responsibility. This means that this role must also be accepted from their side.

In most current Balkan collective labor relations systems there is, directly or indirectly, an emphasis on state intervention with a clear distrust to the social partners' ability to find common solutions. The search for a culture of common solutions, even with the emergence of a new role of participation promoted by the European trade unions, is a one-way road.

Collective labor dispute resolution systems should only function as a eans of assisting collective bargaining and not as a substitute of it.

LIST OF CONTRIBUTORS

■ **Raluca Dimitriu** (Bucharest University of Economic Studies) is Labour Law Professor at the Law Faculty – University of Economic Studies and PhD Coordinator in the field of labour law and industrial relations. She published over 100 studies and books in Romania, Austria, France, Belgium, Germany, Portugal, Great Britain. As a member of the European Labor Law Network, Raluca Dimitriu prepares national reports on specific areas of labour law. She is also a member of the Central Eastern European Labour Experts Network and, as an ILO expert, has provided advice on labor legislation development for several countries in the region. She is a Eurofound expert, being frequently involved in drafting of comparative law studies in the field of industrial relations.

Prof. Dimitriu is also a member of the Scientific Committee of the Legal Research Institute of Romanian Academy, member of the Board of the Society of Labor Law and Social Security and trainer for Magistrates specialized in Labour Law. Raluca Dimitriu is an ERA (Academy of European Law, Trier) speaker, constantly participating in gender equality events.

■ **Kübra Doğan Yenisey** (Istanbul Bilgi University) is a full professor of Labor and Social Security Law at Istanbul Bilgi University, Faculty of Law. Having graduated from the Faculty of Law, University of Ankara, she has received her Ph.D. degree from the University of Geneva in 2000. Her main research interests are technology and its impacts on labor law, the principle of equality and gender discrimination, harmonization of Turkish law with acquis communautaire, collective labour rights, labor conditionality in trade agreements.

■ **Ivana Grgurev** (University of Zagreb) is Full Professor at the Chair of Labour Law and Social Security Law, Faculty of Law, University of Zagreb. She is a member (national expert of Croatia) of the European Labour Law Network. She has published several books and articles in the field of labour law (discrimination law, collective agreements, managerial contracts,

etc.). She was a vice dean at the Faculty of Law, University of Zagreb and a president of the Representativeness Committee entitled to decide on representativeness of trade unions for collective bargaining. Ivana Grgurev was a member of the working groups that drafted the Croatian Anti-discrimination Act and Maternity and Parental Benefits Act. She is currently a member of the National Council for the Development of Social Policies and is engaged in drafting the National Plan for Combating Sexual Violence and Sexual Harassment.

■ **Senad Jašarević** (University of Novi Sad), Serbia was born on January 5, 1963 in Novi Sad, Serbia. He graduated from the Faculty of Law in Novi Sad in 1986 where he currently holds the position of Full Professor, specializing in Labour Law and Social Security Law. He was President of the Serbian Association for Labour Law and Social Security. Senad Jašarević is mediator of the Republic Agency for Settlement of Labour Disputes. He is the author of numerous scientific and professional works in the fields of labour and social security law.

■ **Ioannis Koukiadis** Ioannis Koukiadis is Emeritus Professor at the chair of Labor Law at the Faculty of Law at Aristotle University of Thessaloniki. He has been twice Employment and Social Security Minister of the Greek Government in 1989 and 1990. He has been a Member of the European Parliament from 1999 to 2004. He has been President of the Board of the Organization of Mediation and Arbitration (O.ME.D. in greek), Vice-chairman of the Teloglion Art Foundation in Thessaloniki , and President of the Law Association of Northern Greece. He is the author of 8 books including the three-volume book called "Labour Law-Labor relations" (individual and collective) and of numerous articles published in daily newspapers and magazines. He has been Co-editor of R. Blanpain's book titled "European Social Law. Before and after Maastricht". He has participated in many international conventions with similar proposals. He was a Lecturer to foreign Universities and waded in international conventions about European matters, including the 1st European Conference of the social representatives (Barcelona) and the 2nd similar Conference in Kazablanca.

■ **Costas D. Papadimitriou** obtained his law degree (1977) at the University of Athens. He holds master's (1981) and PhD (1985) degrees in Labour Law from the Université Paris X- Nanterre.

He is emeritus Professor of labour law at the Law School of Athens. He is a Supreme Court Attorney at Law and President of the Greek Organization for Mediation and Arbitration. He is member of the Department of Studies of the Greek Parliament since 1994. He is also national expert for different networks (European Labour Law Network, Free Movement of Workers Network, Odysseus Network).

He is President of the Greek Association for Labour Law and Social Security Law. He has published numerous articles and books and regularly advises national and international governmental institutions as well as private organizations in the areas of labour law.

■ **Aleksandar Ristovski** (Ss. Cyril and Methodius University in Skopje) is Associate Professor at the Ss. Cyril and Methodius University in Skopje (Iustinianus Primus Law Faculty) where he teaches labour law, social security law and other subjects at undergraduate, postgraduate and doctoral level studies. Dr. Ristovski has participated in several international scientific projects and has on multiple occasions been engaged as external collaborator of the International Labour Organization (ILO) on labour law and industrial relations' related projects in North Macedonia. He also is a national expert for North Macedonia in the European Labour Law Network (ELLN), the CEElex network of national legal experts on labour and industrial relations in Central and Eastern Europe and the Comparative Civil Service Network (CCSN). Since 2019, Professor Ristovski is vice-president of the Association for Labour and Social Law of North Macedonia (ЗТСП). He is a member of the working groups for drafting a new Law on Labour Relations and Law on Protection Against Harassment at the Workplace.

■ **Vesna Simović-Zvicer** (University of Montenegro) was born on 02.05.1977 in Šavnik, Montenegro. She is a professor at the University of Montenegro (subjects: Labour Law, European Labour Law and Social protection).

Since June 2014, she has been a member of the Judicial Council from among distinguished lawyers, and in December 2019 she was elected as the president of the Judicial Council. Since October 2010, he has been on the list of arbitrators and conciliators in the Agency for Peaceful Resolution of Labor Disputes.

She is a member of the following international associations/professional associations: national expert at the European Network for Gender

Equality (since June 2018); national expert at the European Center for Expertise (since 2016); member of the research team at the European Network for Labor Law (since 2014).

So far, she issued about 10 publications and more than 20 articles. The most important scientific and professional works:

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■ **Krassimira Sredkova** is Professor of Labour Law and Social Security at Sofia University "St. Kliment Ohridski". She is President of the Bulgarian Association of Labour Law and Social Security and Editor-in-Chief of the Journal "Contemporary Law". She was a member of the European Committee for Social Rights (2015--2020) and is a member of the Governing Body of the International Association for Labour Law and Social Security. Also, she used to be Legal Adviser of the President of the Republic of Bulgaria, Member and President of the Advisory Council for Legislation in the National Parliament, Member of the Committee for Freedom of Association Committee of the ILO. Professor Sredkova works in the fields of Labour Law, Social Security Law, International Labour Law, Social Law of the EU and has authored 247 publications in the field of national, international, EU and comparative labour law and social security law.

■ **Nicos Trimikliniotis** is Professor of Sociology, Social Sciences and Law at the School of Social Sciences, University of Nicosia. He heads the team of experts of Cyprus team for the Fundamental Rights Agency of the EU

and is the expert of Cyprus on the European Labour Law Network. He has researched sociology and law of the state, ethnic conflict, migration, asylum precarity, citizenship, racism, labour, and discrimination. Publications (selection): *Migration and the Refugee Dissensus in Europe: Borders, Security and Austerity* (2020, Routledge); *Mobile Commons, Migrant Digitalities and the Right to the City*, Palgrave, 2015). He is currently directing and is the principal investigator for a research project entitled *Mobile Citizenship, States of Exception and (non)Border Regimes in post-Covid19 Cyprus*, awarded by the Hellenic Observatory at the London School of Economics and Political Science, funded by the A.G. Leventis Foundation.